

Freight Rate Regulation in Canada

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I. INTRODUCTION: NEED FOR REGULATION

The transport industry is a principal catalyst of trade and industrial development. By moving goods from points of production to points of consumption, it plays a vital role in the economy of a country and of nations of the world. An efficient and adequate network of transport facilities enables territorial specialization of communities having basic resources of raw materials, fuel and labor, and having cost advantages over other regions. With this development, and the consequent urbanization brought about by industrial concentration, shippers and communities come to depend for their very survival on the assured flow of materials, so that unlike most other industries, transportation partakes of the dedicated nature of public utilities.¹

Ownership of the transport industry in private enterprise if confined to a few firms, confers a tremendous power over the fate of individuals, shippers, industries and even communities, who depend for their very existence on the smooth functioning of this industry. By controlling the freight rates and business decisions, these firms can alter the location of industries, maintain industries in unfavourable locations and prevent their establishment at more favoured places, thus reducing their dependants to mere pawns in a monopoly game, each pitted against the other, to a point where the carriers' total net profits would be the largest.

The strategic place thus occupied by the transport industry in the economy provides the essential justification to a nation to regulate the three main facets of that industry, namely, pricing of services, entry and adequacy of operations. While in the past, the primary task of regulation was based on the need to curb monopoly power and improve the performance of carriers in terms of equity between shippers and communities, it has come to be realized that this aim is really a part of the larger objective of providing the nation with an economic, efficient and adequate

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¹ On the significance of transportation, see generally Locklin, *Economics of Transportation* (6th ed. 1966), 1-16 (hereinafter cited as Locklin).

system that will promote its "economic well-being and growth"² by an optimum allocation of resources. For this reason, even a perfectly competitive market situation will not assure the nation of economy and efficiency in transportation, and market forces can probably never be relied upon to regulate the industry, although the users of the service may appear to get the benefit of lowest rates for their movements.³ However, every regulatory scheme must be justified by the economic results of the policy adopted, and the "case for continuing it or any particular regulatory policy must be that transport service is more adequate and efficient under that control or policy than without it or under a different regulatory policy."⁴

While the railroads had the virtual monopoly of inland transport supply in this country, as in others, the task of the regulatory authority was simple enough, to ensure that they played their part equitably, and a system of controls that assured reasonable rates and prevented unjust discrimination was all that was needed. This task was particularly easy because of the relatively few firms that were able to provide railroad services and a restriction of their operations would adequately serve the needs and interests of the shippers.

Due to the superiority of railways over all existing media of transport, little or no complaint was raised in the first quarter century of their operation, but with the emergence of competing media, especially the motor vehicle, as a significant force, the nature of regulation was transformed from one primarily concerning itself with "protecting the public" from possible monopolistic exploitation, to a concern with protecting one mode from the competitive aggressiveness of the competing mode; and in the second half of this century, with the almost universally pervasive intermodal competition in key areas and commodities, was conceived the need to co-ordinate and harmonize the operations of all carriers engaged in transport so that the scarce economic resources may be optimally allocated for the greatest advantage of the country.⁵ This new

² See the statement of objectives in the *National Transportation Act*, Stat. Can. 1966-67 c. 69, s. 1.

³ In the long run, rates set by perfect competition, which approximate cost levels, will not facilitate innovations and new investments when more attractive opportunities exist in other sectors, so that industry costs are likely to be higher than under imperfect competition.

⁴ Nelson, *Railroad Transportation and Public Policy* (1959), 112 (hereinafter cited as *Nelson*).

⁵ The pattern was similar in the United States, Canada and Great Britain: Nelson, *supra* n. 4, at 112.

outlook does not, however, dispense with the need for rate control; on the contrary, it accentuates it and while minimum rate control was unnecessary in the era of virtual monopoly, a setting of floor rates on a scale consistent with the inherent advantages of each mode of transport becomes vitally important to ensure that resources are optimally utilized. Furthermore, the type of competition which develops among transportation agencies, especially between different modes, is imperfect, and irregular or uneven in geographical incidence so that the intensification of such competition cannot be relied upon to eliminate tendencies for discrimination in rate making. There is thus "no valid justification for relaxation of regulatory policy to permit greater discrimination in rate making",⁶ although the MacPherson Royal Commission looked forward to the day "when because of effective competition throughout the nation, maximum rate regulatory machinery may be scrapped completely."⁷

A. *Regulated Versus Unregulated Sectors*

The new policy of co-ordination and harmonization, to achieve the desired transportation goals has to come to grips with the irritating problem presented by those inter- or intra-modal sectors of the industry which, due to administrative necessity or for other reasons, escape the control of regulation or are exempted therefrom. While inability to enforce regulations, as distinct from official failure to do so, is an imminent problem, exemptions, granted for reasons such as that the carriers concerned are not engaged in common transport, but under contract with particular shippers or that they haul their own merchandise for consumption or sale, strain the effectiveness of regulation when those sectors compete significantly with the common, regulated carriage. These unregulated carriers finding it easy to enter the industry and withdraw from it when conditions suit them, and charge rates well below those necessitated by the "public utility" character of common carriers,⁸

⁶ *Report of the Special Study Group on Transportation*, U.S. Senate Committee on Commerce, No. 445, 87th Congress, 1st Session, 422 (hereinafter cited as *Doyle Report*).

⁷ *Royal Commission on Transportation* (Can. 1961), (Vol. 2), 48 (hereinafter cited as *MacPherson Report*).

⁸ Being public utilities, common carriers must serve potential as well as actual demand at any time with little, if any, prior notice; because of this and the fact that transportation like human labour cannot be stock-piled in slack periods to meet peak demands, common carriers must always have reserve capacity, which increases their operating cost.

take the cream of business from the latter. These gaps in regulation call for an enlightened system of control that would enable the regulated modes and sectors to compete on a fair basis with their unregulated counterparts.

In this article the writer will discuss one of the main aspects of regulation, namely control of rates, with intermodal comparison, in light of the fundamental changes introduced by the *National Transportation Act*.⁹

B. History of Rate Regulation in Canada

When railways were first projected in Canada there were no general statutes under which they could operate and they had to ask Parliament to enact special statutes to confer powers necessary for their organization, operation and maintenance. The early special Statutes of Upper Canada were consolidated into the *Railway Act of Ontario*¹⁰ which was modelled on the corresponding English *Act* of 1845. Upon Confederation it became necessary to enact a new statute which would be applicable to all railways within the jurisdiction of the Parliament of Canada under Section 92(10) of the *British North America Act, 1867*¹¹ and accordingly the first *Federal Act* was passed on May 22, 1868.¹²

It was however not until the *Railway Act* of 1888¹³ that the federal Parliament asserted control of the regulation of rates. This *Act* was passed upon the recommendations of the first Royal Commission of 1886 which was appointed to inquire into the entire matter of rate regulation and to consider whether a body similar

⁹ Stat. Can. 1966-67, c. 69.

