9. Implications of Northern Routes and Other Mode Regulation for Oversight of Fares on Monopoly Airline Routes in Canada

DEFINING A MONOPOLY AIRLINE ROUTE

The factors which might be considered in defining the routes on which the carrier(s) might have market power include:

- the number of carriers on the route (intra-modal competition);
- the ability of additional carriers to offer service on the route (barriers to entry or contestability);
- the number of carriers serving the same city-pair by different routes (interhub competition); and
- the existence and time and cost comparability of alternative modes of transportation including automobile, bus and train (intermodal competition).

There are a number of alternative standards for regulatory intervention. If the objective is to confine regulatory intervention to cases in which the excercise of monopoly power is highly probable, the city-pairs selected for scrutiny (either reactive or proactive) would be served by a single carrier, have significant barriers to entry, and have ineffective interroute (including interhub) or intermodal competition.

Factual evidence of barriers to entry would include restrictions on the access of potential entrants to physical and intangible infrastructure, specifically:

- lack of access to counter or gate space or arrival/departure slots;
- lack of access to interlining privileges;
- lack of (or inferior) access to computer reservation services; and
- lack of access to frequent flyer programs.

Factual evidence would also include the characteristics of potential entrants. Morrison and Winston define a potential entrant as a carrier serving both the origin and destination points on a route but not the route itself.[113] It would be of considerable interest to know how many single carrier routes

in Canada have such "first tier" potential entrants. It should also be noted in passing that the statistical results of Morrison and Winston imply that, other things being equal, the fare on a route declines as the number of "first tier" potential entrants increases but that this relationship is not statistically significant.[114] This might be taken to imply that the constraint imposed on incumbents by "second tier" potential entrants who serve either the point of origin or the point of destination of a route but not both and not the route itself is minimal.

More theoretical types of evidence would involve an examination of the characteristics of the route involved and how these might affect the reaction of an incumbent carrier to entry. Do sunk costs and/or regulatory restrictions on exit commit incumbents to the route? Incumbents may be particularly difficult to dislodge from routes where either the origin or the destination is their hub.[115] Are fixed costs such that the incumbent(s) and the entrant cannot both earn normal profits on the route? If so, excess profits need not induce entry even if access to the requisite infrastructure does exist.

Evidence regarding the competitiveness of alternative modes might include their respective frequencies, connections, fares and travel times.

DEFINING A REASONABLE FARE

Having established the type of route on which fare regulation has a reasonable probability of being beneficial, the task is then to establish the criteria for adjudicating fares. One approach would be to set fare caps. These caps could take the form of those presently available to captive shippers under the *Staggers Act*. Fares on monopoly routes would be subject to maximum price–variable cost ratios. The maximum ratio would be such that passengers on the route in question pay no more than the stand-alone average cost of their service.

The approach taken by the National Transportation Agency to the reasonableness of northern air fares is somewhat different. The Agency calculates service-specific and possibly route-specific rates of return as well as system rates of return. These calculations assume that both overhead costs and capital can be apportioned to a particular service or route. This implies that overhead services and the services of capital equipment can be rented in small amounts (that is, an airplane for two days per week or ground

personnel or equipment for two hours per day). In contrast the stand-alone cost approach allows for indivisibilities in various functions. In other words, a service may have to bear the entire cost of an airplane if the latter cannot be rented elsewhere when it is not in use on that service.

The Agency's northern fare investigations have not needed to address the issue of differential pricing. Would the Agency allow an excess return on a particular route if the system as a whole was earning normal or less than normal returns? This is likely to be the issue confronting fare regulation on southern monopoly routes in the next few years.

The stand-alone cost approach taken by the ICC appears preferable here. The National Transportation Agency's practice of allocating overheads on a *pro rata* basis implies equal price-variable cost margins across routes or services. While this may have political appeal, it is not what would happen in a contestable market with indivisibilities. If the regulatory process is to approximate the competitive and allocatively efficient outcome, fares should be allowed to exceed variable cost by the amount of fixed unit stand-alone cost. This is likely to differ considerably from route to route.

The stand-alone cost approach rules out the approach to rate-making embodied in the competitive line rate. The imposition of a competitive line rate would imply a requirement that the fare per mile on the monopoly portion of a flight be the same as on any connecting competitive portions. Given differences in equipment and traffic densities there is a strong likelihood that a fare specified in this manner would not cover stand-alone average cost.

It should be noted that, given the vast and variable array of fares now offered on most routes, the imposition of a regulatory ceiling on the economy or Y-fare protects a relatively small fraction of air travellers. Monopoly power can be exploited by manipulation of the discount structure and by withdrawal of discount fares which "forces" travellers to fly at the Y-fare or not at all. The importance of discriminatory pricing poses a considerable regulatory problem. Regulation of a Y-fare at which few people fly is somewhat redundant. Regulation of discount structures and their availability is likely to be complex and costly for all concerned. The controversy over the regulation of freight rates on bulk coal which ought to be a relatively simple task should serve as a warning to those contemplating the regulation of the full spectrum of fares and their availability on monopoly routes.

Moreover, discrimination can result in the marginal user being served at marginal cost and is thus allocatively equivalent to competition under some circumstances. The efficiency consequences of regulating the entire spectrum of fares on monopoly routes are ambiguous at best and are, in all probability, negative once the cost of the regulatory apparatus is taken into account. This leaves Y-fare regulation as a kind of "life line" regulation which guarantees a "reasonable" full cost fare which is always available although it may be infrequently used.

ACCESS REQUIREMENTS

In its provisions relating to rail regulation, the *National Transportation Act, 1987* gives the National Transportation Agency the authority to require that other railway companies be accorded various forms of access to shippers who would otherwise be captive to a single railway. Some of these access provisions may be applicable to air transportation. They might then be employed to increase the degree to which monopoly routes are contestable. These access provisions and Canadian experience with them are described below.

The Act contains a number of provisions which allow a shipper served by a single carrier to have access to competing carriers. These access provisions are as follows:

- *Running rights:* Under section 148 a railway company may, with the approval of the National Transportation Agency, use the whole or any portion of the tracks, terminals, stations or station grounds of any other railway company and exercise full rights and powers to run and operate its trains over any portion of the railway of another railway company. The Agency may fix, by order, the privileges and obligations of each railway as well as the required amount of compensation.
- *Joint use of right-of-way:* Under section 149, the Governor in Council may order the joint or common use of the right-of-way of a railway by two or more railway companies if it is satisfied that this would result in significant efficiencies and reductions in cost. The Governor in Council may also fix by order the extent of this joint or common use and the compensation that must be paid.

- *Connection of intersecting railway lines:* Under section 150, the National Transportation Agency may order that railway lines that intersect, cross or run through the same urban or industrial area be connected to permit the safe and convenient transfer of traffic between the lines and the interswitching of traffic between the railways involved. The Agency may determine and apportion the cost of effecting and maintaining this connection. Under section 151, the Agency may, in conjunction with the relevant provincial regulatory board, also order the connection of intersecting, provincially regulated railways.
- *Interswitching:* Under section 151(1), where a line of one railway company connects with the line of another railway company, the Agency may, on the application of the company owning either of the railways involved or of a municipal corporation or other interested party, order the companies that operate those lines to afford all reasonable and proper facilities for the safe and convenient interswitching of traffic between those lines. Under section 151(2), where the point of origin or destination of the traffic is within 30 kilometres of the interconnection point (the interswitching limits) the terms and conditions under which interconnection occurs must be as determined by the Agency. The Agency may also extend the interswitching limits if the point of origin or destination is "reasonably close" to the point of interchange.

With respect to the application of the access provisions of the Act, the Agency has made one order under section 150 requiring that two railway lines be interconnected. In 1990 it ordered that the Port Stanley Terminal Railway be connected with CP trackage at St. Thomas, Ontario.[116]

A number of requests for running rights under section 148 have been submitted to the Agency. One involved an application by CP Rail for running rights over 10 miles of CN trackage in order to serve two large chemical producers in the Fort Saskatchewan Alberta area. The two railways ultimately settled the matter privately.[117] Another application filed under section 134 of the 1967 Act involved the use of facilities, namely, the CP passenger station in Regina by VIA Rail. This was also settled privately. Three applications for running rights are currently under review by the Agency. These involve two short-line railways in Ontario and a proposal to run highway trailers on bogies on CN tracks between Moncton and Windsor.

Interswitching has been a feature of Canadian railway regulation since 1908. The National Transportation Agency sets interswitching rates and adjudicates applications for extension of the interswitching limits (currently within 30 kilometres of the interchange point) within which regulated terms and conditions apply. The Agency recently denied an application by CIL of West Carseland, Alberta to be included within the interswitching radius of Calgary. Its reason for denial was that CIL was not disadvantaged with respect to its freight costs.

Regulation may enhance the bargaining power of passengers on monopoly air routes in the same way it has enhanced the bargaining power of captive rail shippers. The analogy between the rail access provisions in the *National Transportation Act, 1987* and possible access provisions for city pair airline markets is somewhat strained but it does serve to illustrate the alternatives.

Running Rights or Joint Use of Right-of-Way

The city-pair airline market analogy to these rail access provisions is the right to use the incumbent's ticketing, baggage handling or servicing facilities and personnel at either or both the point of origin or destination. The moral hazard problems could be such as to require a great deal of regulatory supervision. The problem would be less severe if these services were provided by outside contractors. Access could then be facilitated by prohibiting exclusive contracts. Flint notes that one feature of airline deregulation in Australia has been to require the existing carriers (Ansett and Australian) to make gates that would otherwise be tied up in long-term leases available "at market lease rates" to other carriers.[118] Flint goes on to note, however, that this involves only two gates each at Sydney and Melbourne and one gate each at Adelaide, Perth and Coolangatta, and this is unlikely to facilitate entry on a scale sufficient to discipline the incumbents.

An extreme example of running rights would be the right to sell seats on the incumbent's aircraft. The analogy here would be swaps in the petroleum refining industry. Carriers could swap blocks of seats on various routes and price their respective blocks as they see fit. As Williamson suggested in the context of the petroleum refining industry, the swap would also attenuate the incentive to treat the other carrier's passengers poorly.[119] Indeed, to the extent that the various ground services can be swapped, the regulatory problem of ensuring an adequate standard of performance may be considerably reduced.

Interconnection and Interswitching

The airline analogy to interconnection (and this is extreme) is to require an incumbent to provide convenient connecting flights at either the origin or destination point to be served by a new entrant. A less extreme analogy would be to prohibit an incumbent from rescheduling connecting flights solely to discourage a new entrant. Another possibility would be to oblige incumbents to allow new entrants access to their frequent flyer programs.

The analogy to interswitching would be to interline baggage, to offer joint rates for ongoing passengers and to hold flights as they would for their own interconnections where flights are intended to connect.

Airlines and railways differ in the extent of the control they exert over their respective infrastructures. Railways own virtually all their rights-of-way, trackage, terminals and other facilities. Regulatory intervention is occasionally required to ensure their availability. Airlines in Canada do not own terminal facilities. These facilities are largely government owned. Access to them is a matter of operating policy rather than regulatory intervention. The possible contribution of terminal operating policy to the contestability of individual airline routes is considered below.

Decentralized Public and Private Responses

Public policies that might increase the contestability of monopoly air routes include:

- ensuring that arrival/departure slots, gates and ancillary facilities at government-operated terminals are available to potential entrants;
- auctioning off the rights to routes that are contestable ex ante but weakly contestable or noncontestable ex post; and
- recognizing the complementarity of airline and terminal services and other local activities, and providing incentives to reflect it in air fares.

With respect to slot availability, either time-of-day pricing or a system of tradeable slots would put entrants and incumbents on the same footing.[120] This would be true even if incumbents were grandfathered. There might still be a problem of stategic refusals to sell adjacent departure space to close rivals. This could be dealt with in several ways. The first is to reduce the

strategic and, indeed, the pecuniary value of slots by expanding airport capacities. The second is to treat the monopolization of slots by a carrier or group of carriers acting jointly the same as the monopolization of any other good or service would be treated, that is, to apply the abuse of dominant position or conspiracy sections of the *Competition Act* to it. Similar considerations apply to the provision of gate space and ancillary airport facilities.

Routes which can support only one carrier and are weakly contestable *ex post* may be more strongly contestable *ex ante*. It may be possible to auction off the rights to single carrier routes. The *National Transportation Act, 1987* presently provides for the auctioning of loss-making routes under section 85(2). In this case bids compete to provide a service with the lowest possible subsidy. In the case of single-carrier profit-making routes, bids could take the form of lump-sum fees, economy fares, fare formulas or some combination thereof. Lump-sum fees could be rebated to the communities involved, perhaps credited against municipal taxes.

Route auctions would face two types of problems. The first is that property rights in routes do not exist. Having sold the right to serve it, a community could not prevent the entry of a competing carrier. One possible means by which exclusivity might be assured is by municipal control over the community airport. In this case a community could theoretically guarantee exclusivity to the winning bidder by denying landing rights to potential competitors. This type of a guarantee may not be enforceable and may not provide much comfort to the winning bidder.

The second type of problem is that auctioning off the right to serve is itself a costly process. The resources required to ensure that the winning bidder meets the commitments and to alter the contract as circumstances change can be considerable. Indeed, some authors have argued that when companies are locked in to their arrangement, the process bears a striking resemblance to conventional price, entry and exit regulation.[121]

The recognition of the existence of complementarities to air travel and the incorporation of them in fare decisions (that is, their internalization) can result in lower air fares. A simple example is the complementarity between ground services such as parking and terminal concessions, and air services. The sharing of ground service revenue with a carrier reduces its profit-maximizing monopoly fare. This principle can be extended to cover broader

complementarities including the complementarity between air fares and local land values. If an air service confers value on a local industrial park or a convention centre the carrier has an incentive to set fares to encourage traffic, provided it shares in the resulting increase in value of these local assets.

Among the private-sector responses to a situation of non-contestable monopoly would be the excercise of countervailing buyer market power in various forms. One form would be corporate aviation either by charter or by corporate aircraft. A profile of the Canadian corporate fleet and carriers specializing in business charters is presented by Wallace.[122] Not surprisingly, firms in the resource sector are well represented among both aircraft owners and users of charter services. These same firms may also make extensive use of confidential contracts with scheduled carriers. At present we have no information on the importance or incidence of confidential contracts of this nature. Non-business passengers may be able to exert the same form of leverage by forming charter groups.

Among the private responses to the information problems facing travellers is the investment by carriers, tour booking companies and travel agents in their reputation. Similarly the carriers protect themselves against possible exploitation by sharing ownership of CRSs. Consumers can also take prudent actions with respect to some concerns. For example, bankruptcy is more of a threat to a traveller under the current system. A traveller can pay for a ticket with a credit card. Some issuing companies will suspend the charges while they, rather than the consumer, deal with the bankrupt carrier. Trip cancellation insurance may also help. On the other side of the transaction, many airlines in financial difficulties are forced to take precautionary steps to assuage the concerns of travellers. For example, Eastern in the United States created a $50 million escrow fund to guarantee tickets in the period before it stopped flying.

10. Conclusions

The domestic airline industry has changed profoundly since deregulation. There is a consensus that this change has been for the better. The power of entry, exit and pricing freedom to weed out inefficient practices has been demonstrated. At the same time the expectation of economists that city-pair airline markets would be both unconcentrated and easily entered has been

disappointed. Market power is likely to exist on a number of southern Canadian routes. Deregulation constitutes a substantial improvement over the previous regime, but the close approximation to a competitive market that many of its advocates envisaged has not materialized. As a consequence, the full potential benefits of free competition have not been realized.

The fundamental policy question is whether there is a set of policies which would increase the economic benefits derived by Canadians from airline deregulation. There is a clear role for merger policy here. Specification of the precise ways in which merger or other competition policies should be applied is beyond the mandate of this study. A few general comments, however, are in order.

First, the *Competition Act* is well-suited to deal with airline mergers. Evidence of the relationship between the number of competitors and price and quality performance, while not without ambiguities and methodological problems, is both more plentiful and of higher quality than in most other markets. There is also considerable evidence regarding the source and magnitude of operating economies at the route and network levels. The analysis of the trade-off between the effects of a substantial lessening of competition and the efficiency gains resulting from an airline merger required under sections 93–96 of the *Competition Act* is likely to be more complete than in most other markets.

Second, the remedies available under the *Competition Act* could be augmented by further deregulation. The achievement of further network economies while preserving competition would be facilitated if foreign carriers could be licensed to operate on domestic routes. As it stands, there is a danger that the only available remedy will be a quasi-regulatory fix which the National Transportation Agency is arguably better qualified to impose and enforce than the Competition Tribunal. An example of a quasi-regulatory remedy is the Competition Tribunal's consent order in the *Reservec* case.[123]

There may also be a role for access policies. The most important of these are inherent in the operating procedures of the major airports. Arrival/departure slots and ancillary facilities should be priced at cost and available to incumbents and entrants on similar terms. Access to the network facilities of incumbent airlines could be enforced by the Agency. The access remedies available to railways under sections 148–152 of the *National Transportation*

Act, 1987 may also be available to airlines under sections 77–79 of the *Competition Act*. These are the abuse of dominant position sections of the Act. The withholding of access to various network facilities to single-route entrants may be regarded as an abuse of dominant position. Similarly the Competition Tribunal may find that incumbents have an obligation to supply network facilities to entrants under section 75 of the *Competition Act*. The Agency is probably better equipped than the Tribunal to take on this task, especially if it involves ongoing supervision. An alternative is to allow for competition by other networks. This would, again, require that U.S. carriers be granted domestic licences. The resulting inter-network competition is preferable, in our view, to imposing access requirements either by means of competition or regulatory policy on a monopoly Canadian-owned network. The possibility of network competition and the formation of alliances also reduce any barrier to entry resulting from frequent flyer plans.

There is little to be said for residual fare regulation, especially under current circumstances. Regulation of the basic, or Y-fare, on monopoly routes may meet a political need. It is unlikely to have much impact on the average cost of travel on these routes. Regulation of the full slate of fare offerings is likely to be a very costly undertaking.

Finally, there may be merit in structuring the regulatory framework so that decentralized arrangements can evolve. This may involve giving individual communities the right to negotiate with potential carriers and award exclusive rights to the carrier promising the best service package. It could involve contractual arrangements which leave travel agents with the incentive to choose the lowest fare for their clients. It may also include technical innovations which make computer reservation systems more readily accessible. Regulators must ensure that they do not preclude the emergence of superior decentralized solutions to problems posed by market power.

ENDNOTES

1. Although Canadian regulation was invasive in all these dimensions, the degree of control varied and differed from that exercised in the United States at that time:

   > A crucial feature of Canada's regulatory approach was its non-directiveness. While fare increases were disallowed from time to time as unjustified by airline costs and financial returns, and while deep discount fares were sometimes disallowed for carrying too few travel and purchase restrictions, the airlines were never told what fares they should charge instead.
   >
   > In this respect, the Canadian approach was always very different from the U.S. approach. As a result, airline pricing in Canada was determined to a greater extent than in the U.S. by airline managements, rather than by regulators. Unlike its U.S. counterpart before deregulation, the Canadian price control mechanism had no built-in incentives to the airlines to provide excess capacity. (Hans Lovink, "When to Deregulate the Airline Industry: Canada's Approach" in Bureau of Transport Economics, *Economic Regulation of Aviation in Australia, Seminar Papers and Proceedings* (Australian Government Publishing Service, 1985), p. 96.)

2. The Committee endorsed the thrust of the position paper, offering suggestions for details in implementation in its Sixth Report, entitled *Freedom to Move: Change, Choice, Challenge*, Ottawa, 1985.

3. Richard M. Soberman, "Canadian Passenger Transportation Policy," in *Canadian Transportation Policy*, edited by David W. Gillen (Kingston: Queen's University, John Deutsch Institute, 1990), p. 8.

4. Starting at the west coast, the dividing line follows the 55th parallel until Manitoba which it crosses at a diagonal until it reaches the 50th parallel. From this point east the boundary follows the 50th parallel.

5. According to section 67 of the Act this percentage can be reduced by the Governor in Council.

6. CP Air began with "Courieur" fares and followed with "Skybus" fares. AC countered with "Nighthawk" and the "One Way/One Day Skysave" programs.

7. Earl Thompson in "The Perfectly Competitive Production of Collective Goods," *Review of Economics and Statistics* 50 (1968), pp. 1–12 and Harold Demsetz in "The Private Production of Public Goods," *Journal of Law and Economics* 13 (1970), pp. 293–306 reached different conclusions on this matter. The two views are reconciled in Thomas Borcherding, "Competition, Exclusion, and the Optimal Supply of Goods," *Journal of Law and Economics* 21 (1978), pp. 111–32. The Thompson view depends on discrimination being maintained in the face of competition. This debate is related to that which distinguishes between the nature of competition among rivals providing the goods. The outcome will have desirable properties if the competition to sign up the customers is Bertrand competition. If the competition is Cournot, competitive entry will be excessive. See Daniel F. Spulber, *Regulation and Markets* (Cambridge, Mass.: The MIT Press, 1989), p. 42 and references cited there. (See section 6 of this report for an explanation of "Bertrand" and "Cournot" competition.)

8. See T. E. Duffy and P. R. Berlinguette, *The Low-Priced Air Fare Review: The First Five Years* (Canadian Transport Commission, Research Branch, 1983/05e, November 1983).

9. Alfred E. Kahn, "Applications of Economics to an Imperfect World," *American Economic Review* 69 (May 1979), pp. 11–12.

10. Alfred E. Kahn, "Surprises of Airline Deregulation," *American Economic Review* 78, no. 2 (May 1988), p. 320.

11. E. E. Bailey, and J. R. Williams, "Sources of Economic Rent in the Deregulated Airline Industry," *Journal of Law and Economics* 31 (1988), p. 188. © 1988 by The University of Chicago. All rights reserved. 0022-2186/88/3101-0006 $01.50.

12. As described in Geoffrey Rowan, "Airlines try to lure bargain travellers," *The Globe and Mail* [Toronto] May 17, 1991, pp. B1 and B2.

13. Charters still play a role, although a diminishing one, in the Toronto–Vancouver run. See the National Transportation Agency, *Annual Review 1989* (Ottawa: Supply and Services Canada, 1990) p. 42.

14. "How Airlines Deregulation Can Mean Dollar Savings for Business Travelers," *Dun's Business Month*, April 1985, p. 81.

15. *The Globe and Mail*, [Toronto], February 12, 1991, p. C1.

16. The National Transportation Agency *Annual Review 1989*, p. 43 reported: "On 32 routes which Air Canada and Canadian turned over to their regional affiliate airlines, the number of discount fares more than doubled in 1988 and remained at this level in 1989, averaging over eight per route."

    With reference to the availability of discounts on short-haul versus long-haul flights:

    > In 1986, discount carriage on long-haul services in the southern domestic market represented 66.7% of passenger volume and 67.6% of passenger-kilometres; this compares with 50.7% and 52.5% respectively for short-haul. This distinction was even more pronounced in the preceding three years. Statistics Canada, *Touriscope, 1988 Tourism in Canada: A statistical digest* (Ottawa: Supply and Services Canada, Catalogue No. 87-401, October 1988), p. 110.

17. Statistics Canada, *Air carrier operations in Canada: October-December 1989* (Supply and Services Canada, Catalogue No. 51-002, vol. 20, no. 4, December 1990), Figure 1, p. xi.

18. Samuel Skinner, U.S. Secretary of Transportation, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems*. A study of the Task Force on Competition in the U.S. Domestic Airline Industry, (Washington, D.C.: U.S. Department of Transportation, 1990), p. 31.

19. Information from an interview (October 19, 1990) with Roger Roy of the National Transportation Agency of Canada.

20. Samuel Skinner, *Airline Marketing Practices*, pp. 8 and 9.

21. "AT&T has stated that its auditing service saved the corporation $700,000 a year even though the company's agency failed to book the lowest fare only two percent of the time." Ibid., p. 18.

22. Guerin-Calvert notes: "CAB found that the U.S. CRSs systematically used their market power in CRS to limit the ability of new entrants (carriers either new to the industry or to dominated markets) to get their lower fares to the public, that new carriers' costs were

increased, and that customers paid substantially higher prices for airline service than they would have paid in the absence of CRS market power." See Margaret E. Guerin-Calvert, "Competitive Analysis of the Reservec-Pegasus Merger," March 2, 1989, Affidavit submitted by Director of Investigation and Research, Bureau of Competition Policy to the Competition Tribunal, Ottawa, in the *Gemini* case, p. 37.

23. Kenneth W. Thornicroft, "Airline Deregulation and the Airline Market," *Journal of Labor Research*, 10, no. 2 (Spring 1989), p. 166.

24. Thomas G. Moore, "U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor," *Journal of Law and Economics*, 29 (1986), p. 26.

25. Bailey and Williams, "Sources of Economic Rent," p. 193.

26. Jordan has argued that, despite the agitation in 1979 and 1980, a longer perspective indicates that strikes/lockouts played a smaller role in the U.S. in the first six years of deregulation than they did in the last four years of regulation. William A. Jordan, "Results of U.S. Airline Deregulation: Evidence from the Regulated Canadian Airlines," *Logistics and Transportation Review* 22, no. 4 (1986), p. 325.

27. *The Vancouver Sun*, December 1, 1989, pp. C1 and C5.

28. *The Globe and Mail*, [Toronto] October 10, 1990, pp. B1 and B2.

29. Ibid., October 13, 1990, pp. B1 and B2.

30. Jean-François Bence, "La déréglementation du transport aérien," *Policy Options Politiques* 11, no. 2 (March 1990), p. 15.

31. Kahn, "Surprises of Airline Deregulation," p. 319.

32. National Transportation Agency of Canada, *Annual Review 1989*, Figure 3.9, p. 42.

33. John R. Meyer and Clinton V. Oster Jr., *Deregulation and the Future of Intercity Passenger Travel* (Cambridge, Mass.: The MIT Press 1987), p. 124.

34. Moore, "U.S. Airline Deregulation", p. 21.

35. Steven A. Morrison and Clifford Winston, "Enhancing the Performance of the Deregulated Air Transportation System," in *Brookings Papers on Economic Activity: Microeconomics*, edited by M.N. Baily and C. Winston (Washington, D.C.: The Brookings Institution, 1989), p. 73.