¹⁰ See R.S.O. 1877, c. 165. s. 23(10) of this *Act* required tolls prescribed by the railways to be approved by the Lt. Governor-in-Council, and provided for two Ontario Gazette publications before becoming legal.

¹¹ 30-31 Vict., c. 3.

¹² *An Act Respecting the Northern Railway of Canada*, 31 Vict., c. 86. For early special statutes incorporating railways, see MacMurchy & Denison, *Canadian Railway Act (1903) Annotated* (1905) 1. The earliest of these were the *Act Incorporating the Champlain and St. Lawrence Railroad*, 1832, 2 Will. 2, c. 58 (Lower Canada) the *Cobourg Railroad Co.*, 4 Will. 4, c. 25, and *London & Gore Rly. Co.*, 4 Will. 4, c. 29, both of Upper Canada.

¹³ 51 Vict., c. 29. However, the *Consolidated Railway Act* of 1879 provided that the Canadian Parliament might reduce the tolls charged by a railway company if that company's earnings exceeded fifteen percent calculated upon the capital expended in construction. For the Canadian Pacific Railway Company this figure was set at ten percent by section 10 of the Articles of Incorporation of that Railway (*C.P.R. Act*, 1881).

to the Interstate Commerce Commission¹⁴ proposed for the United States might serve the needs of the Canadian railways. By this *Act*, the Cabinet established a sub-committee of itself, the Railway Committee of the Privy Council, and gave it somewhat restricted powers of rate regulation.¹⁵ The Railway Committee was however not given jurisdiction over government railways nor over the Canadian Pacific Railways incorporated by a special *Act* in 1881.¹⁶

For various reasons, including its political character and lack of technical training, the Railway Committee did not function satisfactorily and on the recommendation of a one-member Royal Commission (Dr. McLean) the *Railway Act* was amended in 1903¹⁷ and an independent three-member Board of Railway Commissioners was created and charged with the duty of regulating rates, fares, demurrage, and other charges made by railway companies. The Board was given jurisdiction by the *Transport Act* of 1938¹⁸ over air¹⁹ and water transport and over agreed charges; and because of its enlarged duties its name was changed to the Board of Transport Commissioners for Canada that year. In 1949 the Board was charged with the responsibility of regulating interprovincial and international pipelines.²⁰

Motor carriage on highways since the 'twenties' has been regulated by provincial authorities and so long as it remained largely "short-haul" the federal government showed little or no interest. However the 1954 Privy Council decision in *Attorney-General for Ontario v. Winner*,^{20a} that provinces had no legislative authority to regulate extra-provincial operation, precipitated federal legislation and Parliament in that year enacted the *Motor Vehicles*

¹⁴ Established in 1887 by the U.S. *Interstate Commerce Act*.

¹⁵ Under s. 11(k) and 12 of the *Act*, the Railway Committee was empowered to "inquire into, hear and determine any application, complaint or dispute respecting tolls and rates for the transportation of passengers and freight." Other sections, e.g. 232 and 233, prohibited discrimination in rates.

¹⁶ See Wright, "An Examination of the Role of the Board of Transport Commissioners for Canada as a Regulatory Tribunal", 6 *Canadian Public Administration* (1963) 349 at 350; and Currie, *Canadian Transportation Economics* (1967) c. 16 at 384 ff. (hereinafter referred as *Currie*).

¹⁷ 3 Edw. VII, c. 58.

¹⁸ 1 Edw. VIII, c. 23, now R.S.C. 1952, c. 271.

¹⁹ This jurisdiction was transferred in 1944 to the Air Transport Board by the *Aeronautics Act*, now R.S.C. 1952, c. 2.

²⁰ The *Pipelines Act*, 13 Geo. 6, c. 20, R.S.C. 1952, c. 211. This jurisdiction was transferred in 1959 to the National Energy Board by the *Act* of 7-8 Eliz. II, c. 46.

^{20a} [1954] A.C. 541.

*Transport Act*²¹ but delegated power to provincial licensing boards hitherto regulating extra-provincial carriage.

Since 1949 interprovincial and international pipelines have been regulated by the federal government,²² but rates for transmission of commodities have been regulated only since 1959 when jurisdiction was transferred to the National Energy Board which was created on the recommendation of the Borden Commission set up in the previous year.²³

Although commercial transportation over inland waters antedates the railways by a couple of hundred years, the government did not until recently find it necessary to introduce any sort of rate regulation. This was because of the public ownership of waterways which enables competition to assert itself, in the absence of legal barriers to entry, at any time to wean away excess profit in the trade. In 1923 legislation was introduced to control rates on grain, but the Board of Grain Commissioners in whom the power was vested, has seldom found it necessary to prescribe maximum tolls.²⁴ However, rates on package freight on the Great Lakes and on both package freight and bulk goods on the Mackenzie River have been regulated by the Board of Transport Commissioners since 1938.²⁵

In the field of civil aviation, other than international carriage, the Air Transport Board was given power to regulate traffic, tolls and tariff by the *Aeronautics Act* in 1944,²⁶ but Air Canada, the principal carrier, was excluded from its jurisdiction. Air Canada operates as a subsidiary of Canadian National Railways, a government undertaking, and by the Trans-Canada contract with the Crown is required to maintain a tariff of charges competitive with other similar transportation services in North America.²⁷

Freight rates on international carriage, air and water, are outside the pale of national laws in view of the interests of several nations involved. Although attempts have been made from time to time by governments to impose their jurisdiction, these have largely

²¹ 2-3 Eliz. II, c. 59.

²² *Supra*, n. 20.

²³ Rate regulation was confined to gases and liquids as these were the only products transmitted by pipeline.

²⁴ 13-14 Geo. V, c. 49, now R.S.C. 1952, c. 153.

²⁵ *Supra*, n.18.

²⁶ Now R.S.C. 1952, c. 2.

²⁷ *Trans-Canada Air Lines Act*, R.S.C. 1952, c. 268, s. 15(2)(d); name changed to Air Canada by 13 Eliz. II, c. 2, in 1964.

been unsuccessful, and have provoked retaliatory measures by affected governments.²⁸

The pressures exerted by technological developments and the changed conditions of transportation have challenged the entire gamut of regulation based on monopolistic theories, and in formulating the national transportation policy the federal government has attempted to introduce sweeping changes in the rate structure, primarily of the railways, in an effort to ensure a viable, competitive transportation system. It is the writer's endeavour to reconcile the objectives of national policy²⁹ in the area of the new rate structure introduced by the *National Transportation Act*³⁰ in the diverse modes of carriage.

II. THE REGULATION OF RAILWAY RATES IN PERSPECTIVE

Before discussing the significant changes introduced by the *National Transportation Act*, it is necessary to analyse in depth the anatomy of rate structure and control that stood up to the rigors of competition injected into the system during this century, and more intensively since the second half. An elaborate structure has emerged since the railways first commenced operations and over the years it has had considerable impact on rate making by other modes of transport that challenged their superiority and steadily eroded their stronghold by means of techniques perfected by the railways themselves.

In the earliest days of the railways, freight rates were not based on any well-defined principles. Individual rates were sometimes put into effect on an experimental basis, and at times by special agreements with shippers, and so long as they maintained their superiority over existing media of transport there was little reason to provide a theoretical basis for the system.³¹ Shippers and communities vied with each other and their competitors and relied on the railways to hold the scales evenly at all times. They thought that the rates were based on some mysterious principles of equity and that they acquired a vested interest in them. As a matter of

²⁸ See *Shipping Contracts and Commercial Documents Act*, 1964, c. 87 (U.K.).

²⁹ These objectives stem from the *MacPherson Report* (*Supra*, footnote 7) and hence the discussion will closely follow their observations and recommendations.

³⁰ Stat. Can. 1966-67, c. 69.

³¹ *MacPherson Report*, (vol. 2), *supra* n. 7, at p. 23.

fact, the underlying power to determine rates was slowly revealing itself and as every monopolist knows today, the railways found that there was a "floor" below which it would not, even in the short run, pay them to move the traffic, and a "ceiling" which cannot be penetrated without significant loss of the traffic. Within this range, whose width varied with the consumers' economic utility of the goods concerned, there was room for considerable manipulation, and once this scale of consumer preferences was known, each commodity could be charged to the limit set by the marginal unit.³² This is really the basis of discriminatory or differential pricing and is the foundation of classification.

The first classification of commodities was published by the Grand Trunk Railway in 1874. In this first classification commodities were grouped in four classes, with the fourth class serving as a basis for determining rates for other classes. Agricultural commodities and lumber were granted special ratings. Articles of the same kind having similar characteristics were grouped together in the same class as far as possible, but as these articles were very numerous³³ and the classes few,³⁴ many diversities had to be ignored in order that classification be of practical utility; and inequalities between commodities were unavoidable.

All articles embraced in a class are usually charged the rate of that class, whatever it may be. The railways make use of a mileage scale which is graduated according to distance.³⁵ Most goods are allocated to sub-classes within each class, one referring to

³² This principle is variously described as "charging what the traffic will bear" or, put negatively, "not charging what the traffic will not bear", or as the MacPherson Commission prefers to call as the "movement value" of the commodity (*MacPherson Report*, (vol. 2), at p. 24).

³³ Over 27,000 in Canadian Classification No. 22 issued Nov. 15, 1966.

³⁴ From four classes the classification grew to ten — Classes 1 to 10; Class 1 being the highest (except for multiples of the first class for articles of extraordinary value) and Class 10 being the lowest. A new classification was recommended by the Turgeon Royal Commission in 1951 (hereinafter cited as *Turgeon Report*) at 121 (and introduced by 1955) since the old system did not provide for flexibility for including new classes necessitated by growing commerce. In this new classification Class 100 is substituted for Class 1 so that lower classes are made up as a percentage of Class 100. A separate classification is used by Express Companies and approved by the Board of Transport Commissioners under ss. 366 and 367 of the *Railway Act*, R.S.C. 1952, c. 234.

³⁵ Generally tapered, *i.e.* the scale does not increase in proportion to the distance, and in long hauls often places are grouped together ignoring vast distances.

"carload" lots of specified weight, the other to "less than carload" lots which has usually a higher rating than carloads.³⁶

In grouping articles together in a class for the purpose of fixing rates, several factors are usually deemed to have a controlling effect. Among these may be mentioned the competitive element, or rates made necessary by competition, the bulk and weight, value, hazardous and extra-hazardous freight, liability to waste or injury in transit, the facilities required for particular or special shipments (*e.g.* chilling, refrigeration, ventilating, and heating), the volume of business, *i.e.* the tonnage movement, and the direction in which the freight moves. Freight occupying a great deal of space must to some extent be charged for that space; or if it be freight of very great value, a higher rate may be charged than if it be of very little value, on account of the responsibility connected with the service, and the corresponding benefit to the owner.³⁷

Some commodities which move in bulk have special tariffs of their own, in which case they supersede the class rate for them if there is one. They are generally established after negotiations with shippers and are in terms of a discount on the corresponding class rate, the discount varying from product to product and from one area of the country to another depending on traffic conditions peculiar to the movement concerned. Many important commodities such as grain, livestock, coal, ore, sand, gravel and stone, lumber and pulpwood, gasoline, cement, and fertilizers, practically always move on commodity rates.

While the railways had monopoly of surface transportation, class and commodity rates were the two most important tariffs used by them.³⁸ Although cost factors were considered, in determining the tariffs, the "value of service" principle predominated, so that high value commodities bore a greater share of the rate burden than low value commodities, the class system operating as the "great leveller". Tapering the rates with distances resulted

³⁶ For an excellent discussion on Classification, see *Currie, supra*, n. 16, c. 7 and *Locklin, supra*, n. 1, c. 9.

³⁷ Freight rates influence in turn the location of industries, of market centres and areas covered by each market; see *Locklin, supra*, n. 1, at 54-55. Class rates produce the highest relative profit and in the days of monopoly, the railways derived a substantial proportion of their revenues from this rating. The proportion now is not significant.

³⁸ Railways often granted "promotional" or "developmental" rates. This privilege was recognized by s. 349(1) of the *Railway Act*, R.S.C. 1952, c. 234, but now denied by the 1966-67 revision.

in some assistance to the long-haul movements. The railways often took upon themselves the role of equalizer of competitive positions of widely separated producers in the market place, without regard to transportation costs involved, and often justified it on the basis that the more distant producer would not move into the market and thus the carrier would lose that volume.