36. The potential of hub-and-spoke architecture was realized before deregulation but its introduction required the freedom to realign routes which deregulation provided. A reference for an engineering description of the advantages of hubbing is Adib Kanafani, "Aircraft Technology and Network Structure in Short-Haul Air Transportation," *Transportation Research 305*, 15A, (1981). An early discussion of the economics appears in Arthur S. De Vany and Eleanor H. Garges, "A Forecast of Air Travel and Airport Use in 1980," *Transportation Research* 6, 1 (1971). In conversation with the authors, George Hariton, who was formerly the Director of Research at the Canadian Transport Commission, noted that Boeing was an important force in developing the hub-and-spoke system.

37. *Flight International,* June 3, 1989, pp. 29–32.

38. To gain perspective on Toronto's North American status as an airport, it is worth noting that in 1988 it was the 21st busiest airport in the world on the basis of passengers embarked and the 20th busiest on the basis of aircraft movements. International Civil Aviation Organization, *Civil Aviation Statistics of the World 1988,* DOC 9180/14 (1989), pp. 150–51.

39. Statistics Canada, *Touriscope, 1988 Tourism in Canada: A statistical digest,* p. 107.

40. As quoted by Lovink, pp. 99–100.

41. David W. Gillen, T. H. Oum and M. W. Tretheway, "Airline Cost Structure and Policy Implications," *Journal of Transport Economics and Policy* (January 1990), p. 28. What is considered a cost factor or a demand factor depends on the definition of output. Gillen et al. felt that such factors as frequency of flights and more attractive frequent flyer programs, affect demand. We view these as elements of quality which the smaller producer finds more costly to provide.

42. Douglas W. Caves, Laurits R. Christensen and Michael W. Tretheway, "Economies of Density Versus Economies of Scale: Why Trunk and Local Service Airline Costs Differ," *Rand Journal of Economics* 15, no. 4 (Winter 1984).

43. Jordan, "Results of U.S. Airline Deregulation," p. 301.

44. David R. Graham and Daniel P. Kaplan, *Competition and the Airlines: An Evaluation of Deregulation.* Staff Report of the Office of Economic Analysis, Civil Aeronautics Board (Washington, D.C.: December 1982), p. 46.

45. Gillen, Oum and Tretheway, "Airline Cost Structure," n. 15.

46. In the United States, the exception is Southwest Airlines, which has been successful and is expanding. However, it has stuck to a regional strategy, adopted point-to-point scheduling rather than a hub configuration, and has not chosen to compete directly with the major carriers on the main routes between large cities.

47. Kahn, "Surprises of Airline Deregulation," p. 318. Kahn is perhaps unique in organizing the demise of the regulatory body, the Civil Aviation Board, which he headed.

48. Before the strike there were 17,725 controllers of which 13,300 were full-time. In March 1987 there were 14,900 controllers of which 11,200 were full-time.

49. The controlled airports currently are Chicago O'Hare, Washington National and Kennedy and LaGuardia in New York.

50. "During the worst two-day period in December, 111 flights into or out of Pearson were cancelled, causing disruption of air traffic from coast-to-coast." National Transportation Agency of Canada, *Annual Review 1988,* p. 50.

51. Garth Wallace, "Living with Slots," *Aviation and Aerospace* (January 1990), p. 51.

52. Robert W. Hahn and Randall S. Kroszner, "The Mismanagement of Air Transport: A Supply-Side Analysis," *The Public Interest* 95 (Spring 1989), pp. 105–106.

53. Slots not used 65 percent of the time in a two-month period are withdrawn by the FAA; international slots are not covered by the rule.

54. See Table B-4 of Samuel Skinner, U.S. Secretary of Transportation, *Airports, Air Traffic Control, and Related Concerns (Impact on Entry)*. A study of the Task Force on Competition in the U.S. Domestic Airline Industry, (Washington, D.C.: U.S. Department of Transportation, 1990).

55. Ibid., p. 2-9.

56. Ibid., p. 2-17.

57. Ibid., p. 2-15.

58. National Transportation Agency of Canada, *Annual Review 1989*, p. 27.

59. Morrison and Winston, "Enhancing the Performance," p. 93.

60. *The Globe and Mail*, [Toronto], November 20, 1990.

61. National Transportation Agency of Canada, *Annual Review 1989*, pp. 38, 40.

62. Moore, "U.S. Airline Deregulation," p. 27.

63. T. H. Oum, W. T. Stanbury and M. W. Tretheway, "Airline Deregulation in Canada and its Economic Effects," Working Paper #90-TRA-013, Draft, June 29, 1990, p. 19.

64. *The Globe and Mail*, [Toronto], October 12, 1990, pp. A1 and A2.

65. National Transportation Agency of Canada, *Annual Review 1989*, p. 30.

66. "Service levels in Canada's top 20 city-pairs increased substantially during the year, as evidenced by a 14 per cent increase in the number of direct flights and a 24 per cent increase in the seat capacity offered (fourth quarter 1988 versus fourth quarter 1987)." National Transportation Agency of Canada, *Annual Review 1988* (Ottawa: Supply and Services Canada, 1989) p. 57.

67. Oum, Stanbury and Tretheway, "Airline Cost Structure," Exhibit 5.

68. Federal Trade Commission, *The Deregulated Airline Industry: A Review of the Evidence* (1988) n. 3, p. 10.

69. National Transportation Agency of Canada, *Annual Review 1989*, p. 30

70. Ibid., p. 55.

71. Ibid., pp. 29–30.

72. Bence, "La déréglementation," p. 16.

73. An s-curve describes the relationship between carrier capacity and revenue on a route. Presumably, more frequent flights increase the value of a ticket on any one flight since they give more options should customers have to make adjustments in their travel times and because of frequent flyer programs.

74. From an Exhibit in the USAir–Piedmont Merger Case, July 1987 as cited in Severin Borenstein, "On the Efficiency of Competitive Markets for Operating Licences," *Quarterly Journal of Economics* 103 (1988), p. 357.

75. Kahn, "Surprises of Airline Deregulation," p. 318.

76. Lawrence F. Cunningham, M. B. Slovin, W. R. Wood and Janis K. Zaima, "Systematic Risk in the Deregulated Airline Industry," *Journal of Transport Economics and Policy,* (September 1988), p. 347.

77. Thomas Moore reported in "U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor," "In spite of the bankruptcy of Braniff and the poor economic performance of Continental, TWA, and Western, the real value of the ten trunk airlines, including Pan Am, has remained virtually unchanged from December 1, 1976, to December 1, 1983. For comparison, real value of all stocks on the New York Stock Exchange fell 3 percent over the same period. Some airlines, such as American, which tripled in value, did very well in this new unregulated market, as measured by the stock value of the company. But the big gainers were the regional carriers. The thirteen regional carriers witnessed the value of their companies balloon almost sixfold in real terms."

78. See "Airlines fly towards financial abyss," *The Ottawa Citizen,* June 19, 1990, p. D7.

79. Fred Lazar, in his *Deregulation of the Canadian Airline Industry: a Charade* (Toronto: Key Porter Books, 1984), p. 46, stated:

> Pricing wars and destructive competition are to be expected in an industry in which all firms produce identical products, there is no dominant price leader, fixed costs comprise the largest share of total costs and demand declines.

80. Lee J. Van Scyoc, "Effects of Airline Deregulation on Profitability," *The Logistics and Transportation Review* 25, no. 1 (March, 1989), p. 48.

81. The margin is the difference between operating revenues and operating expenses (excludes depreciation and interest charges).

82. Level I airlines are the larger carriers. From 1981 to 1986 the class included AC, CP, EPA, Nordair, Quebecair, PWA and Wardair. In 1988, AC, CAIL and Wardair represented the class. Currently there are two Level I carriers, AC and CAIL.

83. See G. J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy* 72, no. 1 (February 1964), pp. 44–61.

84. The model employed here is an address model in which carriers have different locations in "departure space" but are otherwise identical. For a general discussion of address models see Steven Salop, "Monopolistic Competition with Outside Goods," *Bell Journal of Economics* 10, (1979), pp. 141–56.

85. See for example National Transportation Agency of Canada, Staff Report, File Number DR-88 3004, Appendix III, (1988), p. 5.

86. Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Row, Torchbook edition, 1962), p. 85.

87. With increasing average costs, the incumbent could not prevent a subset of customers from signing up with an entrant, and the break-even price is not sustainable. However,

within the capacity of an airplane, average costs per passenger decline, and the carrier's break-even price would be sustainable.

88. Technically, sustainability in this context means that the charges to each group must be in the core of the price game. It is conceivable that the core is empty, but the more likely outcome is that more than one assignment will be in the core. Under quite general circumstances Ramsey prices (prices which maximize welfare subject to a break-even constraint) are in the core.

89. Soberman, "Canadian Passenger Transportation Policy," p. 5.

90. Robert W. Hahn and Randall S. Kroszner, "The Mismanagement of Air Transport: A Supply-Side Analysis," *The Public Interest* 95 (Spring 1989), p. 105.

91. Lazar, *Deregulation*, p. 137.

92. Michael W. Tretheway, "Analysis of the Effect of the Gemini Computer Reservation System Merger on Competition in the Canadian Airline Industry," (March 1, 1989). Affidavit submitted by Director of Investigation and Research, Bureau of Competition Policy in the *Gemini* case, p. 19. Note that CAIL has only purchased a minority interest in its feeders.

93. Ibid.

94. The average round trip was 1,179 miles. Morrison and Winston, p. 67 and n. 15.

95. David W. Gillen, W. T. Stanbury and Michael W. Tretheway, "Duopoly in Canada's Airline Industry: Consequences and Policy Issues," *Canadian Public Policy* 14(1) (March 1988), p. 27.

96. Morrison and Winston, "Enhancing the Performance," p. 83 and fn. 44.

97. Ibid., p. 67.

98. The European and American codes cover display bias, pricing, contract length, terms and conditions of contracts, and provide non-discriminatory access to enhancements such as direct access links. Margaret E. Guerin-Calvert, "Competitive Analysis," p. 46.

99. Michael E. Levine, "Evidence," (March 1, 1989), submitted by Director of Investigation and Research, Bureau of Competition Policy to the Competition Tribunal, Ottawa, in the *Gemini* case, p. 16.

100. Skinner, *Airline Marketing Practices*, p. 6.

101. Bailey and Williams, "Sources of Economic Rent," p. 189.

102. Skinner, *Airline Marketing Practices*, p. 15.

103. See *The Globe and Mail* [Toronto], December 15, 1989, p. B6.

104. Asra Q. Nomani. "Fare Game: Airlines may be Using a Price-Data Network to Lessen Competition," *Wall Street Journal* [New York], June 28, 1990, p. A1.

105. Kahn, "Surprises of Airline Deregulation," p. 319.

106. R. D. Willig and W. J. Baumol, "Using Competition as a Guide," *Regulation* (1987), no. 1, pp. 28–35.

107. M. J. Roberts, "Residual Rate Control: The Unmet Challenge of Deregulation, *The Logistics and Transportation Review* 23, 1 (1987) pp. 83–108.

108. F. Dunbar, and J. Mehring, "Coal Rail Prices During Deregulation: A Hedonic Price Analysis," *The Logistics and Transportation Review* 23, 1 (1987) pp. 17–34.

109. Roberts, "Residual Rate Control," n. 107.

110. R. Lande, *Railway Law and the National Transportation Act* (Toronto: Butterworths, 1989), pp. 140–41.

111. Canadian Transport Commission, Decision number MV-40-224 (MV-86-1) (Ottawa, 1986).

112. Ibid., p. 35.

113. Morrison and Winston, "Enhancing the Performance," pp. 61–112.

114. Ibid., p. 74.

115. Morrison and Winston found that, other things being equal, fares were higher on routes where either the origin or the destination was the hub of a major carrier. See Morrison and Winston, ibid., p. 74. Others dispute the proposition that routes involving hubs are particularly difficult to enter. See "The Myth of the Fortress Hub," *The Avmark Aviation Economist* (October 1990), pp. 6–9.

116. National Transportation Agency of Canada, *Annual Report 1990* (Ottawa: Supply and Services Canada, 1991), p. 20.

117. Lande, *Railway Law and the National Transportation Act*, p. 147.

118. P. Flint, "Toto, I have a feeling we're not in Kansas anymore," *Air Transport World* (May 1990), pp. 52–59.

119. O. E. Williamson, "Credible Commitments Using Hostages to Support Exchange," *American Economic Review* 73 (September 1983), pp. 519–40.

120. Borenstein has pointed out that if bidders in a slot market differ in their ability to capture surplus slots, the free market allocation of slots may not maximize total surplus. This need not imply any asymmetry between incumbents and entrants. See S. Borenstein, "On the Efficiency of Competitive Markets for Operating Licenses," *Quarterly Journal of Economics* 103 (May 1988), pp. 357–85.

121. See O. E. Williamson, "Franchise Bidding for natural monopolies — in general and with respect to CATV," *The Bell Journal of Economics* 7 (Spring 1976), pp. 73–104.

122. See G. Wallace, "Flying for Business," *Canadian Aviation* (October 1989), pp. 23–31.

123. The Consent Order specifies detailed rules for the display of flight information on computer reservation systems and for the relationships between these systems and carriers and subscribers respectively. See "In the matter of an application by the Director of Investigation and Research under subsection 64(1) of the *Competition Act*, R.S.C. 1970, c. C-23, as amended; Consent Order (Competition Tribunal, CT - 88 / 1).

9

CONSTITUTIONAL JURISDICTION OVER TRANSPORTATION: RECENT DEVELOPMENTS AND PROPOSALS FOR CHANGE

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I. INTRODUCTION

The purpose of this study is twofold: to provide an overview of constitutional jurisdiction in the field of transportation, and to consider the need for constitutional change in this field.

The study examines the relevant provisions in the Canadian Constitution allocating jurisdiction over the field of transportation,[1] and considers the judicial interpretation of these provisions and the extent to which the courts have modified or supplemented the original scheme contemplated by the Constitution. It then examines how legislative jurisdiction has actually been exercised by both federal and provincial governments to establish whether the constitutional division of responsibilities has limited or constrained the ability of governments to respond to changing circumstances in transportation.

This analysis leads logically to the second purpose of the study — a consideration of the need for constitutional change in the field of transportation. Does the existing constitutional scheme require amendment? Such an analysis is timely, given the current constitutional discussions that are ongoing in

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Canada. In September of 1991, the Government of Canada initiated a process aimed at a fundamental and comprehensive re-examination of the Canadian Constitution.[2] In addition to the proposals put forward by the government, there have been a variety of other suggestions for fundamental constitutional change published over the past year.[3] Many have included proposals for change to the constitutional allocation of jurisdiction over transportation. It is important that the debate over such changes be grounded in a detailed and concrete understanding of the existing scheme of the Constitution; it is also important to identify with some care the possible implications of any proposed constitutional amendments. This study will attempt to provide such an understanding.

The first section of the paper outlines the existing constitutional jurisdiction in the field of transportation. Since this is an area that has been discussed quite extensively in the academic literature,[4] the emphasis here is on recent developments, particularly the recent Supreme Court of Canada judgements which have clarified the respective roles and responsibilities of the federal and provincial governments in relation to transportation. This section outlines the various provisions in the Constitution which grant federal or provincial jurisdiction over transportation and reviews the regulatory framework which both levels of government have put in place on the basis of their constitutional responsibilities. Finally, it identifies the issues or areas which can be expected to generate litigation in the future, as reflected by an analysis of recent court decisions.

The first issue discussed in the second section of this study is whether the existing constitutional framework has led to any obvious problems or difficulties. The study examines the extent to which the current constitutional framework may have prevented governments or the private sector from responding to changing needs or circumstances in transportation. It also analyzes the extent to which the Constitution may impede government as it faces the challenges inherent in designing a transportation system that will meet future needs of Canadians.[5]

The second section of the paper also considers the merits and implications of a variety of proposals to change constitutional responsibilities in relation to transportation. Over the last year, the Constitutional Committee of the Quebec Liberal Party (The Allaire Committee),[6] the Group of 22,[7] as well as the Government of Canada,[8] have all put forward proposals for altering the

Constitution as it relates to transportation. This section also considers the extent to which the existing Constitution permits governments to delegate or alter regulatory responsibility in the transportation field.[9] The paper concludes with an overall assessment of the need for formal constitutional amendments in the field.

II. The Existing Constitutional Framework

The *Constitution Act, 1867* does not classify transportation as a class of subject (or head of power) assigned exclusively to Parliament or the provincial legislatures. Instead, specific transportation matters or modes are dealt with in a variety of separate constitutional provisions which effectively divide responsibility for transportation regulation between the federal and provincial governments. In general terms, the Act allocates jurisdiction over interprovincial and international transportation to the federal government, while reserving to the provinces responsibility for transportation matters within a single province. This territorial approach to transportation[10] is reflected most clearly in section 92(10) of the *Constitution Act, 1867,* which reserves to the federal Parliament responsibility over "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province,"[11] while providing for provincial responsibility for "Local Works and Undertakings."

Other provisions in the 1867 Act which allocate jurisdiction to the federal Parliament include sections 91(9) ("Beacons, Buoys, Lighthouses, and Sable Island"); 91(10) ("Navigation and Shipping"); 91(13) ("Ferries between a Province and any British or Foreign Country or between Two Provinces"); section 92(10)(c) (power to declare local works for the "general Advantage of Canada"); and section 108 (certain Public Works and Property of each Province was transferred to Canada, including Canals, Public Harbours, Railways and Military Roads).[12] The federal power over "trade and commerce" in section 91(2) of the 1867 Act was at least potentially relevant to the field of transportation. The courts have construed this provision narrowly, however, and it has never been interpreted as adding significantly to federal authority in this field.[13] Federal authority over criminal law in section 91(27) has also permitted the federal government to establish a set of criminal prohibitions and sanctions relating to the operation of motor vehicles, vessels and aircraft.[14] Provincial authority in relation to transportation matters flows

from section 92(10) ("Local Works and Undertakings"); section 92(13) ("Property and Civil Rights in the Province"); and section 92(16) ("Matters of a merely local or private Nature in the Province").

The courts have also been called upon to supplement the original division of powers contemplated by the 1867 Act as new modes or methods of transportation arise. Of greatest significance in this regard is air travel which of course was unknown in 1867 and was therefore not mentioned in the original division of powers. The courts have interpreted the federal Parliament's power to make laws for the "Peace, Order and good Government of Canada" as including the exclusive authority to regulate all aspects of air travel.

The terms of section 92(10), establishing federal jurisdiction over inter-provincial works and undertakings, have been the greatest single source of constitutional litigation in the field of transportation. The principles which the courts have developed in their interpretation of this provision make up the essential core of the constitutional jurisprudence in the transportation field.

JURISDICTION OVER WORKS AND UNDERTAKINGS

Section 92(10) of the *Constitution Act, 1867* provides that the provincial legislatures have exclusive power to make laws in relation to:

> Local Works and Undertakings other than such as are of the following Classes: —
>
> (a) Lines of Steam or Other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> (b) Lines of Steam Ships between the Province and any British or Foreign Country:
>
> (c) Such works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Although section 92(10) is in terms a grant of legislative power to the provinces, the exceptions established in subsections (a), (b) and (c) have proven to be the most significant feature of the provision. These exceptions from provincial authority represent grants of exclusive legislative authority to the Parliament of Canada, in accordance with section 91(29) of the *Constitution Act, 1867.*

There are a number of settled principles with regard to the interpretation of section 92(10). The first relates to the distinction between "Works" and "Undertakings" referred to in the provision. The courts have interpreted an "Undertaking" as involving both a physical and an organizational element. Viscount Dunedin in the *Radio Reference* referred to an undertaking as "not a physical thing, but . . . an arrangement under which . . . physical things are used."[15] Thus, in the *Winner* case, the federal Parliament possessed jurisdiction not only over the buses which provided the interprovincial transportation, but also over the bus company itself.[16] This functional approach means that federal authority over interprovincial undertakings extends to all aspects of the organization or enterprise which provides the service in question.

A second settled principle has to do with the fact that constitutional jurisdiction over a particular work or undertaking is to be undivided: for the purposes of section 92(10) jurisdiction is allocated to a single level of government. The courts have consistently rejected the idea of dividing jurisdiction between the federal and the provincial governments over a single undertaking. This fundamental principle was first established in the *Bell Telephone* case of 1905.[17] The Privy Council rejected the idea that the telephone company's long-distance business and its local business should be separated for the purpose of allocating legislative jurisdiction. The Board held that the telephone company was engaged in an interprovincial undertaking and thus the whole of the company's business, including its strictly local activity, fell under federal jurisdiction.

This approach is quite different from that adopted by the Privy Council in relation to its interpretation of the federal trade and commerce power in section 91(2) of the *Constitution Act, 1867.* It consistently restricted the federal authority over trade and commerce to the interprovincial or international aspects of trade; the local aspects of trade remained subject to exclusive provincial jurisdiction and could not be reached by federal legislation. Thus,

in the *Natural Products Marketing Reference* (1937),[18] a federal statute regulating natural products that were primarily traded in international markets was ruled invalid since the statute included some transactions which could be completed within a single province. The reasoning of the Privy Council was that federal authority could only be exercised in relation to those transactions which crossed provincial borders. This segmented approach to the construction of the trade and commerce power has proven to be one of the key factors in limiting the scope and usefulness of this particular source of federal authority.[19]

On the other hand, the Privy Council's determination that jurisdiction over transportation undertakings was to be undivided has led to quite different results in the transportation field. Once an undertaking is classified as interprovincial, federal jurisdiction immediately extends to all aspects of the enterprise, including any features that are strictly local. This has meant that federal authority to regulate transportation undertakings has been much more extensive and therefore more effective than in many other areas of federal jurisdiction. In particular, the Privy Council's undivided approach to transportation undertakings has meant that this is one of the few areas in which the federal government is capable of effective action without the necessity of involving provincial governments.[20]

The courts' resistance to dual jurisdiction in the transportation field has had important implications in the central issues which have emerged in litigation surrounding section 92(10). The allocation of jurisdiction has been treated by the courts as "an all or nothing affair";[21] a transportation undertaking is subject *either* to federal jurisdiction or to provincial jurisdiction, but not simultaneously to both. This has meant that the key question for purposes of section 92(10) has been the characterization of an undertaking as either local or interprovincial. This, in turn, has led to two recurring questions that continue to dominate the court decisions in this area:

1. What is the extent of the interprovincial activity or connection that is necessary to support a finding that a given undertaking is interprovincial or international as opposed to local?
2. To what extent can federal jurisdiction be extended to an otherwise purely local undertaking because that local undertaking is functionally integrated or connected with an interprovincial undertaking?

INTERPROVINCIAL WORKS AND UNDERTAKINGS

The courts have established a relatively low threshold of interprovincial activity to support a finding that a particular undertaking qualifies as an interprovincial one. The courts have consistently held that an undertaking falls within federal regulatory authority even if only a small percentage of its business activity is interprovincial or international. The primary test is whether the interprovincial or international services are a "continuous and regular" part of the undertaking's operations. If this requirement is met, then the whole undertaking is subject to exclusive federal regulation.

There are many examples of this rule being applied so as to include primarily local undertakings within federal jurisdiction. In the case of *Re Tank Truck Transportation* (1960),[22] the issue was whether the *Ontario Labour Relations Act* was applicable to an Ontario trucking company whose operations were predominantly confined to the province of Ontario. The evidence before the Court was that, in 1959, the trucking firm had completed 94 percent of its trips within the province, with just 6 percent extending beyond provincial borders. But the Court found that the interprovincial activity was a "continuous and regular" aspect of the trucking firm's operations and, as a result, the whole of the undertaking, including the local operations within Ontario, was subject to the exclusive authority of the Parliament of Canada.[23] A similar ruling was made in the *Liquid Cargo* case (1965),[24] where only 1.6 percent of a trucking firm's trips extended beyond provincial boundaries.

The most recent Supreme Court of Canada pronouncement on this issue was made in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications.*[25] The question here was whether Alberta Government Telephones (AGT), a provincial Crown corporation operating a telephone system in Alberta, fell under federal or provincial authority. AGT's physical facilities were located entirely within the province of Alberta and the system could carry telephone messages only within the province. However, the AGT system was connected with other telephone companies outside the province to enable local subscribers to make extra-provincial telephone connections. AGT argued that it fell under provincial regulatory authority since its activities were confined totally to the territory of the province of Alberta. The Supreme Court unanimously rejected this claim, holding that AGT was subject to exclusive

federal authority.[26] In reaching this conclusion, the Court articulated a number of general principles that it indicated ought to guide analysis of this issue:

1. The location of the physical apparatus of an undertaking in a single province and the fact that all the recipients of a service are within a single province will not preclude a finding that an undertaking is interprovincial in scope. The primary concern is "not the physical structures or their geographical location, but rather the service which is provided by the undertaking through the use of its physical equipment."[27]
2. In considering the nature of the service or operation, one must look to the "normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors. . . ."[28]
3. It is impossible to formulate in the abstract a single comprehensive test which will be useful in all cases; instead, the court must be guided by the "particular facts in each situation. . . ."[29]

Applying these principles to the situation of AGT, the Court found that the operations of the Crown corporation were interprovincial and international in scope. The primary basis for this conclusion seemed to be that AGT provided a service which enabled residents of Alberta to communicate beyond the borders of the province. According to Chief Justice Dickson, who wrote for the Court on this point, "AGT is, through various commercial arrangements of a bilateral and multilateral nature, organized in a manner which enables it to play a crucial role in the national telecommunications system."[30] It was the capacity to provide this extra-provincial service which supported the finding that AGT was subject to exclusive federal authority.

One leading commentator, Professor P. Hogg, has observed that this represents a more expansive reading of federal authority than has been adopted in other contexts.[31] As he has pointed out, the fact that a local undertaking is capable of providing a service beyond the borders of a single province had previously been regarded as an insufficient basis for asserting federal regulatory jurisdiction. For example, in the *Cannet Freight Cartage* case,[32] a freight forwarder provided local customers with the opportunity to ship goods beyond the borders of the province. The freight forwarder took delivery of goods in one province and made all the arrangements necessary to ship the goods to another province by rail. The Ontario Court of Appeal

found the freight forwarder to be subject to exclusive provincial jurisdiction because its own operations were limited to a single province. The Court reasoned that the freight forwarder did not become an interprovincial undertaking by virtue of shipping goods on an interprovincial railway.

Professor Hogg has expressed the view that it is not easy to see a difference in the facts that make up the *AGT* case and those of earlier cases such as *Cannet Freight*. He has suggested that what might explain the Supreme Court's most recent decision was the sheer scope and complexity of the agreements between AGT and the other Canadian telephone companies. These multilateral agreements meant that AGT was part of what amounted to an integrated national telecommunications network.[33] What seems evident, in any event, is that the Supreme Court was prepared to take a slightly broader view of federal regulatory authority in this case than it had previously. It is also significant that the Court was prepared to move in the direction of greater federal authority in an area which had traditionally been subject to control by the provinces.