The railways meted out distributive justice by ensuring that commodities which competed in the same market bore the same rate or the same differential, and shipper complaints often stemmed from inequality, and even equality, in treatment on the criteria established by the railways themselves. Occasionally, however, the complaint of discrimination resulted from charging a much higher or lower rate than ought to have been charged compared to the charge levied against another in the same or some other class. This system of tariffs, modified only by competition from other railways, reached a stage of sophistication where everybody seemed to be satisfied so long as the game was played according to rules, and resulted in the highest possible revenue to the railways. The task of regulatory authority was simply to protect this happy position of the shipper when the railways tended to swing the balance unfavourably provoking charges of unfairness, or undue discrimination, by the shippers. Thus the regulatory authority, the Board of Railway Commissioners, played a second fiddle to the railway who called the tune.³⁹

Within this "ideal" system there were, of course, some distortions, and as some of these are considered by the regions concerned as symbolic of their rights, it is necessary to dwell upon them at length. To the railways, however, they were not really distortions but an exercise in shrewd enterpreunership, and in at least one of them they have still everything to gain.

³⁹ The Board no doubt had considerable power in disallowing or delaying the rates proposed by the railways, and this often hampered their monopoly designs, but under the system of control, if railways played their part skilfully they had nothing to fear. For a further discussion of the regulatory control, see *infra*, at p. 310 ff.

⁴⁰ The *Crow's Nest Pass Act*, Stat. Can. 1897, 60-61 Vict., c. 5, gave effect to this Agreement.

A. Rates on grain: The Crow's Nest Pass Agreement

The first distortion introduced into the traditional rate structure was the 1897 Crow's Nest Pass Agreement⁴⁰ between the Dominion Government and the Canadian Pacific Railway whereby in consideration of a government subsidy of about \$3.4 million⁴¹ the C.P.R. undertook to construct a railway line from Lethbridge through the Crow's Nest Pass into the Kootenay area of British Columbia where coal and other mineral discoveries had been made, and to reduce freight rates on a) grain and flour,⁴² and b) a number of articles⁴³ important to settlers and farmers on their movement from central Canada to the Prairies, in perpetuity,⁴⁴ on all points on the C.P.R. lines then in existence⁴⁵ in the West to Fort William and Port Arthur and all points east, and on points in existence in eastern Canada to the aforementioned points to the West respectively.

The reductions on eastbound traffic (of grain and flour) were designed to improve the competitive position of the cash staple of the Prairie region and thus to encourage that type of economy without which the regions could not be developed. The reductions on westbound traffic were designed to encourage the settlement of the West by eastern Canadian farmers.⁴⁶ The Crow's Nest rate reductions as a group, therefore, were clearly directed toward the furtherance of economic development in the Prairie region and toward the linking of that development with the eastern Canadian economy.⁴⁷

Except for a short period between 1920 and 1922 the Crow's Nest Pass rates on grain and flour were never above the 1899 level

⁴¹ The subsidy was \$11,000 per mile subject to a maximum of \$3,600,000.

⁴² The reduction was up to 3¢ per 100 lbs. See also *infra*, footnotes 48 and 50.

⁴³ The reduction varied from 10% to 33⅓%, commonly the former figure (e.g. 10% on agricultural implements, wire, iron nails and spikes, binder twine, roofing and building paper, window glass, paint and oils and furniture; 20% on coal and oil; 33⅓% on green and fresh fruits).

⁴⁴ S. 1(d) and (e) of the *Crow's Nest Pass Act*: "no higher rates than such reduced rates or tolls shall be hereafter charged by the company between the points aforesaid" — a provision quite logically interpreted by the West as an undertaking in perpetuity.

⁴⁵ There were only 3,000 miles of C.P. Rly. trackage then in existence.

⁴⁶ See the Submission of the Province of Saskatchewan to the MacPherson Royal Commission on Transportation, (vol. 2), 1960, entitled "*An Historical Analysis of the Crow's Nest Pass Agreement and Grain Rates: A Study in National Transportation Policy*".

⁴⁷ *Ibid.*, at p. 10.

but since 1922 have been maintained at that level.⁴⁸ The temporary increases in that short period were authorized by Parliament under the *War Measures Act*⁴⁹ to meet an emergency condition.

In 1925 Parliament amended S. 325 of the *Railway Act*⁵⁰ suspending the Crow's Nest Pass Agreement indefinitely and cancelling Crow's Nest Pass rates on all commodities other than grain and flour and making these rates applicable to all grain and flour

⁴⁸ The following table from the Submission, *supra*, n. 46 at p. 39 gives an idea of the grain rates:

RATES ON GRAIN TO FORT WILLIAM-PORT ARTHUR
FROM SELECTED POINTS

(In cents per 100 pounds: Crow's Nest Pass Rates = 100 in Index)

	From Winnipeg 420 miles		From Regina 776 miles		From Calgary 1242 miles	
	Cents	Index	Cents	Index	Cents	Index
Before August 1898	17	121.4	23	115.0	29	111.5
August 1, 1898 —						
August 31, 1899	15½	110.7	21½	107.5	27½	105.8
September 1, 1899 —						
October 6, 1903	14	100.0	20	100.0	26	100.0
October 7, 1903 —						
May 31, 1918	10	71.4	18	90.0	24	92.3
June 1, 1918 —						
August 11, 1918	12	85.7	20	100.0	26	100.0
August 12, 1918 —						
September 12, 1920	14	100.0	24	120.0	30	115.4
September 13, 1920 —						
December 31, 1921	19	135.7	32½	162.5	40½	155.8
January 1, 1921 —						
November 30, 1921	18	128.6	31	155.0	39	150.0
December 1, 1921 —						
July 5, 1922	17	121.4	29	145.0	36	138.5
July 6, 1922 to date	14	100.0	20	100.0	26	100.0

⁴⁹ R.S.C. 1927, c. 206.

⁵⁰ Stat. Can. 1925, c. 52, Sections 2 and 3: section 325(5) and (6) is now section 328(6) and (7), R.S.C. 1952, c. 234. The *Act* was amended as a result of the Supreme Court of Canada decision in *Re Crow's Nest Pass Rates* [1925] S.C.R. 155 that the Agreement covered only points on the C.P.R. lines as they existed on the date of the Agreement, *viz.* 1897. The *Act* was further amended to include Rapeseed in the term "grain" as a result of another decision of the Supreme Court of Canada in *Bogoch Seed Co. v. C.P.R. & C.N.R.* [1963] S.C.R. 247, holding "rapeseed" was not "grain" within the meaning of section 328 (Stat. Can. 1960-61, c. 54, s. 2). The rates however applied to certain by-products of the milling, distilling and brewing industries and also to certain feed products not included in the strict interpretation of the terms "grain" and "flour".

moving eastward on lines from any railway point to Fort William and Port Arthur.⁵¹

The grain rates were, by decisions of the Board of Railway Commissioners, applied on a uniform mileage basis to all lines in the grain area, including:

- a) Westfort and Armstrong,
- b) Churchill (on lines over the Hudson Bay Railway) *for export*, and
- c) Pacific coast terminals (Vancouver, New Westminster, Victoria and Prince Rupert) *for export*.