Historically, federal regulatory authority had included Bell Canada (serving Ontario and Quebec), the British Columbia Telephone Company, as well as telephone companies serving Yukon, the Northwest Territories and parts of Newfoundland.[34] But the telephone companies in the other provinces had traditionally been subject to provincial or local control.[35] Thus, in a practical sense, the Court's decision in *AGT* had quite significant practical implications. It opened the door for federal regulatory authority in a context which had traditionally been regarded as subject to exclusive control of the provinces.[36]

INTEGRATION OF LOCAL AND INTERPROVINCIAL UNDERTAKINGS

As noted, a transportation undertaking can be classified as federal if the undertaking itself is regarded as interprovincial (as in the *AGT* case), or if a purely local undertaking is integrated or connected with another undertaking which is itself interprovincial.

The precise degree of the connection or integration that is required has been the subject of extensive litigation over the years. An early Privy Council case determined that mere physical connection between a local railway and an interprovincial railway was insufficient to bring the local railway under federal authority.[37] Integration in an operational or functional sense is

required before local undertakings fall within federal authority. For example, a local railway line that was operated under a formal management agreement by the CNR was held to fall within federal authority.[38] Similarly, a company supplying stevedore services in Toronto to seven shipping companies involved in international shipping was held to be subject to federal labour legislation.[39] Although the stevedore company was independent of the shipping companies, the services which it provided were integral to the successful operation of the shipping enterprises. The same reasoning was applied in the *Letter Carriers* case,[40] in which a trucking company which had contracted with the Post Office to deliver and collect mail was found to be within federal authority. The Court found that the trucking operation was integral and necessary to the operations of the Post Office itself.

The most recent Supreme Court of Canada judgement on this issue is the *Central Western Railway* case.[41] The issue here was whether Central Western Railway, a small railway located entirely within the province of Alberta, fell within federal or provincial jurisdiction. Central Western used its 105 miles of track in central Alberta to transport grain from nine elevators to the CNR's interprovincial rail line. The grain cars were then transported by CN to Vancouver for export. Central Western's tracks were separated from those of CN by a four-inch gap, and the CNR controlled the device which regulated entry onto its line. The issue for the Court was whether the degree of connection and integration between Central Western and CNR was sufficient to subject the local railway to federal jurisdiction.

Chief Justice Dickson, speaking for a majority of the Court,[42] rejected the argument that Central Western could be regarded itself as an interprovincial railway, noting that mere physical connection between a local and an interprovincial rail line was an insufficient basis for establishing federal jurisdiction. He cited the *AGT* case, arguing that "[t]he linchpin in the *AGT v. C.R.T.C.* decision was this court's finding that AGT, by virtue of its role in Telecom Canada and its bilateral contracts with other telephone companies, was able to provide its clients with an interprovincial and, indeed, international telecommunications service."[43] The Chief Justice regarded Central Western's operation as quite different from that of AGT. He noted that Central Western simply moved grain within Alberta and that the interprovincial transportation of grain was handled entirely by CN. On this basis, he concluded that Central Western was a local railway and not itself part of an interprovincial undertaking.

The Chief Justice then turned to the second possible basis for finding in favour of federal authority. Even though Central Western was a local railway, it would fall under federal authority if it could be characterized as an integral part of a federal work or undertaking. Dickson C. J. indicated that this integration might develop in at least two different ways.[44] First, the management and operation of Central Western might be coordinated or undertaken in common with that of an interprovincial undertaking. Second, the effective operation of a federal undertaking might be dependent on the services of Central Western.

Dickson C. J. concluded that Central Western was not functionally integrated with any interprovincial undertaking and therefore not subject to federal authority. He reasoned that Central Western and CN were operated as separate undertakings rather than in common; further, CN was not dependent on the services of Central Western for its own operations. Nor was Central Western integrated in a functional sense within a so-called "Western Grain Transportation Network."[45]

Despite the Court's ruling in this particular case, Chief Justice Dickson's judgement illustrates the very broad reach of federal regulatory authority in this field. The functional character of the Court's approach is noteworthy. Even where there is in form two separate undertakings, the courts will inquire into the degree of practical or operational integration between the undertakings. Federal regulatory authority will extend to any operations that are regarded as essential or conducted in common with a core interprovincial undertaking. The practical effect of this approach is to ensure an expansive interpretation to federal authority under sections 92(10)(a) and (b) of the *Constitution Act, 1867.*

WORKS DECLARED FOR THE GENERAL ADVANTAGE OF CANADA

Paragraph 92(10)(c) of the 1867 Act provides an exception to the principle that local works and undertakings are subject to exclusive provincial jurisdiction. This subsection provides that the Parliament of Canada may simply declare that a local work is "for the general advantage of Canada or for the advantage of two or more of the provinces"; such a declaration is sufficient to bring an otherwise local work within federal regulatory authority.

This power has been used close to 500 times, mostly in the late 19th and early 20th centuries and in most cases in relation to railways.[46] It can be used in relation to a specific work or to a broad class of works.[47] Moreover, the "works" in question need not be limited to the field of transportation or communication but can involve any sort of physical or tangible thing.[48] Once the declaration is issued, the courts will not inquire into whether the work is in fact for the general advantage of Canada. The declaration by Parliament will be regarded by the courts as dispositive.[49]

Various commentators have suggested that the declaratory power is inconsistent with classical principles of federalism since it permits the federal government to increase its jurisdiction unilaterally at the expense of the provinces.[50] The power has fallen into relative disuse and appears to have been used only twice in the last 25 years.[51] A recent federal proposal that the power be abolished[52] is discussed later in this study.

PEACE, ORDER AND GOOD GOVERNMENT

The opening words of section 91 of the *Constitution Act, 1867* grant the Parliament of Canada power ". . . to make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." While this source of federal authority has generally been interpreted narrowly by the courts, one important exception has been in the field of transportation. The "Peace, Order and good Government" power has been held to support exclusive federal jurisdiction over air transportation.[53] The Supreme Court of Canada found aeronautics to be a "distinct subject matter" which went beyond local concern and "must from its inherent nature be the concern of the Dominion as a whole."[54]

The effect of the *Johannesson* case was to include all aspects of aeronautics, including purely local aeronautics undertakings, as subject to exclusive federal authority. Thus the distinction between interprovincial and local undertakings, which has been critical in the judicial interpretation of section 92(10), has no application to the field of aeronautics. Even purely local airline operations fall under exclusive federal regulatory authority, without any requirement that the local operation be connected to or integrated with an interprovincial undertaking.[55]

Given the settled nature of federal jurisdiction over aeronautics, the litigation in this field has tended to focus on a variety of subsidiary issues such as the extent to which provincial laws of general application apply to airports. The courts have tended to hold that airports and aeronautics undertakings are exempt from the application of any provincial legislation which affects a vital part of the federal undertaking. For example, it has been determined that airports are exempt from municipal zoning bylaws of general application[56] as well as from height restrictions imposed by a province on land adjacent to an airport.[57]

A second issue that has produced some litigation is the extent to which federal jurisdiction extends to undertakings that are connected to aeronautics. Here, the courts have relied on the jurisprudence developed in relation to section 92(10)(a); the issue has been whether the related undertaking is sufficiently integrated with the main aeronautics undertaking. For example, in the *Field Aviation* case,[58] the Alberta Court of Appeal held that a company engaged in the servicing of aircraft was so intimately connected with aeronautics as to fall within federal jurisdiction. On the other hand, a company constructing airport runways,[59] as well as companies offering porter services or limousine service to and from the airport[60] have been held to be separate undertakings subject to provincial jurisdiction.

OTHER CLASSES OF SUBJECTS

Three other enumerated classes of subjects assigned to Parliament in section 91 of the *Constitution Act, 1867* deal explicitly with matters related to the field of transportation.[61]

These are:

91.9 Beacons, Buoys, Lighthouses and Sable Island

91.10 Navigation and Shipping

91.13 Ferries between a Province and any British or Foreign Country or between Two Provinces.

Federal authority over transportation matters is also supplemented by section 108 of the *Constitution Act, 1867*, which provides as follows:

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

The Third Schedule includes the following classes of provincial public works and property:

1. Canals, with Lands and Water Power connected therewith.
2 Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other debts due by Railway Companies.
7. Military Roads.

Although the Third Schedule transfers to the federal government all improvements or public works associated with rivers and waterways, the ownership of the rivers themselves remains with the provinces.[62] This means that the provinces may legislate with respect to the use of these waters, as long as their legislation does not interfere with federal legislation in relation to navigation and shipping.

The most important source of federal authority from the above catalogue of powers is section 91(10), "Navigation and Shipping". The language in the section is unqualified, suggesting that federal authority could be extended to all aspects of this subject. However, for many years the courts seemed to take the position that this head of power was circumscribed by the same limits that had been developed with respect to federal undertakings under section 92(10)(a).[63] In *Agence Maritime v. Canada Labour Relations Board*,[64] for example, it was held that local shipping was subject to provincial labour relations legislation. Similarly, ferries that operated largely within the waters of British Columbia were held to be within provincial jurisdiction for purposes of labour legislation.[65] In these cases, the courts seemed to interpret federal authority over navigation and shipping as extending primarily to interprovincial and international undertakings.

The most recent decision of the Supreme Court of Canada on this issue suggests a somewhat more expansive reading of federal authority over navigation and shipping. In *Whitbread v. Walley* (1990),[66] the issue was whether certain limitations of civil liability contained in the *Canada Shipping Act*, R.S.C. 1970, c.S-9 applied to a pleasure boat operated within provincial waters. The Supreme Court unanimously held that the provisions in the *Canada Shipping Act* applied uniformly to all shipping, including local shipping as well as pleasure boats. Mr. Justice La Forest, writing for the Court, distinguished the federal power over navigation and shipping in section 91(10) from that applicable to works and undertakings in section 92(10)(a). Whereas federal jurisdiction over works and undertakings was limited to interprovincial and international transportation, there was no such limitation with respect to navigation and shipping. La Forest J. stated that Parliament's jurisdiction over maritime law should be viewed as territorially co-extensive with its jurisdiction in respect of navigable waterways.[67] He rejected the idea that any distinction could be made between local shipping and interprovincial shipping. Instead, he took the view that all navigable waterways within Canada are part of a single navigational network which must be subject to a uniform legal regime. La Forest J. drew an analogy between navigation and shipping and the field of aeronautics which, as noted above, has been regarded as a single subject matter within the exclusive authority of Parliament. This is so, Justice La Forest suggested, because it is functionally impossible to make a distinction between air travel of a local versus an interprovincial nature. The same situation holds true, according to Justice La Forest, with respect to navigation and shipping. This points to the need for a uniform regulatory and legal regime for navigation and shipping and for "a broad reading of the relevant head of federal jurisdiction."[68]

The analogy which Mr. Justice La Forest draws between "navigation and shipping" and "aeronautics" is significant. Certainly the federal power over navigation and shipping has never been regarded as being as extensive as the power over aeronautics.[69] This result is somewhat ironic, given the fact that the area of navigation and shipping is an enumerated head of federal authority, while aeronautics has simply been added through judicial interpretation of the federal residual power. The result and the reasoning in *Whitbread and Walley* indicate the Supreme Court's willingness to reassess this situation and to consider expanding the limits of federal authority over navigation and shipping.

As to the manner in which governments have actually exercised their constitutional authority, our analysis thus far indicates that the courts have taken a much more expansive approach to federal authority over transportation matters than they have in other fields, such as federal authority to regulate trade and commerce.[70]

To what extent does the federal and provincial legislation enacted in this field reflect the fairly centralized scheme contemplated by the formal Constitution? In general terms, the regulatory framework does recognize a leading role for the federal government over transportation matters. However, in certain instances the federal government has chosen not to exercise the full range of authority which it has been allocated under the Constitution. Of course, this is a political rather than a constitutional stipulation, one which can be reversed by ordinary legislation.

What follows is a brief overview of the regulatory framework that has been put in place in the four principal modes of public passenger transportation: air, water, rail and motor vehicle. The focus of this analysis is on particular modes of transportation or forms of regulation which have been an important source of litigation or court decisions in the past. As such, there is no attempt to provide a comprehensive outline of federal or provincial legislation relating to transportation matters.[71] The main purpose of including this information is to provide a more complete understanding of how governments have actually used their formal powers set out in the Constitution.

Air Transportation

The federal government currently dominates the regulation of all air passenger transportation in Canada. Under the *National Transportation Act, 1987* it has exclusive responsibility for regulating the provision of all air services in Canada; and under the *Aeronautics Act* it regulates the safety and security of passengers, aircraft, airport and aviation facilities. All air carriers in Canada are subject to exclusive federal regulation under these statutes, including carriers engaged in purely local transportation. The provincial role in the transportation field is currently limited to establishing and directly operating certain airports as well as subsidizing some air passenger services.[72] Almost all of the airports and airstrips owned and operated by provincial governments are located in remote, northern areas of the provinces.[73]

Three provinces directly subsidize air passenger services; one province (Ontario) has established a provincial Crown corporation to provide air passenger services directly in Northern Ontario.[74] However, all the provincially-operated airports as well as all air passenger services must be federally licensed and meet all the relevant federal regulatory requirements. In short, the regulatory framework governing aeronautics reflects the centralized interpretation developed by the Supreme Court of Canada in this area.

Marine Transportation

The primary public mode of marine passenger transportation is provided by passenger and automobile ferries. The Parliament of Canada has established safety requirements under the *Canada Shipping Act* which apply to all ferry services, including ferries operating within a province. This statute represents a codification of the "rules of the road" for all navigation and shipping within Canadian navigable waters. The federal government also assumes responsibility for the provision of ferry services between provinces,[75] as well as for certain ferry services that are intra-provincial in nature.[76] Many of the provinces also provide local ferry services, the most important of these being provided by British Columbia, Ontario, Newfoundland and Quebec.[77] However, even these provincially operated services are subject to the safety and operational requirements of the *Canada Shipping Act*, thus ensuring a uniform regulatory framework across the country. The provinces have not imposed any additional ferry safety requirements on services which they operate or subsidize but would be free to do so as long as their regulations did not conflict with the paramount provisions in federal law.

Rail Transportation

The federal Parliament regulates the vast majority of passenger rail services in Canada. The federal government has responsibility for all interprovincial and international railways, as well as for any other railways which have been declared to be for the general advantage of Canada. This includes the vast majority of all passenger rail operations in the country. These rail services are regulated by a variety of federal statutes including the *National Transportation Act, 1987* (NTA) and the *Railway Act* (RA). The NTA provides for an administrative agency, the National Transportation Agency, and grants it certain regulatory powers in relation to federally-regulated passenger rail services. Certain decisions of the Agency can be varied or rescinded by the federal Cabinet.

Provincial regulation of passenger rail services is extremely limited. In British Columbia,[78] Ontario[79] and Quebec[80] there are various provincially operated or subsidized local rail services which are subject to provincial regulation. But these provincial services are confined mainly to commuter rail networks or to remote, northern regions. The vast majority of all passenger rail activity is subject to exclusive federal regulation.

Motor Vehicle Transportation

The primary public mode of motor vehicle transportation is provided by the bus industry. As noted above, the Privy Council decision in the *Winner* (*supra* note 16) case established that bus undertakings engaged in regular interprovincial service fell under exclusive federal authority. However, the bus industry had traditionally been regulated at the provincial level, and the federal government had no regulatory structure in place to assume control over the industry. Accordingly, within months of the Privy Council decision in *Winner*, the federal government delegated the regulation of interprovincial undertakings back to the provinces.

The *Motor Vehicle Transport Act, 1987* transfers regulatory authority over interprovincial motor vehicle undertakings to provincially appointed boards. The provincial boards are granted the authority to license the undertakings and to determine the terms and conditions under which they will operate.

It is an established principle of Canadian constitutional law that one level of government cannot directly delegate legislative powers to another level of government.[81] Thus it was inevitable that questions would be raised regarding the validity of the delegation to provincial boards under the *Motor Vehicle Transport Act*. However, the Supreme Court of Canada upheld the validity of the delegation in *Coughlin v. Ontario Highway Transport Board*,[82] ruling that a provincial board, validly constituted under provincial law to regulate local undertakings, could be vested with the authority to regulate extra-provincial undertakings. This left the regulation of the bus industry to the provinces and has led to significant variations in the applicable regimes governing bus operations across the country.[83]

Two general points should be noted about the delegation of authority to regulate the bus industry. First, the delegation under the *Motor Vehicle Transport Act, 1987 (MVTA)* can be revoked, altered and limited by ordinary federal legislation. Indeed, there is already a provision in the MVTA

permitting the federal Cabinet to exempt certain undertakings from the Act through regulation.[84] This exemption has only been used on one occasion, with respect to the Roadcruiser bus service in Newfoundland.[85] The point is that it can be used at any time in the future by the federal government without the necessity of obtaining provincial consent. This would mean that the federal government could resume responsibility for the regulation of any or all aspects of the interprovincial bus industry simply by passing an Order in Council or by amending the terms of the *Motor Vehicle Transport Act, 1987*.

The second general point is that there appear to be some limits to the capacity of the federal government to delegate authority to the provinces. In *Coughlin* the provincial board that was granted the authority was already validly established under provincial law. Implicit in this decision, therefore, is the requirement that the provincial legislation establishing the provincial board be valid independently of any federal law.[86] This would mean that the province could not establish a board or agency whose sole purpose was to regulate interprovincial undertakings.[87] The provincial legislation establishing such an agency would be beyond the constitutional capacity of the provinces, since there would be no valid provincial purpose which the agency was fulfilling.

FUTURE LITIGATION

This discussion indicates that the main outlines of jurisdiction in the field of transportation are now relatively settled. Over the years, the courts have identified a series of general principles which govern the allocation of jurisdiction over transportation. These principles are reasonably well understood by both government and industry, and the dividing line between provincial and federal responsibility is relatively clear.

However, transportation issues will continue to be a frequent source of constitutional litigation in the future. This litigation will arise out of the attempt to apply the general principles identified by the courts to the facts of specific cases. While such issues will vary, one or two central issues will tend to recur with particular frequency.

The first of these issues is the extent to which federal regulation can be extended to local undertakings which have been integrated or connected with interprovincial undertakings. Future transportation systems will place

an emphasis on developing more integrated forms of travel, permitting Canadians to use different modes of transportation on a single trip.[88] As local and interprovincial modes of transportation become more integrated, the constitutional jurisdiction over these systems might shift in favour of the federal government. As we have seen, the courts have adopted a functional approach to the issue of jurisdiction, inquiring into the degree to which there is common management or operation of various transportation undertakings. As intermodal transportation increases, the issue will be the extent to which an otherwise purely local transportation undertaking becomes integrated within some larger interprovincial network. In such cases, the precise dividing line between federal and provincial responsibility may be uncertain and require clarification by the courts.

A second, related issue which may produce future litigation relates to a possible move away from regulation based on distinct modes of transportation. In the past, governments have tended to establish separate schemes of regulation for specific modes of transportation. In recent years, however, there has been a recognition that certain issues, such as safety, security, substance use and environmental pollution cut across all modes.[89] The federal government has responded by enacting legislation based on a particular issue or public purpose rather than on a specific mode of transportation.[90] Within this context, the distinction between "local" and "interprovincial" undertakings is largely meaningless. For example, legislation designed to regulate environmental harm will presumably be aimed at all undertakings with possible adverse effects on the environment. Yet purely local undertakings may cause just as much harm to the environment as interprovincial ones. Thus for such legislation to be truly effective, some means must be found to ensure that all undertakings which produce adverse environmental effects are subject to a set of common standards.

Since constitutional jurisprudence developed by the courts has been premised on a traditional, modal theory of government regulation, the principles which apply to one mode of transportation are quite different from those which apply to others. If the distinctions between modes begin to break down, it may cause the courts to re-evaluate some of its previous jurisprudence. In particular, it may prompt the courts to try to create some room for the development of a set of uniform principles — issue-specific

rather than mode-specific — which would apply across a series of transportation modes. The regulation of adverse environmental effects is a prime instance of where such a re-evaluation might take place.

Even were this to occur, it would be an incremental process which would take many years to develop. The main outlines of constitutional authority over transportation policy are now so well settled, there should not be any significant shift in the courts' approach to these matters in the foreseeable future. The litigation which does arise will be issue-specific and narrowly focussed, and will turn on how the generally accepted principles apply to the facts of specific cases. These fact-specific judicial decisions are unlikely to involve significant implications for transportation policy makers and planners.

III. Proposals for Constitutional Change

The first section of this paper has provided a snapshot of the current constitutional arrangements governing the field of transportation. The question which now arises is whether these existing arrangements require modification or amendment.

It is important to keep in mind the distinction between purely statutory arrangements, subject to amendment through ordinary legislation, and the dictates of the Constitution. The focus here is on the degree to which the terms of the formal Constitution require modification. The related issue of whether government policy in the transportation field ought to be altered in some way is beyond the scope of this paper.

This section begins with an examination of the degree to which the terms of the Constitution may have limited governments or the private sector from responding effectively to transportation issues. It measures the practical impact and significance of the Constitution on both government and industry. A number of issues arise here. First, has the Constitution prevented governments from putting in place forms of regulation which would be better suited to the underlying transportation marketplace? In effect, has the Constitution forced governments to rely upon inefficient or ineffective forms of regulation? Secondly, has the Constitution had any negative impact on the

way in which the transportation industry delivers services to the public? For example, has it acted as a barrier to the development of more efficient modes of transportation?

Then follows an examination of various proposals for constitutional change; this assessment focusses on recent proposals for constitutional amendment which have surfaced on the public policy agenda and suggests which, if any, ought to be included in any amendments to the Constitution.

THE PRACTICAL IMPACT OF EXISTING CONSTITUTIONAL ARRANGEMENTS

The transportation industry in Canada has undergone a fundamental transformation since Canada's original constitutional arrangements were put in place nearly 125 years ago. Despite this transformation, the Constitution has not prevented governments from responding effectively to the changing circumstances because of the courts' flexible and functional interpretation of the division of powers in the field of transportation. As the transportation industry has evolved, the courts have in effect updated the Constitution. This has ensured that any gaps or ambiguities are resolved in a satisfactory fashion. It has also meant that constitutional jurisdiction has evolved to take account of changing needs and circumstances in the industry.

The most obvious example of this constitutional "updating" is in air transportation. The courts have allocated exclusive jurisdiction over air transportation to the federal government, thus ensuring the development of an effective national air transport system. But the courts have taken a similarly broad interpretation to federal authority over interprovincial works and undertakings and have found that even predominantly local undertakings are subject to federal regulatory authority if they are engaged in regular interprovincial activity. This preference for federal authority is important, since it permits the creation of a national "level playing field" to govern the transportation industry.

This is not to say, however, that either the federal or provincial governments have put in place a regulatory structure which actually creates this level playing field. The Interim Report of the Royal Commission on National Passenger Transportation makes the observation that the laws affecting passenger transportation are "fragmented" and suggests that passenger transportation companies "may not be competing against other modes on

a level playing field."[91] However, this fragmentation is more a result of policy decisions by successive governments than by the dictates of the Constitution.

Certainly with respect to the main public modes of passenger transportation — air, bus, marine and rail — the federal government possesses very broad regulatory powers under the Constitution. But the Constitution is largely permissive; it creates room for federal regulatory authority but does not require that authority to be exercised in any particular manner. Thus the federal government has chosen in some instances to delegate at least some of its authority back to the provinces.[92] In other cases, federal statutes have been drafted in such a way so as not to take complete advantage of the potential federal authority available in a particular area. For example, the *Canadian Transportation Accident Investigation and Safety Board Act* establishes a federal board with authority to investigate and report upon accidents in certain specified modes of transportation.[93] The Act does not apply to accidents occurring on highways, where the vast majority of all transportation accidents occur. However, there is certainly no constitutional reason which would prevent the federal government from extending the Act to govern at least some aspects of highway transportation.

As noted above, the federal government has authority over interprovincial undertakings operating on highways. Furthermore, the Parliament of Canada has enacted legislation governing the safety of new cars and components sold in Canada.[94] In addition, the federal Parliament regulates the behaviour of individual drivers through a variety of provisions in the *Criminal Code* of Canada. These various sources of federal authority would provide an ample basis for extending the application of the federal safety legislation to at least some aspects of highway transportation. Thus the fact that the legislation is framed more narrowly is attributable to factors other than the absence of appropriate constitutional authority in the federal Parliament.

What of the extent to which the Constitution may have indirectly limited the development of more efficient modes of transportation? Again, there seems little basis for concluding that the Constitution has had such an impact. Consider the development of intermodal or integrated systems of transportation, in which passengers might rely on more than one means of travel to arrive at their destinations.[95] Such systems depend upon the construction

of terminals that serve airplanes, trains, buses and taxis; they also depend upon the development of support services such as intermodal baggage handling, scheduling, reservation systems and ticketing. It might be thought that divided constitutional jurisdiction in the transportation field might make the development of such intermodal systems more difficult to achieve. For example, the fact that the provinces have jurisdiction over local undertakings, while the federal government has jurisdiction over interprovincial undertakings, might be seen as a factor limiting the development of integrated transportation networks.

In fact, however, there would appear to be little basis for supposing that the Constitution would prevent the emergence of more integrated transportation systems. As noted in the first section of this paper, the courts have framed constitutional jurisdiction over transportation undertakings in functional terms. Federal jurisdiction extends to a purely local undertaking only when it is integral to the successful operation of the related interprovincial undertaking or when the two are managed in common. In short, there is no hard and fast distinction between those undertakings that are subject to provincial jurisdiction and those subject to federal authority. The jurisdictional line depends upon the facts and circumstances of particular cases and turns on the degree of functional integration between the various elements of a transportation network.

The greater the degree of functional integration between different modes of transportation, the more likely it will be that the integrated system as a whole will fall under exclusive federal jurisdiction. This is because the integrated or intermodal system will necessarily involve at least some undertakings or modes of transportation that already fall under exclusive federal authority. As these federally regulated modes of transportation become integrated within some larger network of transportation undertakings, the larger system itself may well become subject to exclusive federal jurisdiction. For example, jurisdiction over intermodal stations for buses, trains, urban transit and airplanes appears to be vested in the federal Parliament[96] because all air travel as well as a significant amount of bus and train travel are already within exclusive federal jurisdiction. The operation of terminals to link these federally regulated modes of transportation with other modes would be an integral part of these federally regulated undertakings. As such, the federal Parliament would possess exclusive authority to regulate the operation of such terminals.

There are, of course, numerous obstacles to the emergence of intermodal transportation systems. The infrastructure to support such systems is extremely costly, while the successful operation of the system can be frustrated by congestion and delays in the urban transportation network.[97] But these are economic, social and political problems, rather than constitutional ones. An amendment to the Constitution would not make the emergence of intermodal systems significantly more likely or feasible.

Thus, in general terms, I would conclude that the Constitution has not posed a serious problem for either government or industry in the transportation field in the past. This being said, it should also be recognized that there are inevitably going to be certain difficulties associated with divided jurisdiction over transportation matters. The main difficulty has already been alluded to earlier: divided jurisdiction carries with it the possibility that different modes or systems of transportation will find themselves competing on an uneven playing field. If regulations set by one level of government are inconsistent with those set by another, it may produce a situation in which a particular mode of transportation receives a competitive advantage.[98] This is particularly the case since it is now becoming apparent that competition occurs across transportation modes rather than simply within a particular mode. Within this context, the actions of all three levels of government — municipal, provincial and federal — have impacts on transportation policies undertaken at each level. For example, the choice between air, bus, rail or private automobile for a particular intercity traveller will be affected by such factors as the nature of the road system, the degree of urban congestion or the development of good public transit. Yet these factors are subject to the control of different levels of government. Thus, even though a particular mode of transportation might be subject to the exclusive control of a single level of government — such as aeronautics — the competitive position of that industry will be affected by decisions taken by other levels of government.

Some degree of divided jurisdiction would appear to be inevitable, since it is simply not feasible for a single level of government to assume jurisdiction over all matters which have an impact on the transportation sector. If divided jurisdiction is a fact of constitutional life, there will always be the possibility that the actions of one level of government might frustrate or undermine the policies of another. This problem cannot be solved through a constitutional amendment, since any amendment would still leave a situation in which jurisdiction was divided between two (or perhaps three)

orders of government. The only long-term solution to the problem is to achieve greater coordination and cooperation between the various levels of government.

PROPOSALS FOR CONSTITUTIONAL CHANGE

Over the last year, a variety of proposals for comprehensive constitutional change have been advanced both by governments and non-governmental bodies. While jurisdiction over transportation has certainly not been a central feature of any of these proposals, some of the proposed changes would affect transportation policy.

1. The Group of 22[99]

The Report of the Group of 22 recommends that the declaratory power of the federal government in section 92(10)(c) of the *Constitution Act, 1867* be abolished (recommendation 4). The Report also recommends that interprovincial and international transportation be federal and intra-provincial be provincial (recommendation 19). Since there is no elaboration of the intent underlying this recommendation, it is not clear whether it contemplates any change to the existing division of powers over transportation. In one sense, the recommendation might be regarded as an affirmation of the *status quo*, since subsections 92(10)(a) and (b) of the *Constitution Act, 1867* provide for federal responsibility for interprovincial undertakings and provincial responsibility for local undertakings. However, it is possible that it contemplates some reallocation of jurisdiction over aeronautics or navigation and shipping, which are now wholly subject to federal authority.

The Report also recommends that the residual power of the federal Parliament be deleted from the Constitution, leaving the question of the allocation of undetermined powers to the political process and the courts. The courts would allocate powers "based on the roles of the two orders of government as reflected in the distribution of powers" (recommendation 3). The effect of this proposal on constitutional jurisdiction over transportation is altogether unclear. Presumably the existing jurisdiction of the federal government over aeronautics, which flows from the federal residual power, would be maintained; it is unclear what would occur with respect to new modes of transportation.

2. The Allaire Report[100]

The Constitutional Committee of the Quebec Liberal Party proposes a comprehensive revision of the division of powers. The Committee proposes that transportation be an area of shared jurisdiction between the federal and provincial government, with Quebec having authority over what is termed "regional" transportation, while the federal Parliament would have authority over "inter-regional" transportation (p. 39). There is no indication whether the proposed provincial responsibility over "regional" transportation would involve transportation beyond the borders of the province of Quebec or whether it would be confined purely to intra-provincial transportation. The Allaire Committee also proposes to grant all residual powers to the provinces. There is no indication whether this would affect existing court decisions which have granted jurisdiction to the federal Parliament on the basis of the residual power.

3. Federal Government Proposals

The federal government's proposals for constitutional amendment, entitled *Shaping Canada's Future Together*, contain a number of recommendations with potential impact on transportation. The federal government proposes to abolish the declaratory power with respect to local works in section 92(10)(c) of the *Constitution Act, 1867* (proposal 23). It also proposes to limit the scope of the federal government's residual power (proposal 22). The federal residual power would not be abolished, however; the proposals contemplate that the federal government would retain authority over matters of "national concern," which was the basis for the Supreme Court's decision that aeronautics was a matter of exclusive federal authority. All that is proposed to be transferred to the provinces is authority for "non-national matters not specifically assigned to the federal government under the Constitution or by virtue of court decisions."[101] Finally, the federal government identifies a number of areas of jurisdiction which are "candidates for streamlining." The intent of this proposal is to eliminate duplication and overlap of services by the various levels of government. The list of items to be discussed with the provinces includes transportation of dangerous goods, ferry services and small craft harbours.[102]

4. Assessment

Both the federal government and the Group of 22 propose to abolish the federal declaratory power in section 92(10)(c) of the *Constitution Act,*

1867. However, there is no discussion in either document of the rationale underlying this recommendation. One can only assume that it is based on the assumption that a unilateral power of this type is inconsistent with the equality of the two levels of government. Some commentators, as well as provincial governments, have criticized the declaratory power on this basis, arguing that it grants the federal government the power to extend its own jurisdiction unilaterally and reduce the jurisdiction of the provinces.[103]

These criticisms must be balanced against a recognition of the important role which this power has played in the past. For example, shortly after World War II, the federal government used the declaratory power to establish federal jurisdiction over atomic energy.[104] The existence of the declaratory power was important in this context since it permitted swift and effective action on the part of the federal government — a necessary response because of the implications of atomic energy on national security. Speedy and effective national regulation was essential. It is arguable that the courts would have eventually recognized that atomic energy would fall under federal authority as a matter of "national concern."[105] But even so, there would have been a period of uncertainty during which the status of the federal legislation would have been unclear. The existence of the declaratory power provided a means of virtually eliminating this uncertainty and ensuring effective and timely federal intervention.

Some commentators have suggested that the declaratory power has fallen into disuse and that its abolition would have little practical effect.[106] In fact, while it has been used sparingly in recent years, it was relied on by the federal government as recently as 1987.[107] And it is impossible to predict the kinds of situations or problems which may emerge in the future. The existence of the declaratory power preserves flexibility in the constitutional framework, ensuring the ability of the federal government to respond effectively to changing circumstances.

Despite these considerations in favour of retaining the declaratory power, it would seem preferable to impose some kind of limitation on its use by the federal government. The existence of such a unilateral and unconstrained power is inconsistent with the fundamental equality of the two orders of government.

Furthermore, while the declaratory power has served an important and useful function in the past, it must be remembered that this was during a period in which the Privy Council had adopted a very narrow interpretation

to other sources of federal authority. The federal trade and commerce power, for example, was interpreted by the Privy Council as applying mainly to interprovincial and international trade. In recent years, the Supreme Court of Canada has adopted a much more flexible and expansive approach to the interpretation of the federal trade and commerce power. Thus the need for a unilateral federal power to declare works for the general advantage of Canada has diminished considerably.

It would seem appropriate to limit the use of the declaratory power in order to protect provincial interests. For example, it might be provided that the federal government could only invoke the power after obtaining the consent of the province in which a particular "work" is situated,[108] or that the federal government must obtain the consent of some number of provinces before issuing a declaration.[109] These changes would protect provincial interests while preserving some limited scope for the use of the declaratory power.

Both the Group of 22 and the Allaire Committee propose to eliminate the federal residual power from the Constitution. The federal government, on the other hand, proposes merely to limit the power. The total abolition of the residual power of the federal government might have significant implications in the field of transportation. As noted above, the courts have used the residual power to recognize exclusive federal authority over aeronautics. As new modes or methods of transportation emerge, the courts might well rely on the residual power as a basis for federal authority. To abolish the residual power altogether would appear to represent an unwarranted limitation on the powers of the federal Parliament.

The federal government proposals suggest that the provinces should be granted authority over "non-national matters not specifically assigned to the federal government." However, the federal government proposes to maintain its authority to deal with "national matters or emergencies."[110] This is important, since federal authority over aeronautics is based on the fact that this is a matter of national concern.[111] Thus it would appear that the federal proposals on the residual power do not contemplate any changes in the current jurisdiction over aeronautics. More importantly, the federal government could also acquire jurisdiction over modes or methods of transportation which might arise in the future. Jurisdiction over these would turn on the question of whether the transportation matter raised a question of "national concern."

In short, there does not appear to be any significant difficulty with the current federal proposals in relation to the residual power. The only real area of concern is whether it will be possible to find language that is sufficiently precise to distinguish between matters of "national" versus "non-national" importance. The current proposals require the addition of constitutional language to the opening words of section 91 of the *Constitution Act, 1867* to grant some additional scope for provincial authority. If the language is ambiguous or imprecise, then there could be unintended or unanticipated consequences in terms of the division of powers. Since the federal proposals do not set out the terms of a formal constitutional amendment, it is impossible to state in advance whether this concern is real or merely theoretical.

The other proposals outlined above do not appear to contemplate any significant realignment of responsibilities in transportation. In general terms, they assume the continuation of federal responsibility for interprovincial and international transportation, with the provinces maintaining control over local transportation. However, the federal proposals for streamlining government appear to contemplate some form of delegation of responsibility to the provinces in areas such as ferries and small craft harbours.

In an evaluation of such delegation, it should be noted that the Constitution already permits some degree of delegation of powers between governments. While the courts have held that direct delegations of powers between legislatures are invalid, they have permitted delegations made to third parties, such as administrative tribunals. Thus the federal Parliament has been able to delegate authority to regulate interprovincial motor vehicle undertakings to provincially-appointed regulatory tribunals through ordinary federal legislation — the *Motor Vehicle Transport Act, 1987.*

The immediate question is whether this existing delegation power might be employed to transfer regulatory authority over other transportation matters to provincial authorities. For example, could regulatory authority over interprovincial ferry services be transferred to a provincially appointed tribunal through an ordinary federal statute similar to the *Motor Vehicle Transport Act, 1987*? Alternatively, could jurisdiction over an interprovincial rail undertaking, such as a high-speed train operating in Ontario and Quebec, be transferred to the provinces?

The answer to these questions would depend on the precise nature of the delegation which was contemplated. The delegation in the *Motor Vehicle Transport Act, 1987* involved a transfer of authority to provincial boards which were already validly constituted under provincial legislation. It would appear that the federal government could make a similar delegation involving ferries, railways or any other mode of transportation. The only necessity would be that the provincial boards which were to exercise the delegated power be validly constituted under provincial law. The province or provinces would have first to create tribunal(s) with authority to regulate intra-provincial and local undertakings. These provincial boards could then receive delegated power from the federal government to regulate interprovincial undertakings operating into or within the province concerned.

There are obviously important limitations and drawbacks associated with a delegation of this type. Specifically, any delegation would have to involve several different provincial boards located in different provinces. These separate provincial boards would only be able to regulate the operations of an interprovincial transportation undertaking within the borders of a particular province. To give a concrete example of how this would work, suppose the federal government wanted to delegate authority to regulate a high-speed train running between Windsor and Quebec City to the provinces of Ontario and Quebec. The federal government would delegate authority over the Ontario operations of the undertaking to an Ontario board, while the Quebec operations would be subject to the authority of a Quebec board. The high-speed rail operation would then be subject to the authority of two separate regulators, one established by Ontario, the other by Quebec.

There would seem to be no way to avoid such divided jurisdiction, at least under the terms of the existing Constitution. It does not appear to be possible for the federal government to delegate authority over the complete operations of an interprovincial undertaking to a single provincially appointed board since no single province could validly create a board with such a mandate. An individual province is permitted only to create a tribunal with authority to regulate transportation undertakings operating within that province. For the same reason, no combination of provinces, acting in concert, can create a single board with authority to regulate the complete operations of an interprovincial transportation undertaking. Thus any attempt by the federal government to delegate regulatory powers over a complete interprovincial undertaking to a single provincially appointed

board would be unconstitutional. This would amount to an attempt by the federal government to enlarge the legislative powers of the provinces, a form of delegation which is not permitted under the current constitution.[112]

If this analysis is correct, any delegation of regulatory authority over interprovincial undertakings such as ferries or railways would inevitably create a situation of divided regulatory authority. The major drawbacks to any delegation of this type could only be avoided through an amendment of the Constitution to provide for direct delegations of legislative power between the two levels of government. Significantly, the current federal proposals contemplate an amendment precisely along these lines. The federal government proposes to insert provisions in the Constitution "to enable the delegation of legislative authority between the two levels of government with the mutual consent of the legislative bodies involved."[113] If such provisions were enacted, they would permit the federal government to delegate authority over the complete operations of an interprovincial undertaking to a single provincially appointed tribunal.

There is a long history of similar proposals to permit delegations of powers directly between governments. The Fulton-Favreau amendment proposal of 1964 would have inserted a power of interdelegation in the Constitution. More recently, the Macdonald Commission recommended a constitutional amendment to permit legislative as well as administrative delegation of powers.[114] A similar proposal was endorsed by the Beaudoin-Edwards Committee examining the constitutional amending formula.[115]

Proposals along these lines have certainly attracted some measure of criticism in the past.[116] On balance, however, a carefully framed interdelegation power would appear to represent a positive contribution to our existing constitutional framework.[117] Such a power would permit greater flexibility in the way in which governments respond to social problems. In transportation, for example, it would open the door to a greater range of regulatory responses involving both levels of government. In particular, it would allow the federal Parliament to allocate responsibility over transportation matters on a regional as opposed to a purely provincial basis. There might well be circumstances, such as a high-speed rail service in the Windsor-Quebec City corridor, where such a regional form of regulation is appropriate. A constitutional amendment permitting legislative delegation of powers between the two orders of government would make this form of regional, interprovincial responsibility for transportation matters a possibility.

Such delegation of powers might also make it possible to fashion more creative responses to the difficulties associated with divided jurisdiction over transportation matters. As noted in the previous section, actions and policies of one level of government often significantly affect the activities of other levels of government. Furthermore, competition within the transportation field occurs across transportation modes as well as within a particular mode. If governments could delegate jurisdiction directly, it might be possible to create new regulatory structures to respond to these challenges more effectively. For example, short air trips compete directly with trips by cars and trains. It might be desirable to grant a single level of government the authority to regulate all three modes of transportation for trips involving limited distances.[118] Permitting direct delegations of legislative powers would add greater flexibility in the responses that are available to government. It would ensure that government regulation can be more closely tailored to the realities of the transportation industry as it evolves.

IV. Conclusion

This paper has reviewed the current allocation of jurisdiction over transportation matters and assessed proposals for constitutional change. These arrangements have worked fairly well in the past because of the pragmatic interpretation of the division of powers by the courts. In contrast to their approach to many other areas of the Constitution, the courts have tended to employ a functional analysis in construing constitutional responsibilities over transportation matters. They have rejected the idea of dividing jurisdiction over a single undertaking between two levels of government. They have also held that where two transportation undertakings are functionally integrated or operated in common, they should be subject to a single regulatory authority. The practical effect of this approach has been to expand federal authority in this field. Since jurisdiction over particular undertakings is to be undivided, federal authority has been recognized over undertakings that are involved only minimally in interprovincial transportation. Similarly, federal authority has also been recognized in relation to local transportation undertakings which are functionally connected or integrated with interprovincial undertakings.

Because of this expansive reading of federal power, the Constitution has made it possible for a single level of government to play a leading role in transportation policy. The federal government has been able to facilitate

the creation of a truly national transportation network across the country. I conclude that there is no need for major constitutional changes in the existing jurisdiction over transportation matters in the Canadian Constitution. The only only significant change which I propose is an amendment to permit the direct delegation of legislative powers between governments. This proposal, advanced recently by the federal government, would provide for greater flexibility and more effective coordination of the respective roles of governments. It would permit governments to adjust their responsibilities on an incremental basis in response to changing trends and circumstances in the transportation industry. In this way, the Constitution would not block or impede the effort to adapt our transportation system to the needs of future generations of Canadians.

ENDNOTES

1. The focus of this study is on the provisions which grant legislative authority in the field of transportation. A companion study in this volume by Patrick J. Monahan, entitled "Transportation Obligations and the Canadian Constitution," examines a number of constitutional provisions which impose a particular obligation to provide transportation services. The constitutional obligations of the federal government will not be considered in any detail in the present study.

2. Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, 1991).

3. See, for example, *A Quebec Free to Choose, Report of the Constitutional Committee of the Quebec Liberal Party* (Montreal, January 1991); *Some Practical Suggestions for Canada*, Report of the Group of 22 (Montreal, 1991).

4. See, for example, C. McNairn, "Transportation, Communication and the Constitution," 47 *Canadian Bar Review* 355 (1969); C. McNairn, "Aeronautics and the Constitution," 49 *Canadian Bar Review* 411 (1971); C. Dalfen and L. Dunbar, "Transportation and Communications: The Constitution and the Canadian Economic Union," in *Case Studies in the Division of Powers*, ed. M. Krasnick, (Royal Commission on the Economic Union, Background Studies, Vol. 62, 1985), pp. 139–202.

5. For example, the extent to which the development of so-called "intermodal" forms of transportation might be constrained or limited by the Constitution is examined. Intermodal transportation involves the integration of different modes of transportation within a single network or system. The integrated system would connect modes either through a single reservation system or through common facilities, such as train stations, airports and bus terminals. See *Getting There: The Interim Report of the Royal Commission on National Passenger Transportation* (Ottawa: Supply and Services Canada, April 1991), p. 141. It is important to emphasize that this aspect of the study focusses on constraints which are implicit in the scheme of the Constitution itself, as opposed to government regulation or legislation. An examination of the efficacy or limitations of existing government policy in the transportation field is beyond the scope of the present study.

6. See *A Quebec Free to Choose*.

7. See *Some Practical Suggestions for Canada.*

8. See *Shaping Canada's Future Together: Proposals.*

9. The issue here is the extent to which regulatory authority can be transferred from one level of government to another without the need to resort to a formal constitutional amendment.

10. See Peter Hogg, "Transportation and Communication," in *Constitutional Law of Canada,* 2nd ed., (Toronto: Carswell, 1985), p. 484.

11. Section 92(10)(a), *Constitution Act, 1867,* U.K., 30, 31 Victoria, c. 3.

12. See the Third Schedule to the *Constitution Act, 1867,* which sets out the classes of provincial property which passed to the Dominion at the time of Confederation. The transfer of title to the Dominion was effective at the moment of each province's entry into Confederation; as transportation was in a stage of infancy at the relevant dates, Dominion proprietary rights acquired in this way have not proven to be significant factors in the regulation of transportation. See McNairn, "Transportation, Communication and the Constitution," p. 366.

13. It should be noted, however, that the trade and commerce power has been used to regulate the safety of new cars and components. The *Motor Vehicle Safety Act,* R.S.C. 1985, c. M-10 requires all motor vehicles imported into Canada to comply with federal safety and environmental regulations. In addition, vehicles manufactured in Canada must have a National Safety Mark indicating that they meet the relevant federal safety and environmental standards.

14. See the *Criminal Code* of Canada, R.S.C. 1985, c.C-46, sections 249–261.

15. *Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304, p. 315.

16. See *A.G. Ontario v. Winner* [1954] A.C. 541.

17. See *Toronto v. Bell Telephone* [1905] A.C. 52.

18. *A.G. B.C. v. A.G. Can. (Natural Products Marketing Reference)* [1937] A.C. 377.

19. It should be noted that in recent years, the Supreme Court of Canada has moved away from this bifurcated approach to the trade and commerce power, recognizing federal authority to regulate general trade and commerce. See *General Motors of Canada Ltd. v. City National Leasing* (1989), 58 D.L.R. (4th) 255 (S.C.C.).

20. Of course, while this constitutional capacity has been vested in the federal government, it has not necessarily chosen to exercise the jurisdiction to its limits. See, for example, the *Motor Vehicle Transport Act,* 1987, R.S.C. 1985, c. 29 (3rd Supp.) s.4 (delegating authority to regulate extra-provincial bus undertakings to the provinces).

21. *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications* [1989] 2 S.C.R. 225, p. 257 (per Dickson, C. J.).

22. *Re Tank Truck Transportation Ltd.* (1960), 25 D.L.R. (2d) 161, Ont. High Court.

23. This result was affirmed by the Court of Appeal without written reasons. See [1963] 1 O.R. 272 (C.A.).

24. *R. v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.* [1965] 1 O.R. 84.

25. *AGT v. CRTC* [1989] 2 S.C.R. 225.

26. All the members of the Court agreed on the issue of jurisdiction; Madame Justice Wilson dissented on the issue of whether AGT was entitled to assert a claim of Crown immunity.

27. Ibid., p. 259.

28. Ibid., p. 257.

29. Ibid., p. 258.

30. Ibid., p. 262.

31. See P. Hogg, "Comments," (1990) 35 *McGill L. J.*, p. 480.

32. *Re Cannet Freight Cartage* [1976] 1 F.C. 174 (C.A.) (approved by the Supreme Court of Canada in *UTU v. Central Western Railway* [1990] 3 S.C.R. 1112, 1145–47.)

33. See Hogg, "Comment," p. 487.

34. Federal authority over Bell Canada and B.C. Tel was based on provisions in their respective Special Acts declaring them to be works "for the general advantage of Canada"; telephone service in Yukon, NWT and Newfoundland is provided by subsidiaries of CN Railway, which is subject to federal authority by virtue of provisions in the *Canadian National Railways Act.*

35. For a summary and discussion of the regulatory situation prior to the *AGT* case, see Dalfen and Dunbar, pp. 156–160.

36. Because the Supreme Court also held that AGT was entitled to benefit from the doctrine of Crown immunity, the result of the case was that the telephone company was subject neither to federal nor to provincial authority. The other two prairie telephone companies in Saskatchewan and Manitoba were in a similar situation. However, the four Atlantic telephone companies are privately owned and can claim no Crown immunity; the effect of the Court's decision was to immediately bring the four Atlantic companies within federal authority. In October of 1989 the federal government introduced Bill C-41, an amendment to the *Railway Act* to make the Act binding on the three prairie telephone companies. However, this bill died on the order paper and has not been reintroduced (as of October 25, 1991). At the moment, therefore, there is no federal legislation which is applicable to the three prairie telephone companies.

37. See *Montreal v. Montreal Street Railway* [1912] A.C. 333.

38. *Luscar Collieries Limited v. McDonald* [1927] A.C. 925.

39. *Reference re Industrial Relations and Disputes Investigation Act* [1955] S.C.R. 529.

40. *Letter Carriers' Union of Canada v. Can. Union of Postal Workers* [1975] 1 S.C.R. 178.

41. *UTU v. Central Western Railway* [1990] 3 S.C.R. 1112; (1990) 76 D.L.R. (4th) 1.

42. Dickson C.J., spoke for eight members of the Court on the constitutional issue; Madame Justice Wilson was the sole dissenter.

43. *UTU v. CWR*, 76 D.L.R. (4th), pp. 15–16.

44. Ibid., pp. 19-21.

45. It was argued that there was an integrated network for the transportation of grain within Western Canada and that Central Western formed part of this network. However, Dickson C. J. concluded that "I do not agree that a Western Grain Transportation Network exists for the purposes of the jurisdictional designation of the Central Western. . . . [T]he fact that several entities involved in the transport of grain fall under federal jurisdiction cannot on its own serve to bring everything connected with that industry under federal jurisdiction." Ibid., p. 22.

46. See Hogg, "Transportation and Communication," p. 491.

47. See *Jorgensen v. A.G.Can.* [1971] S.C.R. 725.

48. Ibid.

49. See N. Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986), pp. 627–631.

50. See A. Lajoie, *Le pouvoir déclaratoire du Parlement* (Montreal: University of Montreal, 1969) pp. 70–72.

51. See *Cape Breton Development Corporation Act*, S.C. 1967, c.6, s.35(1); *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c.12, s.9.

52. See *Shaping Canada's Future Together: Proposals*, proposal no. 23.

53. See *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292.

54. Ibid., p. 308–09.

55. See *Jorgenson v. North Vancouver Magistrates* (1959) 28 W.W.R. 265 (B.C.C.A.).

56. See *Re Orangeville Airport Ltd.* (1976) 11 O.R. (2d) 546 (C.A.).

57. See *Re Walker and Minister of Housing for Ontario* (1983) 41 O.R. (2d) 9 (C.A.).

58. See *Field Aviation Company Limited v. Alberta Board of Industrial Relations* [1974] 6 W.W.R. 596 (Alta. A.D.).

59. See *Construction Montcalm Inc. v. The Minimum Wage Commission* [1979] 1 S.C.R. 754.

60. See *Re Colonial Coach Lines Ltd.* [1967] 2 O.R. 25 (Ontario H.C.); *Murray Hill Limousine Service v. Batson* [1965] B.R. 778 (Que. C.A.).

61. In addition to the three classes of subject noted in the text, the power over "trade and commerce" (section 91.2) and the power over "criminal law" (section 91.27) have been used to enact legislation that relates to transportation policy. See discussion *supra* at notes 13 and 14.

62. See *Attorney General of Canada v. Attorney General of Ontario, Quebec and Nova Scotia,* [1898] A.C. 700.

63. This, for example, was the view expressed by Dalfen and Dunbar in their study for the Macdonald Commission in 1985; see Dalfen and Dunbar, p. 150.

64. *Agence Maritime Inc. v. Canada Labour Relations Board,* [1969] S.C.R. 851.

65. *Singbeil v. Hansen* (1985) 19 D.L.R. (4th) 48 (B.C.C.A.).

66. *Whitbread v. Walley* (1990) 120 N.R. 109.

67. Ibid., p. 120.

68. Ibid., p. 123.

69. For example, labour relations matters in all aeronautics undertakings are subject to exclusive federal authority; in the field of navigation and shipping, federal authority has been limited to undertakings engaged in interprovincial and international activity.

70. See discussion *supra* at note 18 and accompanying text.

71. For example, the regulatory framework with respect to the road system or to private passenger automobiles is not included in this discussion. Neither of these areas has been the source of any significant litigation or court decisions.