The statutory grain rates have thus been regarded by the West as a "charter of Prairie agriculture" and have always been and remain matters of public policy.⁵² It was apparent after World War II that due to inflation these rates would not even cover out-of-pocket expenses. Besides, competition from other modes of transportation, notably highway, had cut down both the volume of other kinds of freight and the ability to charge rates for hauling it. While the railways still had monopoly over inland transportation, it was easy for them to burden shippers of other commodities both within the Western region and outside of it with any shortfall in anticipated earnings from grain movement, but this was no longer possible and the railways claimed before the Turgeon Commission (1951) and the MacPherson Commission (1960) that they were losing substantially and that in any case Parliament had abrogated the Agreement in 1925. While dismissing the argument that the low statutory grain rates cast an unfair burden on shippers of other commodities, as unproven, the Turgeon Commission recommended that Parliament should make whatever changes in these rates upward or downward it may appear just and reasonable to make as time goes on,⁵³ but no action was taken. Although the then Prime Minister (The Rt. Hon. John G. Diefenbaker) announced that the MacPherson Commission's terms of reference did not cover the Crow's Nest Rates, the Commission in considering the overall rate structure had to deal with these rates and recommended that "upon submission and approval of reports of the variable cost of moving grain and of revenue therefrom in the

⁵¹ In 1925 there were 17,000 miles of railway lines and three railways (C.P.R., C.N.R. and Northern Alberta Rly.) operating in that region.

⁵² MacPherson Report, (vol. 3), *supra*, n. 7, at p. 403. Currie, *supra*, n. 16, at 101 remarks that "probably in no part of the world are rates held down by statute to the levels prevailing in the 19th century".

⁵³ *Turgeon Commission Report* (1951) at 252.

previous year, the railways be granted annually a sum of money equal to the shortfall of revenues on variable expenses plus \$9 million for C.P.R. and \$7.3 million for C.N.R. as contribution to overheads. When the process of rationalizing plant by the elimination of unprofitable branch lines has substantially progressed, or when it appears that there has been any substantial change in the overhead costs of the railways, the constant costs of the railways should be re-evaluated".⁵⁴

The MacPherson recommendation was not accepted by the Government and by the time the *National Transportation Act*⁵⁵ was passed, many of their findings were out of date. When this *Act* was in the Committee Stage, the then Transport Minister while assuring that "Crow's Nest Pass rates are frozen for all time to come and cannot be reopened", proposed that the new Commission (the Canadian Transport Commission) make a review of the cost of carrying the grain without endangering the rates in any way whatsoever, in order to verify the claim that the Crow's Nest Pass rates are not compensatory, so that the Treasury, and not other freight shippers in the rest of Canada, would pay. This plan was defeated because the Members of Parliament for the West contested the idea that the railways were making losses and that, if they were, this could be avoided by rationalizing, pooling and better management.

The *National Transportation Act* made a small amendment to the *Railway Act*,⁵⁶ by putting on a statutory footing the westward bound export grain rate which was included by the Board of Railway Commissioners in 1925 within the Crow's Nest Pass arrangement. The discrepancy between domestic grain rates and export grain rates were taken into account and by S. 471 of the *Railway Act* (added by the *National Transportation Act* s. 74(2)), the new Commission is required to undertake a study of the differences between domestic and export rates and report to the Governor in Council for appropriate action in the public interest.

B. "At and East" grain rates

"At and East" grain rates are not based on any statutory requirement but are agreed to by the Railways in order to retain export traffic for Canadian ports in the East which compete with U.S. ports on the Atlantic coast. The rates apply to bulk export

⁵⁴ MacPherson Report (vol. 1) 65-66.

⁵⁵ Stat. Can. 1966-67, c. 69.

⁵⁶ R.S.C. 1952, c. 234, s. 328(2).

grain brought by ships from the Great Lakes, Georgian Bay and St. Lawrence River Ports to railway points on the eastern lake shore (Midland, Goderich, etc.) and thence moving by rail to Montreal, Halifax and other eastern Canadian ports.

These rates in some instances were suspected of being as low as and even lower than statutory grain rates. The railways sought to increase these rates effective January 1961 on the ground that they were below the variable cost of carrying the traffic. The Board after investigation issued Order 103860 on February 23, 1961 disallowing the railway's proposal but fixing a rate of 33¢ (wheat basis) from the Georgian Bay and related ports to St. John, West Saint John and Halifax, the rates on other grains from and to other ports being linked to it. The Railways accordingly published the level of rates found reasonable by this order, but before these rates went into effect, the Cabinet suspended the Board's findings. This suspension continued from 1961 and the former lower rates applied on this export grain traffic until 1966.

The *National Transportation Act*⁵⁷ amending s. 329 of the *Railway Act* authorized the payment of a permanent subsidy for the movement of this grain. The subsidy is based on the difference between the freight rates that were in effect on November 30, 1960 and the compensatory rates approved by the Board.⁵⁸ This subsidy is not a heavy drain⁵⁹ because the grain movements have seriously declined since the St. Lawrence Seaway was deepened in 1959 permitting ocean going ships to call directly at Lakehead elevators for receiving grain; and it is also in line with the overall government policy for grain exported from the West, which has to make long voyages to far away markets.

C. *The Maritime Freight Rates Act*

Like the Crow's Nest Pass rates on grain, the *Maritime Freight Rates Act*⁶⁰ is a prominent feature in the railway rate structure and is the transportation *Magna Carta* of the East. The *Act* was passed on the recommendations of the Duncan Commission ap-

⁵⁷ Stat. Can. 1966-67, c. 69, s. 50.

⁵⁸ The rates on export flour were pegged to the level prevailing on September 30, 1966, and a subsidy is payable if these rates are found non-compensatory

⁵⁹ The subsidy paid to railways other than C.N.R. in 1966 amounted to \$2,176,200; *62nd Report of the Board of Transport Commissioners for Canada* (1966) at 11. The annual C.N.R. subsidy under this head averages \$12 to \$13 million.

⁶⁰ R.S.C. 1952, c. 174.

pointed in 1925 to deal with the complaint of the three Maritime provinces that they got a raw deal under the Confederation. At the time of the Confederation one of the big problems was the economic disparity which existed owing to geography. New Brunswick and Nova Scotia were two of the four partners in the Confederation and alleged that they entered into it mainly on the strength of the transportation promises which were made to them.