72. For an extended discussion of the provincial role in this regard see IBI Group, "Intercity Passenger Transportation Policy Framework: Provincial Economic and Safety Legislation Review" a working paper prepared for the Royal Commission on National Passenger Transportation, October 1990, pp. 3–7.

73. Ibid., p.4. Overall provincial involvement in operating and subsidizing airports has been increasing in the past decade: in 1979, the provinces operated or subsidized about 124 land airports, whereas in 1989 this number had grown to 378. However, Transport Canada continues to operate the largest and busiest airports in Canada and its annual airport related expenditures are about 11 times higher than those of the provinces combined.

74. The province of Ontario has established norOntair to provide subsidized air services to 21 communities in Northern Ontario. In 1988, the operating subsidy for norOntair was $4.3 million.

75. Certain of these ferry services are a constitutional obligation of the federal government, including ferries in Prince Edward Island, Newfoundland and British Columbia. These obligations are contained in the respective Terms of Union admitting these provinces to Canada. Each of the obligations are thus part of the Constitution of Canada and take precedence over all federal and provincial legislation. Further, they may only be amended in accordance with the procedures set down in Part V of the *Constitution Act, 1982.* For a discussion of the precise nature and implications of these various obligations, see Monahan, "Transportation Obligations and the Canadian Constitution."

76. The federal government has, in recent years, sought to devolve responsibility for the provision of intra-provincial ferry services to the provinces. The usual arrangement has the province agreeing to assume responsibility for a service in exchange for payment of a fixed sum from the federal government. For a discussion, see IBI Group, "Intercity

Passenger Transportation Policy Framework: Federal Legislation Review," a working paper prepared for the Royal Commission on National Passenger Transportation, June 1990, pp. 14–16.

77. For example, British Columbia has established a Crown corporation (British Columbia Ferry Corporation) to provide ferry services in the province. Tolls and service schedules are established by the Corporation's board of directors and must be approved by the provincial Cabinet. The Corporation also receives a substantial subsidy from the provincial government.

    In Newfoundland, the province directly operates seven intra-provincial coastal ferry services, while an eighth service is subsidized. These services were taken over from the federal government in 1979. Service schedules and fares are developed by the Newfoundland Department of Transportation.

    The Quebec Ministry of Transportation operates or subsidizes about a dozen longer-distance ferry routes across the St. Lawrence River and along the North Shore of the Gulf of St. Lawrence.

    For further descriptions of these various provincially operated or subsidized services, see IBI Group, "Intercity Passenger Transportation Policy Framework: Provincial Economic and Safety Legislation Review," pp. 14–19.

78. The British Columbia Railway provides passenger service between North Vancouver and Prince George, B.C.

79. The Ontario Northland Railway offers passenger rail service in Northern Ontario, while GO Transit provides mainly commuter rail services, some of them on its own trackage, in the Greater Toronto Area. Ontario has also established the Ontario Northland Transportation Commission and granted it the authority to operate and regulate rail services in Northern Ontario. Decisions of the Commission are subject to amendment by the provincial Cabinet.

80. The Montreal Urban Community Transport Commission offers commuter rail services in the Montreal area.

81. This principle was established by the Supreme Court of Canada in *A.G. Nova Scotia v. A.G. Canada* [1951] S.C.R. 31.

82. *Coughlin v. Ontario Highway Transport Board* (1968), 68 D.L.R. (2d) 384.

83. For a discussion of these provincial variations, see IBI Group, "Intercity Passenger Transportation Policy Framework: Provincial Economic and Safety Legislation Review," pp. 20–33.

84. See section 16 of the MVTA, 1987 which provides as follows:

    > The Governor in Council may, by regulation, on the recommendation of the Minister made after consultation by the Minister with the government of each province affected thereby, exempt from the application of this Act or of any provision of this Act, either generally or for a limited period or in respect of a limited area, any person, the whole or any part of any extra-provincial bus undertaking or extra-provincial truck undertaking, every extra-provincial

bus undertaking or extra-provincial truck undertaking, any group or class of such undertakings or any extra-provincial bus transport or extra-provincial truck transport.

85. The Roadcruiser bus service, operated by CN in Newfoundland, was initiated in 1968 when CN shut down the passenger rail service in Newfoundland and substituted a bus service in its place. It was exempted from the MVTA in the mid-1970s following a dispute between CN and the Board of Commissioners of Public Utilities of Newfoundland.

86. This is the view expressed by Peter Hogg in his discussion of the *Coughlin* case. See Hogg, *Constitutional Law of Canada*, 2nd ed., p. 303.

87. This limitation will prove to be significant in our discussion later in this paper.

88. See *Getting There*, pp. 141–42.

89. Ibid., p. 40.

90. See, for example, the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c.3.

91. See *Getting There*, p. 44.

92. See the provisions of the *Motor Vehicle Transport Act, 1987* noted in the previous section, delegating authority over the bus industry to the provinces.

93. *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c.3. See section 3 for a definition of the application of the Act.

94. See the *Motor Vehicle Safety Act*, R.S.C. 1985, c.M-10.

95. See discussion in *Getting There*, pp. 103–05.

96. The possibility of establishing some sort of Canadian Terminals Agency is discussed in *Getting There*, p. 149.

97. For a discussion of these various factors, see *Getting There*, pp. 104–05.

98. Ibid., p. 226.

99. See *Some Practical Suggestions for Canada.*

100. *A Quebec Free To Choose.*

101. *Shaping Canada's Future Together*, p. 58.

102. Ibid., see pp. 58-59.

103. See Hogg, *Constitutional Law of Canada*, p. 493.

104. See *Atomic Energy Control Act*, S.C. 1946, c.37.

105. This was the reasoning of the Ontario High Court in *Pronto Uranium Mines Limited v. The Ontario Labour Relations Board*, [1956] O.R. 862.

106. Hogg (*Constitutional Law of Canada*, p. 493) suggests that the declaratory power has not been used since 1961.

107. See the *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c.12, s.9.

108. See, for example, the *Cape Breton Development Corporation Act*, S.C. 1967, c.6, which recites that the provincial government had consented to the legislation containing a federal declaration under section 92(10)(c) of the *Constitution Act, 1867*.

109. These suggestions have been made before and are reviewed and discussed in Hogg, *Constitutional Law of Canada*, p. 493.

110. See *Shaping Canada's Future Together*, Proposal 22.

111. This was the basis of the reasoning by the Supreme Court of Canada in the *Johannesson* case, *supra* note 53.

112. This is the basic proposition established by the *Nova Scotia Interdelegation Case*. For a discussion of the principles established by this case, and an analysis which leads to similar conclusions proposed in the text, see Hogg, *Constitutional Law of Canada*, pp. 307–08.

113. See *Shaping Canada's Future Together*, Proposal 25.

114. See The Macdonald Commission, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Vol. III, p. 257.

115. See Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada*, June 20, 1991, p. 29.

116. Critics of legislative interdelegation argue that it would promote uncertainty and would "confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions." See W. R. Lederman, "Some Forms and Limitations of Co-operative Federalism," 45 *Canadian Bar Review* 409 (1967), p. 426.

117. The interdelegation power would have to be framed so as to ensure that a delegation might be revoked upon the giving of proper notice. The delegation would also have to be framed in relatively precise terms and in accordance with certain principles or criteria agreed upon in advance by both levels of government.

118. This is suggested in *Getting There*, p. 227.

10

TRANSPORTATION OBLIGATIONS AND THE CANADIAN CONSTITUTION

Patrick J. Monahan*
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I. INTRODUCTION: TRANSPORTATION AND THE CANADIAN CONSTITUTION

> The problems and methods of transportation constitute an essential thread in the development of the country.[1]

Transportation policy has always occupied a critical and central place in Canadian nation-building. The close connection between transportation policy and national policy is nowhere more evident than in the terms of the Canadian Constitution itself. Canada is unique among the developed nations of the world for the number and detail of transportation obligations which have been entrenched in its formal constitution.

The *British North America Act, 1867* (now called the *Constitution Act, 1867*) recites the undertaking of the Canadian government to secure the construction of a railway linking the former colonies with each other; British Columbia entered the Union in 1871 in return for a constitutionally entrenched guarantee of a transcontinental railway; the *Prince Edward Island Terms of Union* require the Canadian government to maintain a ferry service linking the Island with the mainland; the Newfoundland Terms of Union (*Newfoundland Act*) provide a guarantee of ferry service between the new province and the

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Canadian mainland. These are merely illustrations of a considerable list of similar constitutional provisions guaranteeing particular transportation services or infrastructure.

Students of Canadian history have long remarked on the number and specificity of these constitutional obligations.[2] The most significant of these relate to undertakings to construct or to take over railways in various parts of the country.[3] It seems that the Canadian government fulfilled these obligations to the ultimate satisfaction of all concerned in the latter half of the 19th century; thus, while of considerable historical interest, such obligations have not been seen as playing a significant role in shaping modern transportation policy in Canada.[4]

More recently, however, interest in the status and meaning of these constitutional obligations has been revived because of the termination or reduction of passenger rail service in many parts of the country. Two provinces have argued that certain proposed reductions are unconstitutional on the basis that they violate constitutional guarantees given to these provinces when they joined Confederation. While Prince Edward Island's legal challenge failed,[5] the challenge in British Columbia succeeded in the trial division of the British Columbia Supreme Court, with the Court ordering the reinstatement of passenger service on a rail line on Vancouver Island.[6] This ruling has recently been upheld by the British Columbia Court of Appeal.[7] The success of this challenge has raised the issue of whether this and other transportation obligations in the Canadian Constitution might indeed have a role to play in the future evolution of Canadian transportation policy.

This paper presents a comprehensive analysis of the legal status, meaning and significance of transportation obligations in the Canadian Constitution.[8] It describes and analyzes the current legal status of the obligations to determine the extent to which they will influence, constrain or shape future transportation policy. While the focus of the paper is on the contemporary legal significance of the obligations, much of the analysis is historical because the current significance of the obligations can only be understood through a review of the purpose and meaning of the obligations when they were first enacted. The report details the circumstances surrounding the enactment of these various obligations as well as the then-prevailing understanding of their meaning and purpose. It also considers the manner in which the obligations have been carried out over the years and the extent

to which the original understanding of their meaning has been reflected in subsequent government policy or judicial decision. Finally, it assesses the current significance of the obligations and whether they should be considered by transportation policy makers concerned with meeting Canada's transportation needs into the next century.

The Canadian practice of specifying certain transportation obligations in its fundamental constitutional law has often been regarded as somewhat out of the ordinary. The larger question, however, is whether there is any reason in principle to object to the practice. The concluding section of this paper reflects on the wisdom of the Canadian approach to constitution making. Alternative methods are suggested which would stop short of formal constitutional entrenchment of an obligation to provide named transportation services.

II. The Confederation Era 1867–1873: Transportation Undertakings as the Instrument of Political Union

A. *BRITISH NORTH AMERICA ACT, 1867*

A variety of factors led to the union of the British North American provinces in the mid-1860s, including the fear of annexation by the United States as well as the termination of the reciprocity treaty by the Americans in 1865.[9] But the key factor in securing support for the scheme, at least among the Maritime colonial leadership, was the commitment to construct an intercolonial railway. As one commentator has put it: "[c]ertainly there could have been in 1867 no confederation without the Intercolonial: there might have been an Intercolonial without confederation."[10]

By the early 1860s, the idea of constructing an intercolonial railway linking the Maritime provinces with Canada had been under discussion for at least two decades. Negotiations to build a rail link had been pursued actively but the discussions had ultimately foundered when the Canadians were unwilling to accept certain conditions demanded by Great Britain. By 1862, negotiations reached a stalemate.

When delegates from the various colonies of British North America gathered at Charlottetown in 1864 to discuss political union, the representatives from

New Brunswick and Nova Scotia saw the meeting as an opportunity to pursue their goal of securing a rail link with the markets of Canada. The Maritime delegates insisted that the construction of an intercolonial railway was a non-negotiable condition of their support for political union with Canada.[11] Nor were the Maritimers willing to accept a mere political commitment from the Canadians that such a railway would be constructed following Confederation. Instead, they insisted that the guarantee should be written into the terms of the imperial statute creating the new federation. Invoking the authority of Westminster would provide an ironclad guarantee that the Canadians would keep their promise to build the railway.

At the time there did not appear to have been any great controversy or objection to this way of explicitly guaranteeing the construction of the Intercolonial. Subsequent commentators have suggested that it is somewhat out of the ordinary to make explicit reference to the construction of a railway in a country's constitution. It should be remembered, however, that what was being contemplated was the enactment of an ordinary British statute. It is perfectly commonplace for ordinary legislation to make reference to quite specific matters, including the carrying out of contractual obligations. Clearly, the colonial leaders of British North America in the 1860s approached the matter on this footing. They were seeking to ensure that the commitment to build the Intercolonial could not be reversed by a subsequent Canadian government. The easiest and most straightforward way to secure this commitment was to set it out explicitly in an imperial statute. The British authorities would act as the "guardians" of the commitment, since any change in the terms of the undertaking would require the consent of Westminster.

The draft resolutions agreed to at the Quebec Conference in the fall of 1864 committed the new Canadian government to building the Intercolonial. Resolution 68 from the Quebec Conference reads as follows:

> 68. The General Government shall secure without delay the completion of the Intercolonial Railway from Rivière-du-Loup through New Brunswick to Truro in Nova Scotia.[12]

The importance attached to the construction of the Intercolonial is evident in a comparison of resolution 68 with the terms of resolution 69 from the Quebec Conference. Resolution 69, in its reference to the construction of

a railway linking the western territory and the Pacific Ocean with the proposed federation, offered the following commitment:

> 69. The communications with the Northwestern Territory and the improvements required for the development of the trade of the Great West with the Seaboard, are regarded by this Conference as subjects of the highest importance to the Federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.[13]

The delegates clearly thought that cost considerations would govern the timing of the construction of the rail link with the west. The commitment to construct the western railway, while regarded as a subject of the "highest importance," was left to the discretion of the new government of the Dominion "at the earliest possible period that the state of Finances will permit." There was no such concern for cost with respect to the Intercolonial. The construction of that railway was expressed in mandatory terms: the general government "shall" secure the completion of the Intercolonial "without delay." The commitment was unqualified and unavoidable. The Canadian government was to secure construction of the railway without regard to considerations of cost or feasibility. The resolutions left no doubt that the construction of the Intercolonial was, from the point of view of the Maritimes, a "condition precedent" for political union.

The London resolutions in 1866 carried forward the explicit and unqualified commitment to construct the Intercolonial. Resolution 65 provided as follows:

> 65. The construction of the Intercolonial Railway being essential to the consolidation of the Union of British North America, and to the assent of the Maritime Provinces thereto, it is agreed that provision be made for its immediate construction by the General Government, and that the Imperial guarantee for three millions of pounds sterling pledged for this work be applied thereto, so soon as the necessary authority has been obtained from the Imperial Parliament.

The London version differed in certain important respects from the terms set out in the Quebec resolutions of 1864. First, the proposed railway was simply described as the "Intercolonial," without any reference to the starting or endpoint of the line; the reference to Rivière-du-Loup and to

Truro had been dropped. Second, while the London version referred to the fact that the construction of the Intercolonial was "essential to the consolidation" of the British Colonies, the language expressing the commitment was surprisingly vague. Whereas the Quebec resolution had indicated in mandatory terms that the General Government "shall secure, without delay, the completion of the Intercolonial Railway," the London version simply referred to the fact that "provision be made for its immediate construction by the General Government."

Finally, the London version stated that the Imperial Government would guarantee a loan of three million pounds sterling to enable the construction to proceed. The addition of this guarantee was of great practical value and represented the most significant modification from the earlier Quebec resolutions. Constitutional commitments are hardly worth the paper they are written on if they are not backed by the necessary funds. The financial guarantee from Great Britain would ensure that the constitutional commitment to build the Intercolonial would become a practical reality.

The wording of the London resolutions served as the basis for the drafting of the *British North America Act* (BNA Act) in January and February of 1867.[14] Section 145 of the *British North America Act, 1867*, as enacted by the British Parliament, set out the formal commitment to build the Intercolonial in the following terms:

> 145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

It can be seen that the first half of section 145 tracks precisely the terms of the comparable London resolution. It recites the agreement that the construction of the Intercolonial was essential to the union and that "provision

should be made for its immediate Construction." The second half of the section, however, is new, setting out a "Duty" of the Government and Parliament of Canada. Certain features of the duty should be emphasized:

1. Whereas previous versions had referred only to the obligation of government alone, section 145 established a duty of the Government and *Parliament* of Canada. This is significant, since the duty to build the railway was thereby entrenched as a limitation on the legislative authority of the Canadian Parliament itself.
2. The obligation had a specific time frame attached; the construction was to commence within six months and was to proceed "without Intermission and . . . With all practicable Speed." Significantly, however, there was no specific date set for completion of the railway.[15]
3. The Intercolonial is specifically identified as linking the "River St. Lawrence with the City of Halifax," similar to the wording of the original Quebec resolution in 1864.
4. Section 145 makes no reference to the financial guarantee of the imperial government. This was because the financial guarantee was secured by a second imperial statute passed contemporaneously, entitled *An Act for authorizing a Guarantee of Interest on a Loan to be raised by Canada towards the Construction of a Railway connecting Quebec and Halifax.* Under this bill, three million pounds were provided for the construction of the railway.[16]

While the Parliament and Government of Canada undertook to secure the construction of the railway, section 145 is silent as to:

- the route to be selected for the railway;
- the amount to be spent on its construction; and
- the manner in which the railway would be operated once it has been completed, including such matters as fares and the general level and quality of service on the road.

However, these matters were dealt with elsewhere in the Act. Sections 92(10)(a) and 91(29) of the BNA Act granted the federal Parliament exclusive legislative authority over interprovincial railways. Thus the Parliament of Canada,

as opposed to the legislatures of the provinces, was granted exclusive legislative authority over the Intercolonial Railway. While Parliament's legislative authority was fettered to the extent that it was obliged to construct the railway, upon completion Parliament would be free to regulate the actual operation of the railway in accordance with the policy of the government of the day.

The larger significance of section 145 was in the precedent it established. Having secured the consent of New Brunswick and Nova Scotia to Confederation with the promise of a railway, the Canadian authorities would soon find that similar promises would be demanded from other prospective provinces. The Canadians would also find that the price would rise with the passage of time; the undertakings which Canada was asked to take on would become more costly and the terms and conditions more difficult to fulfil. Still, having once agreed to such a request, the Canadians could find little reason to reject subsequent proposals. The only issue to be negotiated was the extent and nature of the transportation obligations to be shouldered by the new federal government.

B. WESTERN EXPANSION: THE *MANITOBA ACT, 1870* AND THE *BRITISH COLUMBIA TERMS OF UNION* (1871)

The *British North America Act, 1867* made specific provision for the eventual expansion of the country westward to the Pacific Ocean.[17] In 1870 and 1871, the new nation began to make good on this promise of an expanded union as the provinces of Manitoba and British Columbia entered Confederation. But the terms on which the two provinces joined Canada were quite different, at least in the transportation obligations which were constitutionally assumed by the Canadian government.

For Manitoba, there were no specific constitutional entitlements to transportation services or infrastructure included in the *Manitoba Act, 1870.* In fact, the Act stated that any provision setting out a particular obligation regarding another province or group of provinces had no application with respect to Manitoba.[18] This meant, for example, that the guarantee of a transcontinental railway made to British Columbia was made to that province alone and had no application to Manitoba. The explanation for this variation in approaches is straightforward. Manitoba, unlike British Columbia, did not have to be persuaded to join Confederation. The huge land mass to

the west of Ontario known as Rupert's Land and the North-Western Territory was annexed to Canada by imperial Order in Council in 1870.[19] Immediately following the admission of the territories, the federal Parliament by statute created the province of Manitoba out of part of Rupert's Land. Since the land in question was already included within the Dominion, there was no need to use transportation promises to induce the new province to join Confederation.

Such was not the case with British Columbia. In 1867, the colony of British Columbia had watched the creation of the Canadian federation with great interest, even to the extent of passing a resolution in favour of admission to the Dominion. Following the annexation of Rupert's Land in 1870, delegates were sent from British Columbia to Ottawa to discuss the terms of B.C.'s entry to the federation.

British Columbia's interest in union with Canada did not prevent the western delegates from seeking advantageous terms for joining. Before leaving Victoria, the Legislative Council had debated and approved a series of specific proposed terms for admission to Canada, including specific undertakings for transportation services or infrastructure which were to be guaranteed by the Dominion. As in the case of the Intercolonial Railway, these were to be explicitly set out in the Terms of Union and thus permanently bind the Government of Canada. The most significant of these proposed guarantees was for a transportation link between British Columbia and the rest of the Dominion. British Columbia sought two commitments from Canada in this regard:

1. Construction of a coach road between B.C. and Fort Garry, to be completed within three years;
2. The immediate commencement of surveys for a transcontinental railway, with Canada committed to completion of the railway "at the earliest practicable date"; construction of the B.C. portion of the railway was to commence within three years.[20]

Note that, while the Dominion was asked to actually construct the coach road and to open it for traffic within three years, no firm time frame was even requested with respect to the construction of a railway. The B.C. proposal simply asked that the railway be constructed "at the earliest practicable date"; what was "practicable" would no doubt be influenced

by considerations of cost and feasibility. At the time, no surveys had been made of the route through the mountains of British Columbia. Thus the overall cost of the undertaking was unknown and probably unknowable in advance.[21] In short, the opening proposal from the British Columbians clearly contemplated that it might be quite some time before the trans-continental railway was actually completed.

What is somewhat surprising is that the final terms agreed upon went beyond the colony's request. Term 11 of the B.C. Terms of Union provided as follows:

> 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.
>
> And the Government of British Columbia agrees to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the north-west territories and the Province of Manitoba. Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further, that until commencement, within two years, as aforesaid, from the date of union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway,

> the Dominion Government agree to pay to British Columbia from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

The final version of the Terms of Union made no reference to British Columbia's original request for construction of a coach road linking the colony with Canada. However, the Government of the Dominion had assumed a much more onerous obligation regarding the construction of a transcontinental railway. The nature of the obligation can be discerned by comparing the main features of Term 11 with the original British Columbian request:

1. Term 11 stated that construction on the railway linking B.C. with the rail system of Canada had to begin *within two years* of the date of union and that construction had to start simultaneously in British Columbia and in Canada; under the original B.C. proposal, the only requirement was that construction of the initial sections of the railway *in B.C.* was to begin *within three years*;
2. Term 11 stated that the railway had to be completed *within 10 years* of the union; the original B.C. proposal merely required the construction to be completed at "the earliest practicable date."

It is unclear why the Canadians were prepared to accept such an onerous obligation, particularly the requirement that the railway be completed within 10 years. Early drafts of section 145 of the BNA Act had contemplated the establishment of a fixed completion date for the Intercolonial, but the Canadians resisted the idea that the BNA Act should specify a date for completion. In the B.C. case, the Canadians were prepared not only to fix a completion date for the railway but were prepared to do so for a project immeasurably more difficult than the Intercolonial.[22]

The main explanation for this new approach appears to relate to the Canadian government's desire to bind its successors to its own railway policy.[23] Certainly the inclusion of the fixed completion date for the project aroused considerable opposition when it was debated in the Canadian Parliament. The leader of the Liberal opposition, Alexander Mackenzie, moved an amendment to the Terms of Union to the effect that Canada should be

pledged only to make surveys and to build the railway as finances might allow. But Mackenzie's amendment was defeated, and the unqualified obligation to complete the railway within 10 years was approved.

It should be noted that the formal constitutional obligation of Canada was limited to the actual construction of the railway; there is no mention of operation of the railway. Once the construction was completed, Canada would have fulfilled its obligation under Term 11. The absence of any requirement to "maintain" the railway after its completion was not accidental. In formulating its original request, the B.C. Legislative Council had instructed its negotiators to seek a commitment that Canada would construct "and maintain" a coach road linking the colony with Canada.[24] Similarly, B.C. had requested that an "efficient Coast Mail Service . . . be established and maintained. . . ."[25] Thus the omission of reference to any requirement to "maintain" the railway suggests that the obligation was simply to construct the railway and not to operate or maintain it afterward.

There were other transportation obligations assumed by the federal government under the B.C. Terms of Union. Under Term 4, the Dominion undertook to "provide an efficient mail service, fortnightly, by steam communication between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers." This obligation was in response to what had originally been two separate requests from the B.C. delegation: (a) that the Dominion government "supply an efficient and regular fortnightly steam communication between Victoria and San Francisco" and (b) that the Dominion government "establish and maintain" efficient coast mail service between Victoria, New Westminster, Nanaimo "and such other places as may require such services."[26] Steam communication between Victoria and San Francisco was requested because San Francisco was the western terminus for the American transcontinental railway, at the time, and the main means of communication between British Columbia and Canada. Ferry service to San Francisco then, was an important transportation link with the other Canadian provinces. At the same time, it was recognized that the San Francisco ferry service would become unnecessary once the Canadian transcontinental railway was completed.

During the debate over the Terms of Union in the B.C. Legislative Council, it was argued that the reference to a ferry service to San Francisco was a

mere "makeweight," and not an essential condition of the colony's entry into Confederation.[27] In the end, the British Columbian proposals requested that a ferry service to San Francisco be "supplied"; the comparable B.C. proposal dealing with the coastal mail service stated that such service was to be "established and maintained." The absence of any requirement to "maintain" the San Francisco service might be taken to suggest that the obligation would not necessarily continue indefinitely.[28]

Term 4 of the B.C. Terms of Union combines these two requests. Under Term 4, the Dominion is required to "provide" an efficient mail service linking Victoria with both San Francisco and Olympia on the mainland. The absence of the explicit requirement to "maintain" the service may indicate some ambiguity as to the duration of the commitment. There is no indication as to the precise meaning which the drafters associated with the requirement to "supply" mail service. Unlike Term 11 and the transcontinental railway however, Term 4 of the B.C. Terms of Union suggests that the obligation to supply ferry services in British Columbia was an obligation that would continue over time. Nor is there any indication that the obligation to "supply" the service would terminate at some fixed point in time. It seems that the Dominion requirement to "supply" the named ferry service was expected to continue indefinitely, until such time as the Terms of Union themselves were amended.[29]

C. THE *PRINCE EDWARD ISLAND TERMS OF UNION* (1873)

While Prince Edward Island delegates had participated in both the Charlottetown and Quebec conferences in 1864, the Islanders were opposed to the proposed terms of Confederation as reflected in the Quebec resolutions. One of the main complaints was that the Quebec resolutions required construction of the Intercolonial; the P.E.I. delegates regarded the Intercolonial as imposing a heavy tax burden on Island residents without any corresponding benefit.[30] Following the Quebec Conference, the Prince Edward Island colonial Legislature passed resolutions rejecting the proposed terms of Confederation.

Following Confederation, negotiations to secure the Island's admission to Canada continued. In December of 1869, the Canadian government made a formal offer of new terms that were a significant improvement over what had been offered to P.E.I. under the Quebec resolutions. One of the terms in

the Canadian offer was for provision of a ferry service linking the Island with the mainland. The Canadian offer stated that "Efficient Steam Service for the conveyance of mails and passengers was to be established and maintained between the Island and the Mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the International Railway and the Railway system of the Dominion."[31] Although the 1869 offer had been framed in accordance with the advice of R.P. Haythorne, the Premier of the Island, it was still regarded as inadequate by the Island government.

One of the main objections was that the new terms made no provision for construction of a railway on the Island. At a series of public meetings held in Prince Edward Island in early 1870, it was argued that the terms would be acceptable only if they were supplemented by a sum sufficient for the construction of a railway. It was suggested that since P.E.I. would have to bear a portion of the expense of building Canadian railways, it was appropriate for the other provinces to contribute towards the construction of a railway on the Island.[32] In April of 1870, the P.E.I. Legislative Council unanimously rejected the proposed Canadian terms.

In 1871, the Island decided to undertake construction of a railway on its own, without assistance from Canada. Legislation was passed providing for the construction of a railway the length of the Island, with the contractors to be paid through the issuance of debentures. The P.E.I. government estimated that the annual interest on the required capital would amount to 30,000 pounds, money that could be raised through a combination of modest tax increases and revenues raised from the operation of the road.[33] The actual costs, however, wildly exceeded these estimates. By 1873, total expenditures on the Island railway had exceeded $3.2 million and the annual interest on the debt was nearly $200,000. To place this debt load in perspective, the entire Island revenue from all sources for 1873 was a mere $395,000.[34] The Island was simply unable to meet the financial obligations associated with the railway and looked to Confederation with Canada as a means of escaping bankruptcy.

Negotiations with the Canadian and imperial authorities began in early 1873. While the Canadians realized that the Island's financial crisis had prompted the negotiations, they agreed to relatively generous terms to secure the admission of P.E.I. to Confederation. The final Terms of Union were drafted

and mutually signed on May 15, 1873. The Dominion was to take over the railway that had threatened to cause the financial collapse of the Island government.[35] While the cost of the railway was to be charged against the Island as a local debt, the Dominion agreed to a "debt allowance" of $50 per capita, twice the amount which had been agreed to in the case of the other provinces. P.E.I. was to receive an interest payment from Canada on the difference between its "debt allowance" and its actual debts upon admission.[36] Furthermore, since Canada had taken over the Island railway, all further costs associated with the railway would be the responsibility of the Dominion government rather than the Island.

It was further agreed that the Dominion government would "establish and maintain" a ferry service linking the Island with the mainland.[37] The use of the word "maintain" is significant; this was the first occasion that the Canadian government accepted the responsibility to ensure the continued operation of a transportation service. The undertaking was apparently open-ended, and there is specific reference to the fact that the ferry service must place the Island in "continuous communication" with the mainland. However, the use of the word "maintain" in connection with the ferry service coupled with its absence in the case of the Island railway is significant. It indicates that the obligation to "take over" the railway does not entail any obligation to "maintain" or actually operate the system.[38]

One final transportation obligation of a relatively minor nature was included in the P.E.I. Terms of Union. The Dominion government assumed the cost, approximately $2,500 per year,[39] of maintaining telegraph communication between the Island and the mainland.[40] As with the ferry service, the obligation to "maintain" the telegraph entailed an ongoing obligation until such time as the Terms of Union themselves were modified.[41]

III. Making Good on the Obligations, 1873–1945: Transportation Undertakings as an Instrument of National Policy

Transportation undertakings played a key role in securing political support for Confederation among the colonial leadership in British North America. The distinctive feature of these undertakings was their explicit guarantee by imperial statute. Successive Canadian governments would be bound, as a

matter of law, to carry out the undertakings agreed to at the time of Confederation. The "guarantee" by Great Britain insulated them from the vagaries of Canadian party politics and from the unpredictable hazards of electoral contests. This was their overwhelming attraction to reluctant or doubtful political leaders in the various colonies.

It was one thing to assume certain obligations and have these obligations set out in imperial legislation. It was quite another matter actually to carry them out. The Intercolonial or the transcontinental railway may have existed on paper but passengers or freight could not be moved by means of constitutional language alone, no matter how majestic or unambiguous the wording. Moreover, the transportation undertakings which the Canadian government had assumed in the 1867–1873 period were extremely onerous, given the significant debt load which the new federation had inherited from the former colonies. There was no reason to assume that the government of the new Dominion would be capable of meeting all such obligations.

A. THE INTERCOLONIAL RAILWAY

In late 1867, the Parliament of Canada passed *An Act respecting the construction of the Intercolonial Railway.*[42] This Act authorized the construction of the Intercolonial from Rivière-du-Loup to Halifax and placed the project under the authority of a board of four commissioners appointed by the Government (section 3). The Act also provided for a loan of four million pounds to finance construction, of which three million was guaranteed by the imperial government (sections 27, 32). The Chief Engineer, Sir Sandford Fleming, estimated the total cost of the project to be approximately $20 million.

The legislation did not specify the route which the Intercolonial should follow. This was a matter of considerable controversy, particularly with respect to the location of the line through New Brunswick. Some argued that the line should run close to the American border in order to take advantage of railways which had already been constructed; others argued for a northern route which would be safer from a military point of view; still others suggested a central line through the province.

In the end, political and military considerations won out and the northern route was followed, a decision that proved to be a source of resentment and grievance for Maritimers for many years. Maritime political leaders charged

that the northern route added to the cost of construction while increasing the distance and the costs of transportation between Halifax and the markets of Central Canada. The decision in favour of the northern route, as well as the subsequent government management of the railway, contributed significantly to the sense of Maritimers' regional grievances over their status within the federation.[43]

The railway was completed in 1876. The final cost of construction came to $34 million, some $14 million more than estimated, with the difference being financed entirely by the Government of Canada.[44] Control of the railway had been removed from the four commissioners and placed directly under the authority of the federal Minister of Public Works in 1874.[45] The Government of Canada found itself in the business of running a railroad.

From the day it opened, the Intercolonial was a losing proposition. In part, this was a product of the artificially low rates which were charged on the line. On average, freight rates on the Intercolonial were discounted approximately 20 percent from comparable rates in Central Canada. The Maritimes insisted that these discounted freight rates were appropriate, because of the selection of the longer northern route through New Brunswick. In 1927, this preferential rate structure for the Maritimes was given a statutory basis in the *Maritime Freight Rates Act, 1927* (S.C. 1927, c.44) whose purpose was described as to give "certain statutory advantages" in rates to persons and industries in "select territory" (section 7).

It must be emphasized that the decision to grant preferential rates was a matter of government policy rather than constitutional entitlement; nothing in section 145 of the BNA Act constrained the Government of Canada in its determination of rates on the Intercolonial. The lack of connection between section 145 and the rate structure is illustrated by the repeal of section 145 by the United Kingdom Parliament in 1893. Despite this repeal, the Maritimes insisted on continuation of the policy of discounted rates and the successive Canadian governments carried on with this preferential policy.

The Intercolonial never became profitable. In 1923, along with other government-owned railways (the P.E.I. Railway, the Grand Trunk and Grand Trunk Pacific and Canadian Northern), it was amalgamated into the Canadian National railway system.[46] Since then, what had been the Intercolonial has continued to be operated as a public enterprise by either CN or VIA Rail.

B. BUILDING THE CANADIAN PACIFIC RAILWAY

In 1871, the Canadian government decided that the railway to the Pacific would be built by a private corporation rather than by the government itself (see S.C. 1871, c.71). The government would provide assistance to the contractors through grants of land and subsidies, up to a limit of 50 million acres and $30 million. But the negotiations between the government and potential contractors soon became mired in scandals and charges of corruption, eventually bringing down the Macdonald Government in 1873.[47]

The subsequent Mackenzie administration had an entirely different attitude towards the construction of the Pacific railway, believing that the line could be built only as financial resources permitted. Prime Minister Mackenzie took the view that the promise of completion within 10 years was physically impossible to fulfil and should never have been given in the first place. Negotiations began between British Columbia and Ottawa in an effort to find some compromise acceptable to all parties.

The federal government sought an extension of the time for completion, and in return offered to construct a railway on Vancouver Island between Esquimalt and Nanaimo. The British Columbia government was unhappy with this proposal, maintaining that the construction of the Esquimalt-Nanaimo line was part of the original obligation under Term 11.[48] The negotiations dragged on for years with the Colonial Secretary, Lord Carnarvon, acting as an arbitrator and trying to help the parties identify a mutually acceptable compromise.[49]

The two governments finally reached agreement in 1883, two years *after* the original deadline for construction of the CPR. By this time, the main line of the railway was nearing completion. The Settlement Agreement of 1883 stated that it represented a settlement of all claims by the province in respect of "delays in the commencement and construction of the Canadian Pacific Railway and in respect of the non-construction of the Esquimalt and Nanaimo Railway." As for the island railway line,[50] British Columbia was to transfer a large portion of land on Vancouver Island to Canada which in turn agreed to grant this land to a private company for the construction of the line. The land would be exempt from taxation by the province as long as it was used for railway purposes. The federal government agreed to provide

a subsidy of $750,000 for the construction of the Island railway. Under the terms of the Agreement, construction was to "commence forthwith" and was to be completed by June of 1887.[51]

The Agreement was ratified by legislation passed by the B.C. Legislature and by the Parliament of Canada,[52] and the federal government contracted with a private company to construct the line. The terms of this second agreement were attached as a "schedule" to the federal legislation implementing the Settlement Agreement with British Columbia. Under this agreement, the contractors (known as the Dunsmuir Syndicate) were obliged to "construct, complete, equip, maintain and work continuously" the line of railway between Esquimalt and Nanaimo (section 3 of the Agreement). The contractors also agreed to maintain the railway "in good and efficient working and running order" (section 9) and to equip the railway in accordance with specifications set down by the federal government (section 10). The construction proceeded largely according to schedule, and in 1886 the 70-mile stretch of railway between Esquimalt and Nanaimo was completed and opened for traffic.

While the governments were reaching a settlement of these issues, the construction of the CPR main line was nearing completion. Under the terms of a contract signed in 1881, the federal government granted the Canadian Pacific Railway Company a subsidy of $25 million and a land grant of 25 million acres to complete the railway by May of 1891. The company was also granted a permanent exemption from taxation by all levels of government.[53] In return, the company agreed to construct the line and to "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway."[54] The terms of the contract with the CPR were approved and ratified by federal legislation.[55] In November of 1885, Donald Smith hammered in the last spike of the Canadian Pacific Railway and the project of a transcontinental railway was finally completed.

All the various agreements, contracts and statutes entered into regarding the completion of the Canadian Pacific Railway were incorporated into federal or provincial legislation and, accordingly, were legally binding. However, these statutes have been a source of considerable litigation over the years, primarily in relation to attempts by provinces to modify or cut down the tax exemptions which they contemplated.[56] But the important point, from a constitutional standpoint, is that none of these agreements or

statutes altered section 11 of the B.C. Terms of Union. Thus, while they may have been legally enforceable, they were not constitutionally entrenched. They could be amended or modified by Parliament or by a province, subject to the paramountcy of federal laws over provincial laws.[57]

For example, in 1950 the Privy Council decided that the British Columbia legislation granting a tax exemption for railway lands on Vancouver Island could be amended or repealed by the provincial legislature.[58] Similarly, the federal legislation establishing the Canadian Pacific Railway was ordinary federal law which could be amended or repealed as the Parliament of Canada saw fit.[59] In this sense, the agreements did not themselves constitute a constitutional limitation on the jurisdiction of Parliament. The only constitutionally mandated obligation remained that specified in Term 11 of the B.C. Terms of Union: to secure the construction of the CPR.

While fulfilment of Term 11 proved a source of great controversy and dispute, there were no significant problems in satisfying the other transportation obligations in the B.C. Terms of Union. To fulfil its obligation to provide efficient mail service between Victoria and both San Francisco and Olympia, the federal government contracted with private carriers and paid any necessary subsidies. There is no record of any complaint from the province regarding the quality or level of the service. In 1925, the two governments agreed that further subsidy of the Victoria to San Francisco service was unnecessary. The federal subsidy of $3,000 which had been paid towards this service was used by the province to improve mail service within British Columbia rather than for the San Francisco service.[60]

While the province had agreed that the federal government should be "relieved of its obligation to maintain a subsidized steamship service between Victoria and San Francisco,"[61] no change was made in the Terms of Union themselves. Accordingly, Term 4 of the Terms of Union continues to refer to the obligation to provide mail service on the Victoria–San Francisco route, even though this service was discontinued in 1925.

C. THE PRINCE EDWARD ISLAND FERRY

In the years following Confederation, the operation of the ferry service connecting P.E.I. with the Canadian mainland proved to be a source of considerable dispute. The federal government was obliged to provide this

ferry service under the Terms of Union with the province. The federal government attempted to fulfil this obligation by contracting with private companies to provide a subsidized service during the summer months. There appears to have been considerable dissatisfaction with the winter service which was provided by the government itself, using ferries operated by the Department of Marine and Fisheries.

In April of 1901, the province presented a memorial to the federal government alleging a failure by the Government of Canada to fulfil its obligation to provide a "continuous communication" between the Island and the mainland. The memorial claimed that the federal government's "solemn undertaking was systematically and continuously broken from the year 1873 to 1888 when for the first time in that latter year an adequate vessel was constructed and placed in service during the winter season."[62] The province claimed damages in the amount of $5 million for the alleged breach of the Terms of Union and asked that the claim be referred to a board of arbitrators. The federal government referred the claim to a committee which found that the federal government had failed to satisfy its obligations during the winter months of 1873 to 1887. The committee recommended that the province be paid an allowance of $30,000 annually as compensation. The government accepted the recommendation and passed legislation authorizing the payments, stating that they would "be paid and accepted in full settlement of all claims of the said province against the Dominion of Canada on account of the alleged non-fulfilment of the terms of Union."[63]

Following the 1901 settlement, there were further provincial complaints regarding the ferry service. In 1912, the Province presented another memorial seeking an increase in the annual subsidy set out in the 1901 legislation. The provincial claims were again referred to a committee for consideration. Following a series of negotiations, Parliament passed legislation authorizing an increase of $20,000.[64] The federal government has continued to pay these subsidies annually in accordance with the terms of the legislation.

Following these two settlements, provincial complaints regarding the operation of the ferry service appear to have diminished. The federal government contracted with Northumberland Ferries Limited to operate a ferry service between P.E.I. and Nova Scotia and, beginning in 1923, employed CN Railway to operate the service between P.E.I. and New Brunswick. Until

the nation-wide strike by CN Rail in 1973, which resulted in a work stoppage of 10 days and a shutdown of the ferry service to New Brunswick, the federal government appears to have satisfied its obligations under the Terms of Union.

D. SUMMARY: POLITICAL OVER LEGAL ENFORCEMENT

The various transportation obligations reviewed here were all established by imperial statute or Order in Council. As such, they were legally binding obligations that could not be unilaterally altered by the federal government. While the obligations were binding, the striking feature of these provisions is that there was no legal mechanism for enforcing them. The only machinery contemplated by the *British North America Act* for settling disputes between Canada and the provinces in 1867 was section 142, relating to disputes over the division of debts and assets — a mechanism that did not apply to transportation obligations. In the absence of legal machinery for settling disputes, the parties would have to rely on negotiation, political pressure or the intervention of third parties to ensure that the obligations were carried out.

The early history of these obligations confirms that this was in fact the prevailing understanding of how they were to be enforced. In each instance when a dispute arose, the parties commenced political negotiations designed to reach a compromise acceptable to both sides. There was no attempt to invoke judicial involvement in the settlement of the dispute. Thus the dispute between British Columbia and Canada over the construction of the CPR was resolved through direct political negotiations as well as through the intervention of the imperial authorities. Similarly, when the Prince Edward Island government became unhappy with the manner in which the Island ferry service was being operated, it presented a brief to the federal government rather than to the courts.

A second observation is that, because the enforcement mechanism was political rather than legal, the political authorities of the time resolved their disputes without regard to the precise legal limits of the particular obligation. Under the B.C. Terms of Union, for example, the federal government was obliged to construct a railway to the "Seaboard" of British Columbia; it later agreed to finance construction of a railway line on Vancouver Island, even though such a line was not expressly required.

Similarly, the only constitutional obligation of the British Columbia government under Term 11 was to transfer land that was directly along the main line of railway in the province; it later agreed to transfer an additional block of some 3.5 million acres in the interior of the province when the land originally to be transferred proved to be of lower value than expected.

The same pattern is repeated in the case of the Intercolonial Railway and the P.E.I. Terms of Union. In the case of the Intercolonial, the constitutional obligation of the Canadian government was limited to the actual construction of the railway. Subsequently, however, the government adopted a policy of discounting freight rates on the line, even though there was no constitutional obligation to do so. In P.E.I.'s case, the federal government agreed to provide an annual subsidy of $50,000 in perpetuity following provincial complaints over the quality of the ferry service.

In each case, there was no attempt to insist on the strict letter of the law; the overriding concern was to ensure that political compromises acceptable to all parties were achieved. Such reliance upon political mechanisms as an instrument of enforcing constitutional obligations was regarded at the time as entirely appropriate and straightforward. The political leaders of the 19th century would no doubt have been surprised by the modern tendency to rely on legal mechanisms to insist on strict adherence to constitutional commitments.

IV. Completing Confederation 1949: Transportation Undertakings in the Newfoundland Terms of Union

The Newfoundland Terms of Union contain the most detailed set of constitutional obligations of any province in Canada. This is hardly surprising since the drafters of the terms had before them the precedents established by the Terms of Union with the other provinces as well as the interpretation of those terms.

The colony of Newfoundland at the time of Confederation in 1949 was particularly concerned about the status of the Newfoundland Railway which it had started to build in the late 19th century. The cost of its construction imposed a crippling financial burden on the island economy,

and the operation of the railway generated large financial losses.[65] Although the railway was taken over by the Newfoundland government in 1923, it remained unprofitable.[66] In the negotiations over the Terms of Union, the Newfoundlanders proposed that the federal government be responsible for any and all financial losses associated with the operation of the railway. The Canadian authorities' agreement is reflected in Term 31 of the Terms of Union:

> 31. At the date of Union, or as soon thereafter as practicable, Canada will take over the following services and will as from the date of Union relieve the Province of Newfoundland of the public costs incurred in respect of each service taken over, namely,
>
> (a) the Newfoundland Railway, including steamship and other marine services;

During the negotiations, the Newfoundland authorities expressed some concern that the Terms of Union did not require the federal government to continue operating the Newfoundland Railway. The only obligation stated in Term 31 was to "take over" the railway and to pay for any losses which might arise from its operation. This suggests that the federal government would be in compliance with Term 31 as long as it ensured that the province did not have to assume any of the losses of the Newfoundland Railway. But the federal government apparently reserved the right to determine the level of service on the railway or, indeed, to shut it down entirely.

During the negotiations leading to Newfoundland's entry into Confederation, the Newfoundland authorities sought clarification of what was entailed by Canada "taking over" the Newfoundland Railway. Prime Minister St. Laurent replied:

> During the course of our negotiations covering the final terms and arrangements for the union of Newfoundland with Canada a number of questions concerning Government policy were raised by your delegation and answered by the Canadian Government. In addition a number of temporary administrative arrangements were settled in order to facilitate the union.
>
> It would not seem fitting to include in formal terms of union matters of this kind, since they are scarcely of a constitutional nature. I am therefore sending you the enclosed memorandum covering these

various items. While these will not form part of the Terms of Union, they contain statements of the policy and intentions of this Government if union is made effective by the approval of the Parliament of Canada and the Government of Newfoundland and confirmed by the Parliament of the United Kingdom.

Yours sincerely
Louis S. St. Laurent
[enclosure]

STATEMENTS ON QUESTIONS RAISED BY THE NEWFOUNDLAND DELEGATION

(xiv) NEWFOUNDLAND RAILWAY

After the date of Union, the Canadian National Railways will be entrusted with the responsibility of operating the Newfoundland Railway and Coastal Steamship Services, and it will be their responsibility to see that the services are furnished commensurate with the traffic offering.[67]

The Sullivan Commission, in its report to the Newfoundland House of Assembly in 1978, argued that the letter from Prime Minister St. Laurent had the effect of modifying the Terms of Union. The Commission took the position that the letter obligated the federal government to maintain the Newfoundland Railway, regardless of cost, as long as there was reasonable demand for its services.[68]

This interpretation of the effect of the letter seems rather doubtful. In the first place, while the courts will no doubt consider material such as parliamentary debates, government reports and other documents,[69] they tend to accord such material minimal weight in assigning meaning to the Constitution.[70] Secondly, St. Laurent's letter specifically distinguished between "government policy" and matters of a "constitutional nature." St. Laurent indicated that the policy and intentions of the government regarding the Newfoundland Railway "are scarcely of a constitutional nature . . . [and] will not form part of the Terms of Union." Thus St. Laurent himself suggested that the undertaking to operate the railway was a political rather than a constitutional commitment and that a conscious decision

was made *not* to include this duty in the Terms of Union. Thirdly, St. Laurent indicated that the policy of the government was to entrust the operation of the Newfoundland Railway to CN Rail and that "it will be *their* responsibility" [our emphasis] to see that the services were operated in accordance with the traffic offering. In effect, St. Laurent did not commit the government to ensure the continued or perpetual operation of the railway. The responsibility was to be imposed on CN by the government. The implication is that a subsequent government could decide to modify the terms and conditions under which CN would operate the railway.

This is precisely the approach taken in the federal Order in Council entrusting the operation of the railway to CN on condition that "such management and operation shall continue during the pleasure of the Governor in Council and be subject to termination or variation from time to time in whole or in part by the Governor in Council."[71] Under the terms of the Order, the federal government specifically contemplated the possibility that the operation of the railway would be "terminated . . . in whole or in part." This provision can be contrasted to the terms set out with respect to the operation of the Canadian Pacific Railway, which specifically required the corporation to operate the railway in perpetuity. The absence of any such requirement in the 1949 Order In Council indicates that the government of the day did not believe that it had any constitutional obligation to ensure the perpetual operation of the railway.

A further significant consideration is that in Term 32(1) of the Newfoundland Terms of Union, the federal government specifically undertakes an obligation to maintain a specific transportation service, namely, the ferry service between North Sydney and Port aux Basques.[72] This makes the failure to include any such statement with respect to the Newfoundland Railway all the more decisive.

Although this provision is similar to the ferry service provisions in the P.E.I. Terms of Union, it differs in its stated obligation to maintain the service "in accordance with the traffic offering." The Sullivan Commission in 1978 speculated that there might be circumstances in which traffic would cease to "offer" and that, in such a case, the obligation to provide the service would cease. However, the Commission emphasized that such a situation would be exceptional and would arise only when there was no longer any demand for the service.[73] It is evident that the obligation to

provide the ferry service between North Sydney and Port aux Basques is very nearly absolute, similar in practical effect to the obligation regarding ferry service in P.E.I.

Between 1867 and 1873, railway rate regulation by the government was unknown. Rates were regarded as a matter of contract to be left to the determination of the market. Thus the various transportation obligations assumed by the federal government during this early period made no reference to them. By the 1940s, of course, the government had assumed a significant role in regulating railway rates. Thus it is hardly surprising that the Newfoundland Terms of Union would make reference to rates to be charged on the named transportation services. The relevant provisions in Term 32 were as follows:

> (2) For the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime region of Canada, and through-traffic moving between North Sydney and Port aux Basques will be treated as all-rail traffic.
>
> (3) All legislation of the Parliament of Canada providing for special rates on traffic moving within, into, or out of, the Maritime region will, as far as appropriate, be made applicable to the Island of Newfoundland.

The effect of Term 32(2) was to impose a constitutional cap on railway rates in Newfoundland and on the Port aux Basques ferry. Rates on the Island of Newfoundland itself were to be fixed in accordance with comparable rates in other parts of the Maritimes. Thus, even though transportation in Newfoundland might be more difficult or costly, rates were not permitted to move above the level of rates throughout the Maritimes.[74] Further, Term 32(2) stated that the rates for rail traffic moving on the Port aux Basques ferry were to be set as if the traffic were moving on land rather than by ship.

Term 32(3) has a slightly different impact. This term did not impose an absolute rate cap. Rather, it simply required that any legislation enacted by the Parliament of Canada providing for special or preferential rates for the Maritime region would also be applied to Newfoundland. There is no obligation to enact such legislation, however. Nor is the federal government constitutionally barred from repealing any legislation which it chooses to

enact, as long as it treats Newfoundland on a footing identical to that of the other Maritime provinces. Of course, given the long history of preferential freight rates for the Maritimes, dating back to the operation of the Intercolonial Railway, the possibility of repealing such legislation is perhaps more theoretical than real. The point is simply that nothing in the Terms of Union prevents Parliament from amending its legislation, as long as any preferential rates applying in the Maritimes also apply in Newfoundland.

V. The Present Status of the Undertakings: The Movement from Political to Legal Enforcement

As we have seen, the original method for enforcement of federal government transportation obligations was political rather than strictly legal. A province that was unhappy with the way in which the federal government was carrying out its responsibilities would typically complain to the federal or imperial authorities. Eventually some compromise solution would be proposed which met the concerns of both levels of government.

In recent years, there has been a slow but discernible shift in the approach to these various constitutional entitlements. Although the transportation obligations set out in the Canadian Constitution continue to be the subject of political negotiations and bargaining compromise between the two levels of government, there is an increasing tendency to seek judicial and legal enforcement of these obligations, rather than to rely exclusively on political avenues of redress. The courts have demonstrated a willingness to take on responsibility for enforcing these obligations, and have assumed an increasingly significant role in their interpretation.

A watershed in this regard was litigation undertaken by the Prince Edward Island government in the mid-1970s following the shutdown of part of the Island ferry during a labour dispute.[75] This case established the proposition that provincial governments could seek enforcement of transportation obligations through the courts. The case also attempted to define the precise legal nature of the obligations and the extent to which it was open to private citizens to seek legal enforcement.