Since 1912 the railway rates in the Maritimes had been advancing at a much higher pace than in the rest of Canada, and this caused considerable restlessness in that region. Like the West, the Maritimes are completely dependent on the railways, and the Duncan Commission recommended an immediate reversal of these advances by reducing the 1927 level of freight rates by 20%, the reduction to apply to all movements within the Maritimes and to the Maritime portion of the through rate on all traffic originating within that region and destined for points outside of it.⁶¹

Accepting these recommendations, Parliament passed the *Maritime Freight Rates Act* in 1927 and agreed to reimburse the railways for the loss in revenue consequent upon the reduction. The *Act* made it clear that the rates on the traffic movements from the "select territory"⁶² may be varied in the normal manner to take account of the variations in railway operational costs, and the reduction "shall be on the general rate level"⁶³ but that "any variation in rates within the territory or outside of it shall not destroy or prejudicially affect the statutory advantages conferred by the *Act* in favor of persons and industries within that territory".⁶⁴

When the *Act* was passed the Railways had a virtual monopoly over the transport market, but since 1927 the development of other modes of transport, notably trucking, in central Canada, upset this nice equilibrium envisaged for the Maritimes by the *Act*. The intense competition from trucking forced the railways to struggle for freight in Central Canada by offering competitive rates and thus the statutory advantages of the Maritimes were effectively diluted. Were the competition not to be met, the railways would have been forced to withdraw significantly from those movements,

⁶¹ S. 4 of the *Act* defines "preferred movements" and s. 5 for greater certainty, defines movements that are not preferred.

⁶² This is defined by the s. 7 of the *Act* to cover the four Atlantic Provinces (New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland the last added under *Terms of Union* in 1947) and that part of Quebec east of Levis and Diamond Junction.

⁶³ S. 3(2)(6) of the *Act*.

⁶⁴ S. 7.

to the detriment of shippers in non-competitive regions, including the Maritimes, since the operational costs would have to be spread over a contracting amount of freight. This disparity in rates forced by competition obviously affected the Maritimes prejudicially and thus against the express provisions of the *Act*, but the result of withdrawing from those movements by not meeting truckers' competition would be even more detrimental to the Maritimes, since rates would go up in that region, and it would not in any way improve their competitive position as against the Central Canadian manufacturers, producers and shippers who could easily desert the railways and take their business to the truckers. This was the rationale of the decision of the Supreme Court of Canada in the *Potato Freight Rate* case⁶⁵ which nullified significantly the statutory advantages enjoyed by the Maritimes. As a result, the 20% reduction was confined to class and non-competitive commodity movements which account for about half of the total freight of the Maritimes.

The principal beneficiaries under the *Act* are thus the railways to whom each year \$10 to \$15 million are farmed out as subsidy, the C.N.R. receiving approximately 85% of it and the other railways, including C.P.R., sharing the remainder. This subsidy also enables the railways to ward off competition from other modes of transport who have to struggle against a heavily subsidized rival and the MacPherson Royal Commission, whose recommendations were reiterated by the Economic Intelligence Unit, recommended,

- (i) the abolition of the subsidy on movements wholly within the "select area" (which amounted to 55% of the total subsidy or \$7.5 million),
- (ii) the extension of the subsidy on westbound movements to all types of licensed public common carrier, and
- (iii) the retention of the subsidy on movements within, to and from Newfoundland and the select area where there is as yet no really pervasive competition.⁶⁶

The MacPherson Commission's recommendations were not accepted by the Government, but in 1968 the Government decided to grant the truckers the same subsidy as granted to railways.⁶⁷ The latter suggested further that the Dominion Government extend

⁶⁵ *Nova Scotia v. C.N.R.* [1937] S.C.R. 271 affirming the decision of the Board of Railway Commissioners (1936), 44 C.R.C. 289.

⁶⁶ MacPherson Report. Vol. 2 c. 8. XII Economic Intelligence Unit's Report on *Atlantic Provinces Transportations Study* (1967) Q.P. Ottawa, at 14 ff. 67.

⁶⁷ The Atlantic Region Freight Assistance Act, Stat. Can. 1968-69, c. 52.

its assistance for the construction of additional roads and harbours in the Maritimes.

The *National Transportation Act* froze all the prevailing rates in the select territory for a period of two years and made special provision for carload rates on lumber, coal and coke between two points in Canada one or both being in select territory, pending evaluation of the E.I.U. report.

In view of the whittling down of the effectiveness of the *Act* by the 1937 Supreme Court decision,⁶⁸ the Maritimes appear not to be anxious to retain the benefits under the *Act* if more economic aid could be obtained to improve the overall condition to make it a vibrant, efficient region.

D. *The Freight Rates Reduction Act, 1959*

The Federal Government which had become increasingly concerned at the effect of higher freight rates on the transport costs of outlying areas, decided in 1959⁶⁹ (the precipitating event being the December 1958 rate increase of 17% authorized by the Board of Transport Commissioners) to ameliorate the effects of horizontal rate increases and in return for a \$20 million amount subsidy directed the railways to roll back the authorized 17% to 10% and later to 8%. Shortly after this grant, the Railways agreed to a new labour contract with their employees and in order that the revenues to pay the substantial increases under this contract may not be obtained by requests for further increases in rates, the government granted an additional subsidy of \$50 million for 1961 and subsequent years.

During the seven years from August 1959 to December 1966, the Board of Transport Commissioners disbursed \$136.1 million under the \$20 million "roll back" subsidy and \$360.7 million under the \$50 million and other special subsidies.⁷⁰

Under the *National Transportation Act*, the Freight Rates Reduction subsidy has been replaced by a general subsidy of \$110 million⁷¹ which would be phased out over a period of eight years. The only future subsidies that the railways will get from Parliament will be

⁶⁸ *Supra*, n. 65.

⁶⁹ *Freight Rates Reduction Act*, Stat. Can. 1959, c. 27.

⁷⁰ 62nd Report of the Board of Transport Commissioners for Canada, (1966) at 13. More than ninety-six percent of these subsidies went to C.N.R. and C.P.R. and the balance to twelve other small railways.

⁷¹ S. 469 *Railway Act*, R.S.C. 1952, c. 234 as amended by Stat. Can. 1966-67, c. 69, s. 74(2).

for compensating them for providing certain uneconomic services and facilities deemed as being in the public interest,⁷² and they have no relation to the "roll back" subsidy. The railways will therefore have to compensate themselves by increases in rates wherever they may find it easy to impose, that is primarily on class and commodity (non-competitive) rated traffic.

E. Operation of regulatory control under the old regime

Before discussing the impact of competition on the traditional rate structure, it is as well at this stage to advert to the system of control that was instituted for the regulation of market behavior of the railways. Briefly this control comprised:

- (1) Prohibition of unjust discrimination,⁷³
- (2) Disallowance and substitution of tariffs if found unjust or unreasonable,⁷⁴
- (3) Filing and Publication of freight tariffs,⁷⁵
and
- (4) Postponement of the effective date of tariff and fixing rates.⁷⁶

(1) Prohibition of Unjust Discrimination

The earliest forms of regulation were designed to curb excesses of monopoly power of the railways. While the principle of differential pricing was accepted as economically sound, the curbs included,

(a) *Prohibition of personal discrimination* — the worst form of discrimination whereby certain shippers would be favoured as against others and corruption would become rampant;⁷⁷

(b) *Prohibition of commodity discrimination* — whereby the differentiation in rates was not justified by accepted principles of rate making. Discrimination becomes undue or unjust only when different rates are charged on two commodities having the same transportation characteristics such as value, bulk, susceptibility to

⁷² *National Transportation Act*, Stat. Can. 1966-67, c. 69, s. 42 (Abandonment and Rationalization of Lines or Operation).

⁷³ *Railway Act*, R.S.C. 1952, c. 234, ss. 317(2), 336 and 337.

⁷⁴ *Ibid.*, s. 328.

⁷⁵ *Ibid.*, ss. 333 and 334.

⁷⁶ *Ibid.*, s. 328.

⁷⁷ The Board of Railway Commissioners had effectively controlled the granting of free passes, rebates, conniving at false billing, etc., and hence personal discrimination is now past history.

loss and damage, regularity of movement, etc.; it also becomes unreasonable when the rates differ for two shipments of the same article of the same weight and moving in the same direction over the same distance;⁷⁸

(c) *Prohibition of place discrimination* — whereby different localities were unjustly discriminated against in respect of tolls.⁷⁹ Charges of unjust discrimination frequently came before the Board as complaints of localities; cities, boards of trade, manufacturers' associations, and chambers of commerce, were the complaining parties although in reality the charges related to persons and commodities.

(d) *Prohibition of "long-and-short-haul" discrimination* — a particular form of place discrimination, which consisted in charging a larger aggregate amount for the carriage of persons or property for a shorter than a longer distance, when both hauls were over the same line and in the same direction, and the shorter was included in the longer distance.⁸⁰ It was only in exceptional situations where the Board was satisfied that competition from other carriers or modes of transport dictated such discrimination, that it would allow such discriminating toll.

(2) *Disallowance and Substitution of Tariffs*

The most important power which the Board possessed was under Section 328 to disallow any tariff or any portion thereof that it

⁷⁸ The Board of Railway Commissioners, in *Calgary Livestock Exchange v. C.N.R. & C.P.R.* (1923), 29 C.R.C. 207, held that a complaint of unjust discrimination is not sustained merely by quoting difference in rates: the shipper must prove that his business has actually been injured by the rate disparity. Proof that the products are competitive and sold in the same market is acceptable. Carload and less-than-carload quantities can be charged at proportionally less rates and so also differences may be based on distances under s. 317(3).

⁷⁹ S. 317(4). Permissible discriminations are (a) those based on differences in operating conditions, such as heavy grades and sharp curves, existence of numerous bridges, climatic differences, or, in brief, unusual conditions... making for higher operating expenses on certain lines; (b) those based on group or blanket rates which result in equality of charges for distances varying by hundreds of miles (permitted under s. 317(3)); (c) rates in the opposite direction, if, due to empty car movements or "up grade" movements, the direct costs are higher or lower (this occurs especially where commodity rates are charged in one direction and class rates in the other); (d) sometimes competition depresses rates in one direction and not in the other. For a detailed discussion, see Locklin, *supra*, n. 1 c. 23.

⁸⁰ See *infra*, p. 313.

considered unjust or unreasonable or contrary to any of the provisions of the *Railway Act*.⁸¹ It was this power that was frequently invoked in many of the rate cases. The rates would be challenged by shippers as unjust or unreasonable if they were discriminatory (i.e. comparatively unreasonable) or so high as to put those dependent on the railways to an unreasonable burden (i.e. unreasonable *per se*); in other words, the general provisions governing "equality of tolls in respect of similar traffic" laid down by Section 317 were the basis of action by shippers, or by the Board when it acted of its own motion.

In determining the validity of shipper complaints, the Board considered various factors, no one factor being accorded full weight.⁸² One rule was the rate per-ton-per-mile which had the simplicity of bringing the rates down to the narrowest point of scrutiny; but as this rule excluded consideration of many circumstances and conditions which enter the making of rates, it was rejected as an infallible measure of the reasonableness or otherwise of the rate or the toll.⁸³ Similarly the Board held that average revenue per ton-mile of all freight movements would not justify a reduction of toll.⁸⁴ Furthermore, the Board held that the reasonableness or unreasonableness of freight rates could not be gauged solely by the ability or inability of shippers under depressed market conditions to market their products with profit under existing rates.⁸⁵

It would appear that the Board controlled only the gross forms of monopoly power under Section 328 and in such rare cases it would order the Railways to substitute a satisfactory rate or, in default, the Board would prescribe such tariff that it considered reasonable. Rate controversies thus almost invariably related to rate relationships under place discrimination⁸⁶ and not to the reasonableness of the rates *per se*. Rates might be held to be unduly preferential or prejudicial under Section 317(4) although not unreasonable under Section 328.

⁸¹ This included the statutory grain rates, Maritime rates, etc. See *supra*, pp. 302-309.

⁸² Some of the factors considered by the Interstate Commerce Commission of the U.S. (and accepted by the Canadian counterpart) are mentioned by MacMurchy & Denison in *Railway Law of Canada* (1922) (3rd Ed.) at 592-596.

⁸³ *Dawson Board of Trade v. White Pass and Yukon Ry. Co.* 11 C.R.C. 402.

⁸⁴ *Western Ontario Municipalities v. G.T.R.* 18 C.R.C. 329.

⁸⁵ *Perrior v. Express Traffic Assn.* (1923) C.R.C. 156; *The Twenty-One Percent Case* decided by the Board of Transport Commissioners for Canada on March 30, 1948, 62 C.R.T.C. 1 (1948).