A. THE PRINCE EDWARD ISLAND FERRY

A nation-wide legal strike by employees of CN Rail in August of 1973 resulted in the shutdown of the ferry service between New Brunswick and P.E.I. for 10 days. Although ferry services were still operating between Nova Scotia and P.E.I. as well as air service to and from the Island, since it was the height of the tourist season, these alternative services were unable to meet the demand. As a result the shutdown had a major negative impact on the Island economy.[76]

The province commenced an action in the Federal Court seeking damages for the losses suffered by the Island during the strike. The province alleged that the federal government had breached its obligation under the P.E.I. Terms of Union to maintain an efficient ferry service linking the Island and the mainland and that the province had a right to compensation for the resulting losses.

The trial judge, Mr. Justice Cattanach, agreed with the province that the federal government had breached its constitutional obligation to provide an efficient ferry service. Holding that an "efficient" service is one that is reasonably capable of meeting the demand for the service, he concluded that there had been a breach of this undertaking during the strike since the service was "wholly inadequate for the need at that time."[77]

However, Mr. Justice Cattanach stated that this breach of obligation did not give rise to an action for damages by the province. In arriving at this conclusion, Cattanach J. distinguished between actions for declaratory relief and actions for damages. He was prepared to grant a mere declaration setting forth the rights and obligations of the Dominion vis-à-vis the province,[78] but he concluded that the province could not succeed in an action claiming monetary compensation for breach of the obligation to provide ferry service. His reasoning was that the obligation was one owed to the public generally rather than for the benefit of any particular individual or class of individuals. Because the obligation had been created for the general public good, Cattanach J. reasoned that no particular person or even province had a right to seek damages for a breach of the obligation.[79]

The Federal Court of Appeal agreed with Justice Cattanach that the federal government had breached its constitutional obligation to provide an efficient ferry service. However, a majority of the Court disagreed with his

conclusion that the province could not bring an action for damages. Chief Justice Jackett concluded that the effect of the Terms of Union was to impose a legal duty on "Canada" in favour of "the Province" of Prince Edward Island. He reasoned that when there is a statutory right to have something done, there is an implied right to be compensated for a breach of such right.[80] Jackett C. J. concluded that the province of Prince Edward Island, as opposed to the residents of the Island themselves,[81] had a right to be compensated for losses sustained due to the interruption of ferry service.

In a separate opinion, Mr. Justice Le Dain agreed with this conclusion. He stated that breach of the constitutional obligation to provide ferry service did not permit individual citizens to sue for monetary compensation. However, he was of the view that the provincial government could sue for any loss directly caused to it by the failure to provide efficient ferry service.[82]

In summary, this case established the following three propositions:

1. The constitutional transport obligations set out in the P.E.I. Terms of Union are legally enforceable;
2. In the event that the obligations are not fulfilled, the provincial government has a right to monetary compensation from the Government of Canada for losses resulting from the breach; and
3. It is unlikely that individual citizens have any right to compensation for losses which they might have suffered as a result of the breach of the obligation; the right to compensation is apparently limited to the provincial government alone.

It is important to consider whether the principles set down in *Canada v. P.E.I.* have been modified in any way by the enactment of the *Constitution Act, 1982*. Section 52(1) of the *Constitution Act, 1982* provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The "Constitution of Canada" is defined in section 52(2) and it includes the BNA Act, 1867, the *British Columbia Terms of Union*, the *Prince Edward Island Terms of Union* and the *Newfoundland Act*.[83] It is evident, in other words, that all of the various provisions establishing transportation obligations of the federal government are included within the meaning of the term the "Constitution of Canada."

Thus, under the terms of section 52, any law that is inconsistent with the constitutional provisions establishing these transportation obligations is of "no force and effect." Any attempt by the Parliament of Canada to modify or reduce its constitutional obligations to provide transportation services is legally invalid. It is clear that a provincial government could seek a declaration of invalidity in accordance with section 52 of the *Constitution Act, 1982*.[84] The only remaining question is whether private individuals could also bring such an action. The Federal Court of Appeal in the *Canada v. P.E.I.* case was of the view that private individuals could not. But an action under section 52 of the *Constitution Act, 1982* is not an attempt to obtain monetary compensation; section 52 simply contemplates the court declaring invalid any law that is inconsistent with the Constitution of Canada.

Courts have taken an increasingly liberal attitude to the question of who has a right to sue for a declaration of constitutional invalidity. The present rule is that a private citizen can maintain an action for a declaration that legislation is invalid if that person can show "that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court."[85]

There seems to be no reason why this general rule should not be applied in the case of the constitutional provisions relating to transportation. Under this approach, the class of persons who could seek a declaration relating to a particular transportation obligation would be extremely broad and open-ended. Any citizen who was a user or even a potential user of a particular transportation service is affected by a decision to reduce or eliminate that service. It would appear, therefore, that even potential users of the constitutionally mandated transportation services would have legal standing to seek a declaration relating to that service. Nor would the class of potential users (and thus litigants) be limited to the residents of a single province.

As the Federal Court indicated in the *Canada v. P.E.I.* case, the obligation to provide ferry service to P.E.I. is for the benefit of residents on the mainland as well as those on the island.[86] The object of guaranteeing the service is to ensure effective communication *between* the residents of the various provinces. The same can be said of the other transportation undertakings that link provinces. It would appear that any citizen who was a user or

potential user of a constitutionally protected transportation service could challenge a decision to reduce that service below the level guaranteed by the Constitution.

The implications of this conclusion may not be as dramatic as might at first be assumed. First, nothing in section 52 of the *Constitution Act, 1982* grants citizens the right to seek monetary compensation in the case of constitutional invalidity. Thus the conclusion of the Federal Court of Appeal in the *Canada v. P.E.I.* case that individual citizens cannot seek financial compensation for breach of a transportation obligation has not been affected by the *Constitution Act, 1982.*

Secondly, and more importantly, the question of standing to sue is a subsidiary one: the determinative question is the scope of the legal obligations themselves. If, as argued earlier, the transportation obligations of the federal government are relatively narrow and circumscribed, then the fact that a broad class of citizens can seek to enforce those obligations is of secondary importance. The key issue, in other words, is the extent of the obligation, rather than who can enforce it.

B. THE PRINCE EDWARD ISLAND RAILWAY

In 1989, the National Transportation Agency granted an application from CN to abandon all the rail lines on Prince Edward Island.[87] The Prince Edward Island government challenged this Order on the grounds that the P.E.I. Terms of Union imposed an obligation on Canada to operate the railway. The P.E.I. argument relied on the wording of the federal obligation to provide a ferry service: ferry service was to be maintained "thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion." The province claimed that this implied an obligation to operate the Island railway as well as the ferry service; without a railway, there would be no way of connecting with the railway system of the Dominion. The Federal Court of Appeal unanimously rejected this argument.[88] Chief Justice Iacobucci (as he then was) held that the only obligation was to provide a ferry service. The reference to the "railway system of the Dominion" in the Terms of Union did not extend this obligation but merely described its effect. Thus there was no constitutional bar to a decision to shut down the railway.[89] It is clear from this decision that the only ongoing transportation obligation relating to Prince Edward

Island is to maintain an efficient ferry service, in accordance with the principles outlined in *Canada v. P.E.I.*[90]

C. THE NEWFOUNDLAND TRANSPORTATION OBLIGATIONS

At the time of Newfoundland's entry into Confederation, the Newfoundland Railway was the only reliable means of overland transportation across the province. On a narrow gauge rail with many steep grades and severe curves, it normally took between 22 and 30 hours to make the 547-mile trip from St. John's to Port aux Basques. Passenger traffic on the railway began to fall off in 1960 and then dropped off substantially after 1965 when the Trans-Canada Highway was completed. The cost of converting the railway to standard gauge or otherwise to improve it was found prohibitive.[91]

In 1967, CN applied to the Canadian Transport Commission (CTC) to discontinue the passenger train service and begin operating a bus service instead. The Roadcruiser bus service was said by CN to be more efficient and convenient than the train service it was to replace. The Railway Transport Committee of the CTC approved the application but adopted what it termed a "large and liberal interpretation" of the Newfoundland Terms of Union so as to give it "the flexibility that changing or unforeseen circumstances may require."[92] According to the Committee, there was a "presumption" under the Terms of Union that public transportation service for passengers between St. John's and Port aux Basques "should be assured so long as it is required by public convenience and necessity." Because of this presumption, the Committee attached a number of conditions to its Order, the most important being that the CN must maintain the bus service "as long as a requirement for passenger service continues."[93]

This interpretation of the transportation obligations of the federal government was indeed both expansive and novel. The relevant provisions in the Terms of Union merely specify that the federal government is to take over the Newfoundland Railway. There is no stated requirement to operate the railway, in contrast to the provision requiring continued operation of a ferry service across the Cabot Strait. The Railway Committee did not interpret the Terms of Union as requiring the maintenance of a passenger rail service *per se*. Rather, it held that the federal government was required to maintain some form of public transportation service which would meet the needs of the residents of Newfoundland.

Canadian National has continued to operate the Roadcruiser bus service in accordance with requirements established by the Canadian Transport Commission and its successor, the National Transportation Agency. While a wholly intra-provincial bus service, it falls under federal jurisdiction due to its close integration with the Newfoundland Railway system.[94]

Although CN discontinued its passenger rail service in Newfoundland in 1969, it continued its freight service on the Newfoundland Railway system. But freight service became increasingly unprofitable, particularly as a result of growing competition from truck transportation on the Trans-Canada Highway. A Provincial Commission of Inquiry into Newfoundland Transportation appointed in the mid-1970s found that the railway could not continue as a viable service.[95] The Commission recommended that the railway system be phased out entirely over a 10-year period. Both the provincial and federal governments rejected this recommendation and instead undertook a major revitalization freight transport program for the railway. Despite these efforts, the railway's losses mounted to over $40 million annually in the early 1980s while its market share continued to decline. By 1987, the railway's share of total freight traffic in the province had fallen to 20 percent, and was projected to decline further.[96]

In 1988, the federal and provincial governments signed a Memorandum of Understanding providing for the phase-out of the Newfoundland Railway on September 1, 1988. Under the terms of the Agreement, the federal government was to provide over $800 million for the improvement of roads and port facilities as well as for labour and community adjustment.[97] The Memorandum of Understanding also provided that the federal payments were offered "in full satisfaction of all Canada's constitutional obligations related to railways on the Island of Newfoundland. . ." [paragraph 10(1)]. Under the Agreement, the province stated that Canada had met all of its constitutional obligations relating to railways on the Island of Newfoundland. In accordance with the terms, the Newfoundland Railway ceased operations, and has been largely dismantled; track and ties have been lifted and the right-of-way returned to its original state.[98]

It is a basic principle of Canadian constitutional law that governments cannot alter the Constitution through mere agreement.[99] Indeed, the Supreme Court of Canada has recently determined that intergovernmental agreements are subject to repeal or abrogation by statute.[100] Thus it is clear that the

Memorandum of Understanding cannot have the effect of altering any constitutional obligations which the federal government might have with respect to the operation of the Newfoundland Railway. However, as this report suggests throughout, the federal government has never been under a constitutional obligation to maintain or operate the Newfoundland Railway. This interpretation flows from the Terms of Union themselves, which merely provide that the Government of Canada is to "take over" the railway. The absence of any requirement to maintain the service means that there is no constitutional objection to a decision to close down the railway.

This interpretation of the Terms of Union was explicitly endorsed by the Premier of Newfoundland, the Honourable Brian Peckford, at the time of the signing of the Memorandum of Understanding. Premier Peckford offered the following comments:

> We have assessed the legal intent and obligations imposed on the federal government by the Terms of Union. It is clear that the Government of Canada does not have a legal obligation to operate a railway in Newfoundland forever. We have always felt, however, that the federal government does have an obligation to ensure that there is a viable transportation system in this province. This agreement today constitutes our mutual recognition that this comprehensive transportation package meets that obligation.[101]

In the period since the shutdown of the Newfoundland Railway, the National Transportation Agency has had occasion to interpret and apply the transportation obligations in the Terms of Union. In its conclusions, the Agency has simply assumed that the 1988 shutdown was perfectly lawful and consistent with the Terms of Union. For example, the Agency recently was asked to interpret the meaning of section 32(2) of the Terms of Union in light of the shutdown of the railway. There was no suggestion that the decision to shut down the railway was in any sense a violation of the Terms of Union.

All of these factors confirm the conclusion that the federal government had no constitutional obligation to maintain the Newfoundland Railway. Accordingly, it would seem that the termination of the railway in 1988 did not violate any of the constitutional obligations of the federal government under the Newfoundland Terms of Union.

The remaining question is how the shutdown of the railway may have affected the other transportation obligations in the Terms of Union. Of particular interest in this regard is Term 32(2), which provides that "for the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime region of Canada. . . ." The problem is that, while Term 32(2) specifically refers to "railway rate regulation," there is no longer a railway system in Newfoundland. Does that mean that the shutdown of the railway has somehow rendered Term 32(2) redundant or inapplicable? The National Transportation Agency's unanimous decision was that Term 32(2) continued to apply despite the shutdown of the railway.[102] Although there is no longer a railway in Newfoundland, there are still "railway rates" which are to be developed by CN and applied in accordance with Term 32(2). The Agency ruled that Terms of Union rates should be developed using rail mileage through North Sydney to Port aux Basques and onto St. John's as if the Newfoundland Railway were still in place. The Agency made it clear, however, that such rates constitute a "ceiling" only and there is no prohibition on CN charging rates lower than the Terms of Union rate, as long as such rates satisfy the other requirements of the *National Transportation Act, 1987.*

While the Agency has determined that Term 32(2) continues to apply as a matter of strict law, other developments in the transportation marketplace are reducing its practical impact and importance. Term 32(2) only protects marine traffic moving over a named route from North Sydney to Port aux Basques. At the time of the negotiation of the Terms of Union in 1949 this was the main marine connection between Newfoundland and the Canadian mainland. However, in recent years there has been a dramatic shift in traffic patterns to the Island of Newfoundland such that only about 25 percent of CN's traffic to Newfoundland now moves over the North Sydney–Port aux Basques gateway. The vast bulk of CN's traffic moves between Halifax and St. John's, a route that is more efficient and less costly for shippers. Technology and the transportation marketplace are thus rendering the protections of Term 32 increasingly redundant from a practical point of view.

A further development which has reduced the practical significance of Term 32(2) is the advent of confidential contracting under the *National Transportation Act, 1987.* The vast bulk of goods now moves at rates that are significantly less than published railway tariffs. Upwards of 65 percent of revenue traffic moving to Newfoundland now moves under confidential contracts.[103] Because the terms of these contracts are private, it is

becoming increasingly difficult to establish a benchmark Terms of Union rate that reflects the actual costs of moving goods to and from Newfoundland.[104] It would appear that the majority of goods moving to Newfoundland does so at rates well below the constitutional "ceiling" established by the Terms of Union.

The Newfoundland situation can be contrasted with that prevailing in Prince Edward Island. Under the P.E.I. Terms of Union there is no restriction on the rates that may be charged for the ferry service linking the Island with the mainland. Accordingly, any limitations on the rates for the P.E.I. ferry service are political and economic, rather than constitutional. Only Newfoundland has an explicit constitutional guarantee with respect to freight rates on the Sydney to Port aux Basques ferry and on the Island of Newfoundland itself.

D. THE VANCOUVER ISLAND RAILWAY

As previously described, in 1883 the governments of Canada and British Columbia agreed to settle their differences over the delays in the construction of the Canadian Pacific Railway. As part of this settlement, there was an agreement as to the manner of construction of a railway on Vancouver Island between Esquimalt and Nanaimo. The province agreed to make certain land grants in favour of the federal government on completion of the railway. The Government of Canada was to designate and contract with the persons who would build the railway, to transfer the land grant to these persons, and to contribute $750,000 towards the cost of construction. The Canada-B.C. Agreement, which was ratified by legislation passed by both governments, made no provision for the manner in which the railway was to be operated upon its completion.

As already mentioned, pursuant to the Agreement, Canada contracted with a third-party syndicate (the Dunsmuir Syndicate) to build and operate the railway "continuously and in good faith." The Canada-Dunsmuir Agreement was appended as a schedule to the federal Act of 1884 ratifying the settlement with the province.

The 70-mile stretch of railway was completed in 1886. The rights and obligations of the Dunsmuir Syndicate were transferred to the Esquimalt and Nanaimo Railway Company and later to the Canadian Pacific Railway

Company. Upon CPR assuming control in 1905, the railway was declared to be a work for the general advantage of Canada and came under federal regulatory authority.

Rail service continued to be offered until late 1989, when the federal Cabinet terminated passenger rail service on this line. The province sought a declaration from the British Columbia Supreme Court that the federal government was obliged to provide the service in perpetuity. The province argued that the obligation to operate the railway "continuously and in good faith" was constitutionally binding on the federal government. The province had to surmount two very large obstacles to succeed with this argument: the first was that nothing in the B.C. Terms of Union obliged the federal government to operate either the Canadian Pacific Railway or the branch line on Vancouver Island.[105] Secondly, nothing in the 1883 Settlement Agreement between Canada and British Columbia obliged the federal government to operate the Island railway. The only commitment regarding the operation of the Island railway is found in the Agreement between Canada and the Dunsmuir Syndicate. The promise to operate the railway "continuously and in good faith" was made to the federal government rather than to the province.

Despite these seemingly persuasive objections to the provincial argument, Mr. Justice Esson of the B.C. Supreme Court found that the federal government had a perpetual obligation to operate the Vancouver Island Railway. With respect to the 1883 Canada-B.C. Settlement Agreement, Esson J. acknowledged that the federal government had not promised to operate the railway continuously. However, he was of the view that the province had relied on the undertaking of continuous operation which the Dunsmuir Syndicate had given to the federal government. Therefore, the promise to operate the railway continuously was a benefit "which the Dominion impliedly offered to maintain for the benefit of the province."[106] This "implied offer" became binding on the federal government when the province carried out its part of the bargain, particularly the "very onerous terms relating to the land grant."

Mr. Justice Esson went on to conclude that the 1883 Agreement had "constitutional force" and could not be unilaterally amended by the federal government. The basis for this conclusion appears to be that the 1883 Agreement was "part of the constitutional compact under which British Columbia

became part and parcel of the Dominion."[107] He further relies on the "intentions" of the two governments in 1871 and 1883 as a basis for finding an obligation to operate the railway indefinitely:

> In 1871 no one would have thought that, if the railway was built, it would not operate in perpetuity. As between the two levels of government, it was unnecessary to stipulate that both would have the benefit of the covenant to operate — enough that the promise was given to the Dominion by the contractors and the railway company. I infer from all the circumstances that the province relied upon the Dominion to enforce that obligation.

What is most striking about this passage is that it makes no distinction between the construction of the island railway and the main line of the CPR. According to Esson J., the assumption *in 1871* was that if the railway was built it would operate in perpetuity. But the railway that was under contemplation in 1871 was not the Island railway; rather, it was the transcontinental railway linking B.C. with the rest of Canada. The logical implication flowing from Justice Esson's reasoning is that the federal government has an obligation to operate *the whole of the Canadian Pacific Railway system in perpetuity,* not simply the 70-mile stretch of rail on Vancouver Island.

This conclusion is not as improbable as it might at first glance appear. It is important to remember that the CPR gave an undertaking of continuous operation to the federal government similar to that made by the Dunsmuir Syndicate. The federal legislation establishing the CPR required the corporation to run the whole of the transcontinental railway system in perpetuity; the wording in the case of the CPR is even more definitive and unambiguous than it was with respect to the Island railway.[108] Thus, if B.C. is entitled to rely on the undertaking with respect to continuous operation of the island railway, there would seem to be no reason preventing it from also relying upon the promise of perpetual operation of the CPR.

Thus Mr. Justice Esson's interpretation of the B.C. Terms of Union and the 1883 Settlement Agreement has important implications for the whole of the CPR, not just the rail line on Vancouver Island. Under the approach adopted by Mr. Justice Esson, a variety of other federal government orders shutting down or reducing passenger service on the CPR would come into question.

Yet there are a number of difficulties associated with the reasoning of the Court in this case. These difficulties include the following:

(i) The legislative history of the B.C. Terms of Union indicates that the federal government's obligation was to construct the CPR, but not to operate it; of particular significance is the fact that there are references to a requirement to "maintain" services elsewhere in the Terms of Union, but no such obligation was included with respect to the CPR;

(ii) This interpretation places British Columbia on the same footing as the other provinces in Canada; the federal government has assumed responsibility for constructing or taking over a variety of other railways, but in no instance has it agreed to operate these railways in perpetuity. The decision to shut down the P.E.I. and Newfoundland railways has been accepted by the courts and/or the province concerned as perfectly lawful. To hold otherwise in the case of British Columbia is to place that province in a preferred and unique position with regard to railway operation; and

(iii) Whatever may have been the intentions surrounding the Canada-B.C. Settlement in 1883, the Agreement did not amount to an amendment of the Terms of Union. Governments cannot alter the Constitution through mere agreement.[109] Thus, even assuming that the 1883 Canada-B.C. Agreement included a promise to operate the railway in perpetuity, such a promise is not constitutionally binding. The 1883 Agreement is not part of the "Constitution of Canada"[110] and thus cannot amount to a fetter on the legislative authority of the Parliament of Canada.

Notwithstanding these objections, a five-member panel of the British Columbia Court of Appeal unanimously upheld Mr. Justice Esson's conclusions in a judgement handed down on October 4, 1991.[111] The Court of Appeal concluded that Canada had a continuing constitutional obligation to British Columbia to ensure the maintenance of passenger and freight rail service on the rail line between Victoria and Nanaimo. While the Court of Appeal found that the obligation was "continuous" it refused to describe the obligation as "perpetual";[112] it also indicated that the service could be discontinued with the agreement of the Government of British Columbia.

The major focus of the Court of Appeal's reasoning dealt with whether the construction of the Vancouver Island Railway was part of the original Term 11 obligation of Canada. The Court of Appeal reasoned that the construction

of the Island portion of the railway was indeed included within the constitutional obligation defined by Term 11. The Court of Appeal suggested that the wording of Term 11, which referred to the construction of a railway to the "Seaboard" of British Columbia, was ambiguous; in the Court's view, this might be read so as to include the construction of a railway line on Vancouver Island. The Court of Appeal relied particularly on an 1873 Order in Council passed by the Government of Canada fixing Esquimalt as the western terminus of the Canadian Pacific Railway. In the Court's view, this was the "best evidence of the intention and understanding of the parties about Canada's Term 11 obligations."[113]

Having found that the obligation defined by Term 11 included the construction of the rail line on Vancouver Island, the Court of Appeal went on to find that the 1883 Settlement arrangements were of a "constitutional nature." In the Court's view, Term 11 was a "skeletal" provision which was "worked out" through the various covenants associated with the 1883 Settlement.[114] These covenants included the undertaking given by the Dunsmuir Syndicate to operate the Vancouver Island Railway "continuously." This meant that this covenant was of a constitutional nature and could not be varied except with the consent of the Government of British Columbia.[115]

To what extent does the Court's reasoning in this case have wider implications for other transportation obligations of the Canadian government? As already noted, the reasoning of Mr. Justice Esson would seem to imply an obligation to maintain perpetual operation of the whole of the Canadian Pacific Railway. This implication is strengthened by the reasoning of the Court of Appeal in this case. The Court of Appeal reiterates at numerous points in its judgement that the island railway is "constitutionally indistinguishable from the Mainland railway."[116] The Court of Appeal also implies that Term 11 itself carries with it some kind of continuing obligation:

> Canada assumed a constitutional obligation to British Columbia, and indeed to all of Canada, to ensure the continuation of the arrangements made to carry the Terms of Union into effect for the benefit of all its citizens. *It is untenable, in our view, to argue that Term 11 was spent once the last spike on the Mainland Railway was driven.* [emphasis added][117]

The Court's theory that Term 11 is a "skeletal" provision only which was to be "worked out" through subsequent enactments also supports the conclusion that the whole of the CPR must be operated in perpetuity. As noted above, the 1881 statute creating the CPR stated that the railway must be operated "forever" by the company. This statutory language could be said to be evidence of what the Court of Appeal identified as an obligation to "ensure the continuation of the arrangements made to carry the Terms of Union into effect for the benefit of all its citizens."

In summary, the implications of the litigation surrounding the Vancouver Island Railway extend far beyond the particular issues raised in the case. The reasoning of both the trial judge and the Court of Appeal supports the conclusion that the federal government has a constitutional obligation to maintain the whole of the Canadian Pacific Railway.[118] Given these very broad implications, it would seem an appropriate matter for review by the Supreme Court of Canada.[119]

The recent litigation on this issue has injected some uncertainty into the precise scope and meaning of Term 11 of the B.C. Terms of Union. The other terms seem straightforward: under Term 4, the federal government is obligated to provide efficient mail service between Victoria and both San Francisco and Olympia. As we noted earlier, the federal approach was to contract with private operators to provide this service and to pay subsidies. Beginning in 1925, a federal subsidy directed towards supporting a ferry service to San Francisco was used by the province to support mail service within the province.

In the 1970s, British Columbia complained that the federal subsidies paid to support ferry service in British Columbia were lower than comparable subsidies paid in the Maritimes. As a result, in 1977 the province and the federal government entered into a new arrangement for ferry subsidies. Under the 1977 Subsidy Agreement,[120] the federal government agreed to pay a block grant of some $8 million annually to the province for support of ferry service. In return for this subsidy, Canada was to be relieved of "any and all obligations for the provision of subsidy or other financial assistance over and above the subsidy provided for in this Agreement" (section 5). It would be up to the province to determine how the federal grant should be used. However, the province agreed to "assure reasonable and adequate service and appropriate supervision thereof" in B.C. coastal waters

(section 4(2)). The province was also obliged under the Agreement to "place appropriate passenger vessels in service . . . to give effective links where required on the coast between communities and principal water and air services" (section 4(3)).

An effective and efficient ferry system has been maintained in the province pursuant to this Agreement. Thus the requirements of the Terms of Union in this regard are currently being satisfied. But the constitutional obligation to provide the service remains that of the federal government rather than the province. The provisions in the Subsidy Agreement imposing obligations on the provincial government are subject to the constitutional requirements of the Terms of Union, which continue to apply.

VI. Conclusions

The first important conclusion is that the ongoing obligations of the federal government are relatively limited and circumscribed. All of the obligations relating to the construction of various railways in different provinces of Canada have long since been satisfied. As suggested, there is no continuing obligation to operate any of these rail services[121] nor is there any constitutional limitation on the manner in which the services are to be provided. The only continuing obligations of the federal government would appear to fall into two categories:

(i) The federal government is obliged to provide the ferry services guaranteed to British Columbia, Prince Edward Island and Newfoundland under the Terms of Union for these particular provinces. Further, it is obliged to maintain passenger and freight rail service on the Island railway on Vancouver Island, pending a final court determination of this issue;

(ii) There is a limitation on the rates which can be charged to Newfoundland in accordance with terms 32(2) and 32(3) of the Newfoundland Terms of Union. It should be noted that this is the only constitutional limitation respecting rates; there is no constitutional constraint on cost recovery in respect of the other mandated ferry services.

The relevant province is entitled to undertake legal action to enforce these ongoing obligations. In addition, the province can seek monetary compensation for any losses which it might have suffered due to interruption of the

guaranteed service. It would appear that private citizens who are affected by breach of a constitutional obligation are also entitled to bring legal action to enforce it. However, it is unlikely that a private citizen would be permitted to obtain monetary compensation for any losses suffered due to a breach of a constitutional obligation. The private citizen could only obtain a declaration of his or her rights with respect to the transportation service in question.

If this first conclusion is correct, then these limited transportation obligations in the Canadian Constitution ought not to be a significant concern for transportation policy makers. Their extremely restricted scope and impact clearly do not represent a significant impediment to the development of a modern and integrated transportation system for Canada.

In one sense, it might be concluded that the inclusion of these transportation obligations in the Constitution was a success; the existence of these undertakings played a key role in the creation of the Canadian State. The critical feature of the undertakings was their binding and enduring character. Because they were incorporated in imperial legislation, successive Canadian governments were obliged to make good on the original undertaking. This provided the colonial leadership in the 1860s and 1870s with the assurances it needed to support political union.

But there are disadvantages to including provisions of this type in a constitution. A constitution is intended to provide a general framework which can be adapted to fit the changing needs and circumstances of state and society. The transportation undertakings set out in the Canadian Constitution are not of this general character. Rather, they set out quite precise commitments to provide certain transportation services, including in some cases the time and manner in which the service is to be carried out. The problem with this type of constitutional provision is not simply that it is out of character with the generality of the constitution as a whole. The real difficulty is that the more specific a constitutional provision, the more difficult it is to adapt that provision to changing circumstances or needs.

One risk is that the provision will simply be rendered meaningless or superfluous by the changing current of events. An illustration of this is the guarantee of preferential rates on the North Sydney to Port aux Basques ferry in

the Newfoundland Terms of Union. While this route was once the main gateway to Newfoundland, changes in technology are rendering it increasingly marginal to Newfoundland's transportation system.

But a second risk, by far more worrisome, is that the courts will attempt to apply a particular provision to changing circumstances in a novel or unforeseen way. One possibility is that the courts will insist that a particular mode of transportation must be used, regardless of its relative cost or efficiency. In effect, the courts would attempt to "freeze" the evolution of the transportation system and prevent the movement to more efficient and cost-effective modes. For example, there has been discussion over the years of the possibility of establishing some form of fixed link between Prince Edward Island and the Canadian mainland. Were this fixed link ever constructed, it might render the continuation of ferry service over the same route superfluous. However, the existence of a constitutionally mandated obligation to provide a ferry service would likely prevent governments from discontinuing the service, even though it would have outlived its usefulness.

Of course, even in a case where the courts required the continued use of an inefficient or uneconomic mode of transportation, it would still be open to governments to amend the Constitution.[122] On the other hand, constitutional amendment in Canada is never a simple or straightforward matter, as the events of the past decade have shown.

On balance, therefore, there would appear to be significant disadvantages associated with the constitutional entrenchment of entitlements to specific transportation services. It is no accident that the practice of including such obligations in the Canadian Constitution has been limited to a means of securing the entry of individual provinces or groups of provinces to Canada. Once a province was created, however, there is no instance where its constitutional entitlement to transportation services has been expanded. Instead, transportation services involving particular provinces have been provided for through ordinary legislation or federal-provincial negotiation and agreement. There has been no willingness to entrench any further entitlements in the Constitution. The inclusion of these provisions is clearly anomalous, for the reasons given above. The exceptional character of the existing constitutional transportation obligations is all the more apparent in light of the enactment of the *Constitution Act, 1982*. The entitlements to specific

transportation obligations are now included as part of the "Supreme law of Canada" and any laws which are inconsistent with this fundamental law are of no force and effect.

It is to be expected that provincial entitlement to transportation services will continue to be dealt with largely through ordinary legislation and federal-provincial agreement. No province has sought to entrench further entitlements to transportation services in the Constitution. At the same time, the recent Supreme Court case dealing with the enforceability of federal-provincial agreements[123] may cause some provinces to demand some mechanism to bind the federal government to meet its contractual obligations.

The answer to this concern is not, as has sometimes been suggested, to entrench federal-provincial agreements directly in the Constitution. As argued above, the constitutional entrenchment of what amount to contractual commitments between the two levels of government can have effects that are both unanticipated and unsatisfactory. A better solution to this potential problem[124] is to use the mechanism which was provided under the Meech Lake Accord with respect to immigration: any province which negotiated an agreement with the federal government regarding immigration could have the agreement protected from unilateral amendment by the federal government.[125] This approach, which falls short of entrenching the agreement itself as part of the Constitution, could be applied more generally. In transportation, for example, it could provide a mechanism to ensure that federal government undertakings were legally enforceable. It would also provide an answer to any provincial concerns regarding the uncertain legal status of agreements with the Government of Canada.

ENDNOTES

I am indebted to Mr. Christopher Morrison, a member of the Osgoode Hall class of 1993, for his excellent research assistance in the preparation of this paper.

1. G. P. de T. Glazebrook, *A History of Transportation in Canada*, Vol. 1, (Toronto: McClelland and Stewart, 1964), p. xiii.

2. See, for example, the guarantee in the B.C. Terms of Union that Canada will provide "an efficient mail service, fortnightly, by steam communication between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers." B.C. Terms of Union, section 4.

3. The single most significant and costly transportation obligation was, of course, the undertaking to construct a transcontinental railway linking British Columbia with the other provinces within 10 years of its entry into Confederation. See B.C. Terms of Union, section 11.

4. See, for example, the essays in K. W. Studnicki-Gizbert, *Issues in Canadian Transport Policy* (Toronto: Macmillan of Canada, 1973) which omit any discussion of constitutional transport obligations as a significant factor in contemporary transport policy. See also C. Dalfen and L. Dunbar, "Transportation and Communications: The Constitution and the Canadian Economic Union," in *Case Studies in the Division of Powers*, Vol. 62, ed. Mark Krasnick (Royal Commission on the Economic Union and Development Prospects for Canada, Background Studies, 1985) which makes no mention of the federal obligations to provide transportation services.

5. See *Prince Edward Island (Minister of Transportation and Public Works) v. Canadian National Railway Co.* [1991] 1 F.C. 129.

6. See *Attorney General of British Columbia v. Attorney General of Canada* 42 B.C.L.R. (2d) 339 (1989).

7. See *Attorney General of British Columbia v. Attorney General of Canada* (Reasons for Judgment of the Court of Appeal for British Columbia, October 4, 1991, unreported).

8. It is important to distinguish constitutional transportation obligations from constitutional *jurisdiction* relating to transportation. Constitutional jurisdiction grants authority to deal with a particular matter, without specifying how that authority is to be exercised; a constitutional obligation imposes a duty to deal with a particular matter in a particular fashion. This study examines the transportation obligations imposed on the federal government under the Canadian Constitution.

9. P. B. Waite, *The Life and Times of Confederation* (Toronto: University of Toronto Press, 1967).

10. Glazebrook, p. 14.

11. It should be noted that the delegates from Prince Edward Island were opposed to the Intercolonial, regarding it as a cause for additional taxation of Island residents without any corresponding benefit. Thus the reference to "Maritime" support for the Intercolonial is limited to the provinces of New Brunswick and Nova Scotia.

12. G. P. Browne, ed., "Quebec Resolutions," *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969), p. 165.

13. Ibid. p. 165.

14. The various drafts of the sections of the BNA Act setting out the commitment to build the Intercolonial are found in Browne, p. 278 and pp. 335–36.

15. Earlier drafts of the bill had contemplated specifying a date for completion of the railway; see Browne, p. 278 (3rd draft of bill, 2 February 1867).

16. S. Fleming, *The Intercolonial* (Montreal: Dawson Brothers, 1876), p. 76.

17. See section 146 of the BNA Act, 1867.

18. See section 2 of the *Manitoba Act, 1870.*

19. Rupert's Land and North-Western Territory Order, 1870 (U.K.), R.S.C. 1970, Appendix II, no. 9.

20. The text of the B.C. proposal was as follows:

> 8. Inasmuch as no real union can subsist between this Colony and Canada without the speedy establishment of communications across the Rocky Mountains by Coach Road and Railway, the Dominion shall, within three years from the date of union, construct and open for traffic such Coach Road from some point on the line of the Main Trunk Road of this Colony to Fort Garry, of similar character to the said Main Trunk Road; and shall further engage to use all means in her power to complete such Railway communication at the earliest practicable date, and that Surveys to determine the proper line for such Railway shall be at once commenced; and that a sum of not less than One Million Dollars shall be expended in every year, from and after three years from the date of union, in actually constructing the initial sections of such Railway from the Seaboard of British Columbia to connect with the Railway system of Canada.

Papers in Connection with the Construction of the Canadian Pacific Railway (Carnarvon Papers), Vol. I, no. 2. (1890).

21. See Glazebrook, pp. 48–49.

22. Note, however, that the obligation in Term 11 was merely imposed on the "Government of the Dominion" rather than upon "Parliament," as was the case with the Intercolonial. This indicates that the obligation in Term 11 does not bind Parliament directly in the sense that it does not oblige Parliament actually to enact legislation. Of course, Term 11 is still "constitutionally entrenched" in the sense that any legislation which Parliament does enact must not conflict with its provisions. Further, the courts will rely on Term 11 to strike down any legislation which is inconsistent with its terms. See discussion *infra*, pp. 36 and 56.

23. See, i.e. Glazebrook, p. 47.

24. *Debate on the Subject of Confederation with Canada*, Victoria, B.C. (G.P.O., 1870), p. 92.

25. *Carnarvon Papers,* Vol. 1, no. 2, clause 10.

26. See clause 7 (re San Francisco) and clause 10 (re coastal mail service) of the original B.C. proposals, reprinted in *Carnarvon Papers*, Vol. 1, no. 2, pp. 140–41.

27. *Debate on the Subject of Confederation with Canada*, Victoria, B.C., p. 78.

28. This issue was not raised in the B.C. debates on the terms; no notice is taken of the difference in the wording proposed for the service to San Francisco as opposed to the service to Olympia. Thus it is impossible to state whether the drafters of the B.C. proposal envisaged that the requirement to "supply" the ferry service to San Francisco would terminate at some point.

29. In addition to the obligations outlined above, the Canadian government also undertook to guarantee for 10 years the interest on a loan for the construction of a "first-class Graving Dock" at Esquimalt. Note that here the obligation was limited to the guarantee of interest; Canada did not have to construct or secure the construction of the Graving Dock. See Term 12 of the Terms of Union.

30. For a full account of P.E.I.'s opposition to the Quebec resolutions, see F. W. P. Bolger, *Prince Edward Island and Confederation* (Charlottetown: St. Dunstan's University Press, 1964), pp. 89–107.

31. See Bolger, p. 201.

32. For an account of the public reaction to the 1869 Canadian offer and the demand for construction of an Island railway as the price for entering Confederation see Bolger, pp. 202–13.

33. Bolger, p. 217.

34. Ibid., p. 235.

35. The Terms of Union provided as follows: "That the railways under contract and in the course of construction for the Government of the Island, shall be the property of Canada."

36. The Island's debt stood at approximately $3.7 million while the "debt allowance" amounted to over $4.7 million.

37. The relevant term provided that: "Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial railway and the railway system of the Dominion."

38. Indeed, this point was noted during the debates in the P.E.I. Legislative Council on the proposed Terms of Union. One of the members objected to the fact that there was nothing in the terms requiring Canada to keep the railway in operation. The Premier replied that this was indeed the case, but that the inclusion of such a requirement was regarded as unnecessary. See *Debates and Proceedings of the Legislative Council of Prince Edward Island for the Session of 1873*, May 1, 1873, (Charlottetown: Queen's Printer), pp. 49–50.

39. See *Debates and Proceedings of the Legislative Council of Prince Edward Island for the Session of 1873*, p. 67.

40. This was added to the terms at the very end of the negotiations and was one of the final concessions from Canada which secured the support of the Island government. See Bolger, p. 279.

41. Canada also agreed to take a dredge boat that was under construction at a cost of up to $22,000. However, there was no obligation on the part of Canada beyond the mere purchase of the boat.

42. S.C. 1867, c. 13.

43. See E. Forbes, *The Maritime Rights Movement: A Study in Canadian Regionalism* (Montreal: McGill-Queen's University Press, 1979).

44. The increased cost of construction was attributable to a variety of causes, not the least of which was incompetence and mismanagement by the Federal Board of Commissioners. See G. R. Stevens, *Canadian National Railways*, Vol. 1 (Toronto: Clark, Irwin, 1960), pp. 192–203.

45. See *An Act to amend the Act respecting the construction of the Intercolonial Railway*, S.C. 1874, c. 15.

46. See *An Act to incorporate Canadian National Railway Company*, S.C. 1919, c. 13.

47. The story is well known and will not be recounted here. See, e.g. D. Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: Macmillan, 1955), and H. A. Innis, *A History of the Canadian Pacific Railway* (Toronto: University of Toronto Press, 1971).

48. The wording of Term 11 itself did not support this contention. Term 11 provided that the railway would connect the "Seaboard" of British Columbia with the railway system of Canada: there is no mention of a railway on Vancouver Island. Notwithstanding the wording of Term 11, the Macdonald Government had passed an Order in Council in 1873 fixing Esquimalt on Vancouver Island as the terminus of the Canadian Pacific Railway. It was apparently contemplated that a bridge would be constructed between the mainland and Vancouver Island near Nanaimo, and a line of railway would then be built on the Island from Nanaimo to Esquimalt. The plans for the bridge across Seymour Narrows never materialized.

49. See *Carnarvon Papers*, for the history of the negotiations between 1873 and 1883.

50. The Agreement dealt with a variety of matters in addition to the issue of the Island railway. For example, a change in the route of the CPR through the Rockies had resulted in the land grant in that area consisting of barren and mountainous country. The province agreed to provide compensation for the low value of this land by conveying a huge block of land (3.5 million acres) in the Peace River area. The Agreement also dealt with the terms and conditions respecting the sale of railway lands to the public.

51. Note that under the terms of the Settlement Agreement, the federal government itself did not undertake the obligation to construct the railway line. Its obligation was simply to transfer lands to the railway contractors, to pay a subsidy of $750,000 and to take security from the contractors in order to ensure that the contractors would complete the line on schedule. See section (e) of the Settlement Agreement.

52. See *An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province*, S.B.C. 1884, c 14. and *An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia*, granted to the Dominion, S.C. 1884, c. 6.

53. Section 16 of the contract provided:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

54. See section 7. The obligation of the railway in this case was more clearly expressed than in the case of the Agreement with the Dunsmuir Syndicate regarding the Island railway. The obligation imposed on the CPR to operate the main line of railway "thereafter and forever" did not appear in the Agreement with the Dunsmuir group. The significance of this wording will be explored later in this paper in connection with the recent B.C. court decision on the operation of the Island railway.

55. See *An Act respecting the Canadian Pacific Railway*, S.C. 1881, c. 1.

56. See, e.g. *Esquimalt and Nanaimo Ry. v. A.G.B.C.* [1950] A.C. 87, dealing with the scope of the tax exemption for the lands owned by the CPR on Vancouver Island.

57. The British Columbia courts have recently held otherwise, concluding that certain statutory provisions dealing with the operation of the Vancouver Island Railway have become constitutionally entrenched. This case and its implications will be discussed later in section V of this paper.

58. See [1950] A.C. 87.

59. An exception arose in the case of Saskatchewan and Alberta in 1905. The federal statutes creating those provinces included the tax exemption granted to the CPR under the 1881 contract. (See section 24 of both the *Alberta Act* and the *Saskatchewan Act*, reproducing section 16 of the contract between the CPR and the Government of Canada). These federal statutes became constitutionally entrenched as part of the Constitution of Canada in 1982 and now have full constitutional force and effect. This means they can only be modified in accordance with the amending formula set out in part V of the *Constitution Act, 1982.*

60. See "Report of the Deputy Minister of Trade and Commerce," p. 39 in *The Thirty-fifth Annual Report of the Department of Trade and Commerce for the fiscal year ending March 31, 1927.*

61. Ibid.

62. The terms of the P.E.I. memorial are described in detail by Mr. Justice Cattanach in *The Queen in Right of the Province of Prince Edward Island v. The Queen in Right of Canada* [1976] 2 F.C. 712, p. 718.

63. S.C. 1901, c. 3, s.1.

64. See *The Prince Edward Island Subsidy Act, 1912*, S.C. 1912, c. 42, s. 2. This statute provided for an annual subsidy of $100,000 to the Island, of which one half was attributable to the failure to provide efficient ferry service in accordance with the Terms of Union.

65. See *Report of the Commission of Inquiry into Newfoundland Transportation*, Vol. 1 (Sullivan Commission) (St. John's, 1978), pp. 30–31.

66. The Sullivan Commission stated that the railway had been a drain on the Newfoundland treasury of approximately $750,000 annually ever since 1923.

67. Documents on Relations Between Canada and Newfoundland, no. 805.

68. Sullivan Commission Report, p. 34.

69. See *Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714, pp. 721–23.

70. See *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* [1985] 2 S.C.R. 486 [holding that the intentions of the drafters of the Charter of Rights, as manifested by statements made before a Parliamentary Committee, were entitled to minimal weight in judicial interpretation.]

71. Order in Council P.C. 1454, April 1, 1949.

72. Term 32(1): "Canada will maintain in accordance with the traffic offering a freight and passenger steamship service between North Sydney and Port aux Basques, which on completion of a motor highway between Corner Brook and Port aux Basques, will include suitable provision for the carriage of motor vehicles."

73. See Sullivan Commission Report, p. 34.

74. See *Attorney General of Newfoundland v. C.N.R.*, (1951) 67 C.R.T.C., p. 353.

75. See *The Queen (P.E.I) v. The Queen (Can)* [1976] 2 F.C. 712 affd. [1978] 1 F.C. 533.

76. For a description of these impacts, see the judgement of the trial division of the Federal Court: [1976] 2 F.C. 712, p. 728.

77. [1976] 2 F.C. 712, p. 729. The trial judge also held that the federal government's obligation included provision for the conveyance of automobiles as well as passengers. The 1873 Terms of Union did not refer to automobiles, since they were non-existent at the time. But Cattanach J. applied section 10 of the *Interpretation Act*, R.S.C. 1970, c. I-23 to hold that the only sensible modern interpretation of the Terms of Union was one that included automobiles.

78. See [1976] 2 F.C. 712, p. 737.

79. Ibid., p. 734.

80. [1978] 1 F.C. 533, p. 556. In the end, Jackett C.J. concluded that the Court could only issue a declaration that Prince Edward Island had a right to money compensation, as opposed to a judgement ordering the payment. But there was no practical difference between the issuance of a declaration as opposed to an actual judgement since in both cases the federal government would comply with the finding of the Court.

81. While Chief Justice Jackett did not express any final opinion on the point, he indicated that it was probably not open to individuals to seek compensation for the loss of ferry service. He held that the obligation was owed to the "Province," which he defined as "the mass of inhabitants of the geographical area whoever they may be from time to time." He indicated that this obligation to the Province did not give rise to rights in individuals or in groups of individuals. See ibid., pp. 555–56 and footnote 30.

82. Le Dain J. made the point that the provincial claim should be limited to damages or costs imposed on the government directly. The province should not be permitted to obtain a judgement for the adverse effects which the province as a whole might have suffered. See ibid., p. 589.

83. For a complete listing of the relevant statutes and orders, see "Schedule I" to the *Constitution Act, 1982.*

84. This follows from the holding in *Canada v. P.E.I.*

85. *Minister of Justice of Canada v. Borowski* (1981) 130 D.L.R. (3d) 588, p. 589 per Martland J. (S.C.C.).

86. [1976] 2 F.C. 712, p. 731 (per Cattanach J.).

87. See Order no. 1989-R-180.

88. See *P.E.I. v. CNR* [1991] 1 F.C., p. 129.

89. Iacobucci J.'s conclusion was as follows:

    It is clear that Canada was to obtain property in the railway presumably because of Canada's assumption of the debts and liabilities of Prince Edward Island at the time of Union. Once it obtained the property, it was legally free to do what it wished with the railway as owner thereof. If an obligation to operate perpetually were intended, clear language to that effect would have been employed as was done, as Counsel for CN pointed out, in the 1883 B.C. railway settlement.

90. In *P.E.I. v. CNR*, Justice Iacobucci also makes the point that the obligation to maintain a ferry service only extends to passengers and mails, but not freight. This is the same approach adopted by Ledain J. in the Federal Court of Appeal in *Canada v. P.E.I.* On the other hand, Chief Justice Jackett in the *Canada v. P.E.I.* case was of the view that automobiles *were included* within the constitutional obligation. This point does not seem of much practical significance, since the vessels providing the service all are equipped to transport automobiles and freight.

91. See generally the discussion of these developments in the decision of the Railway Transport Committee of the Canadian Transport Commission permitting the substitution of bus service for passenger trains: Pamphlet No. 14, 58 R.T.C., p. 359, July 3, 1968.

92. See opinion of D.H. Jones, Chairman, ibid., p. 371.

93. Ibid., p. 376.

94. See *Canadian National Railway Co. v. Board of Commissioners of Public Utilities* [1976] 2 S.C.R. 112.

95. See *Report of the Commission of Inquiry into Newfoundland Transportation*, Vol. 1 (1978), p. 233–34.

96. See "Remarks by the Honourable John Crosbie on the Newfoundland Transportation Initiative," June 20, 1988, p. 4. (Mimeographed.)

97. See "Memorandum of Understanding between the Government of Canada and the Government of the Province of Newfoundland," (MOU), June 20, 1988, paragraph 5. (Mimeographed.)

98. See *In the Matter of a complaint made by Atlantic Container Express Inc.* (National Transportation Agency of Canada, Decision No. 266-R-1991) May 22, 1991.

99. See *A.G. Nova Scotia v. A.G. Canada* (Nova Scotia Interdelegation) [1951] S.C.R. 31.

100. See *Reference Re. Canada Assistance Plan Act*, (S.C.C., August 15, 1991, unreported).

101. "Statement by the Honourable A. Brian Peckford, Premier of Newfoundland and Labrador on the Newfoundland Transportation Initiative," June 20, 1988, p. 7. (Mimeographed.) Obviously such a statement cannot itself alter any existing constitutional obligation. It does, however, give an indication of the legal opinion of the Government of the day with respect to the extent of the constitutional obligation.

102. All three members of the Agency were in agreement on this point; there was a dissenting opinion from one member of the board on the method to be used to calculate a Terms of Union rate. See *Atlantic Container Express Inc.*

103. Ibid., p. 4.

104. See the attempt by the National Transportation Agency in its recent decision on the complaint by Atlantic Container Express to deal with this and other problems in establishing a Terms of Union rate.

105. In fact, as noted earlier, article 11 of the Terms of Union did not even mention the line on Vancouver Island; the obligation was to build a railway to the "Seaboard" of British Columbia.

106. 42 B.C.L.R. 339, p. 359 (1989).

107. Ibid., p. 362.

108. The operators of the CPR promised to "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway." See S.C. 1881, c.1, section 7.

109. See Nova Scotia Interdelegation case, MOU between the Government of Canada and the Government of Newfoundland and Labrador.

110. As defined by section 52 of the *Constitution Act, 1982.*

111. See *Attorney General of British Columbia v. Attorney General of Canada* (Reasons for Judgment, B.C. Court of Appeal, October 4th, 1991, unreported).

112. Mr. Justice Esson, at trial, had found that the obligation to maintain service on the E. and N. was "perpetual"; this part of his Order was varied by the Court of Appeal.

113. See Reasons for Judgement, p. 41.

114. See, in particular, the Court's reasoning on pp. 44–45.

115. It is interesting to note that the Court of Appeal finds that the obligation is owed to the provincial government only. The implication is that private citizens are not entitled to rely upon these particular constitutional obligations. As noted previously, the obligations in Term 11 are part of the "Constitution of Canada" and are part of the "supreme law of Canada." It thus seems difficult to understand why the obligation can only be enforced by governments as opposed to private citizens. The Court of Appeal does not discuss the issue but merely notes in passing that the obligation could be varied with the consent of the B. C. government.

116. See Reasons for Judgement, p. 43.

117. See Reasons for Judgement, p. 45.

118. The "Canadian Pacific Railway" is defined in an 1874 statute as including the main line of railway, running from "a point near to and south of Lake Nipissing" westward to "some point in British Columbia on the Pacific Ocean." Further, the railway is to include two branch lines, the first constructed in Ontario, the second in Manitoba. See *An Act to Provide for the construction of the Canadian Pacific Railway*, S.C. 1874, ss. 2 and 3.

119. It is not known at this time whether the Attorney General of Canada intends to appeal. Leave to appeal would have to be granted by the Supreme Court of Canada.

120. See "Subsidy Agreement between the Government of Canada and the Government of the Province of British Columbia," April 18, 1977.

121. This is subject only to the single exception noted in paragraph (i) below.

122. All of the constitutional provisions identified here could be amended under section 43 of the *Constitution Act, 1982*, which requires the consent of the Parliament of Canada as well as any province to which the provision applies.

123. See *Reference Re Canada Assistance Plan Act*, (S.C.C. August 15, 1991, unreported).

124. The problem is potential only since there is no indication at this time of any dissatisfaction on the part of provinces with the enforceability of agreements relating to transportation.

125. Under the proposed section 95A, once an agreement had been ratified by the province and by the Parliament of Canada, it would have the force of law and it could not be amended without the consent of both parties. A similar procedure is contemplated by the recent constitutional proposals published by the Government of Canada on September 24, 1991. See *Shaping Canada's Future Together: Proposals*, (Ottawa: Supply and Services Canada, 1991), p. 34.