When the power of disallowance was invoked by the Board, considerable delays occurred in the disposition of the case. However, as opposed to the "general rate revenue cases" where railways were unable to earn substantial portions of revenue for a considerable time, especially in the post-war inflation period, the disputes of rates on particular commodities at the instance of any shipper or class of shippers did not so threaten their financial position.⁸⁷

(3) *Filing and Publication of Tariffs*

Under the old system of regulation one of the important safeguards available to the shippers was the requirement that every toll, in order to be lawful, be filed with the Board and published in accordance with its directions. A toll advancing tariff could be effective only 30 days after filing, and a toll reducing tariff 3 days after filing. This requirement was intended to give some sort of stability to the rates, and covered only non-competitive class and commodity tariffs. In the case of competitive tariffs, the railways had to file them with the Board and specify their effective dates. In each case, the Board had the power to disallow, suspend or postpone the tariffs under the overriding jurisdiction conferred by section 328.⁸⁸

The requirement of filing and approval before effectiveness of the tariff placed the railways in an unfortunate position when facing competition from other modes not subject to similar restrictions;⁸⁹ and on the recommendations of the Turgeon Commission,⁹⁰ the railways were permitted to put into effect a competitive rate immediately upon issue and before filing; but they were still required to justify the rate at the time of or shortly after filing.⁹¹

The 1967 revision made important changes in the matter of filing and approval. No change was made with respect to advancement of tariffs but the procedure for tariff reduction, since normally it

⁸⁶ *i.e.* under s. 317(4) of the *Railway Act*.

⁸⁷ This phenomenon has been ably discussed by the Turgeon Commission (1951) in their Report, c. II. See also Currie, *supra*, n. 16 at 73 ff.

⁸⁸ *Railway Act*, R.S.C. 1952, c. 234, s. 328.

⁸⁹ The Board however did its best to assist the railways by approving of rates at very short notice, even as short as one day's notice. See Currie, *supra*, n. 16 at 21.

⁹⁰ Turgeon Report, *supra*, n. 34 at p. 86.

⁹¹ By s. 334 the railways were required to prove that (a) competition existed, (b) the rate was compensatory and (c) not lower than necessary to meet competition. They were required further to furnish relative information regarding competition that they were facing.

was put through to meet competition, was equated with competitive tariffs, so that a reduction would be effective immediately upon issue and before filing with the Commission. The Commission however is given power to disallow any rate, competitive or non-competitive, under an entirely new framework: the competitive rate may be disallowed after filing if it is proved, on investigation, that it is not compensatory; a non-competitive rate may likewise be disallowed if it takes advantage of the carrier's monopoly power.⁹²

(4) *Postponement or Suspension of the Effective Date of Tariff*

Under the old section 328, the Board had also the power to postpone or suspend the effective date of the tariff and thus modify the provisions of Section 333. This power would normally be exercised on complaints from the shippers and communities affected (naturally where the rates were advanced) but the Board could of its own motion investigate into the reasonableness of the new or modified tariff. This power could be invoked even after the tariff had become effective. The Commission under the 1967 Act does not have such power since under the new framework it is unnecessary.

From the above it is apparent that while the railways had a monopoly of surface transportation the regulatory control in normal times was not restrictive of their legitimate rate decisions and was dictated only by the need to protect shippers and communities tied to the railways. Such a regime was highly satisfactory to all the interests involved, though it did not yield the largest economic gain to the nation, nor did it make for efficiency. But in times of rapidly rising costs the railways were unable to earn substantial revenues due to delays resulting from challenges to their proposals to increase rates, and this was one of the greatest difficulties experienced by them. However, the restraint on rates in the wake of keen competition fostered by other modes forced the railways to concentrate on efficiency and economy, and hastened such innovations as dieselization, centralized traffic control, electronic car tracing and other automation devices, piggyback method and container services.

⁹² The overriding power of the Board under the old s. 328 has been abrogated and the authority (now the Canadian Transport Commission) could only disallow rates under the new ss. 334 and 336 (the minimum and maximum rate control provisions). The Commission however may have the same power of disallowance under s. 16 of the *National Transportation Act*, Stat. Can. 1966-67, c. 69. (See *infra*, p. 332).

F. *The Long- and Short-Haul Discrimination*

The railway industry operates on what economists term the law of increasing returns or diminishing costs. Since a large proportion of a railroad's expenses are fixed or constant, and does not vary with the volume of traffic, it would pay the railroad to continue to carry traffic at a rate that would at least cover the "movement expenses" or variable costs, and contribute something to constant expenses.⁹³ If under pressure of competition a railroad is forced to carry at this low rate, naturally its anticipated level of earnings will fall and it will have to cover these from other, non-competitive traffic whose rates will correspondingly rise.⁹⁴ If it does not meet the competition, it will lose that volume of traffic and the rates generally for the remaining traffic may have to be raised.

If a railway faces competition on its through traffic because another railway or agency has a more direct route to that point,⁹⁵ or because another mode of transport⁹⁶ can economically carry that traffic at a low rate, the first railway will be compelled to lower the through rate in a bid to retain business. The rate to intermediate points under these circumstances need not change unless the volume of through traffic is of such magnitude that the revenues thus lost have to be covered by non-competitive traffic, in which event the intermediate point rates may be higher than the through rate. The maintenance of the intermediate rate at its old level, or even an

⁹³ Long— and short-haul discrimination has largely been a railway phenomenon, although water carriers, pipelines and air carriers are also subject to large fixed overheads as railways. Motor carriers however are not so subject. See Locklin, *supra* n. 1 at 488, 489.

⁹⁴ This assumes that the railway would otherwise lose its regular business. If the low rate is necessary to attract new business, the rates on non-competitive traffic do not have to be increased.

⁹⁵ For example, rates to Vancouver from Calgary are the same as from Edmonton. In other words, the C.N.R. charges no more on the haul of 944 miles over its lines from Calgary through Edmonton to Vancouver than the C.P.R. charges on its direct route, 642 miles from Calgary to Vancouver. Similarly, the C.P.R. rate from Edmonton through Calgary to Vancouver (836 miles) is the same as the C.N.R. rate from Edmonton directly to Vancouver. This practice was justified by the Board of Railway Commissioners in a number of cases: e.g. *Bonnars' Ferry Lumber Co. v. Great Northern Railway* (1909), 9 C.R.C. 504; *Canadian Shippers' Traffic Bureau v. C.N.R.* (1928), 35 C.R.C. 168; *Brock (Western) Ltd. v. Canadian Freight Association*, (1931), 38 C.R.C. 326. The ground on which this was justified is that such an equality of rates ignoring vast distances does not affect the localities concerned, since the direct route or through rate shippers would in any case bring their traffic through the other carrier.

increase, does not of itself make it unjustifiable under other provisions of the Railway Act.⁹⁷

In the absence of competition above referred to, it is illegal for the railways to charge in the aggregate a higher rate for a shorter than a longer distance and this prohibition has been enshrined since the earliest days of rate regulation in the statute.

It has been suggested that there is never any justification for charging more in the aggregate for a shorter than a longer haul, and that the railways should be prohibited from infringing this principle even in the guise of meeting competition.⁹⁸ If the regulation is so designed that the railroads are prohibited from carrying traffic at rates lower than the long run variable costs for the movement concerned, such costs defraying all appropriate fixed and indirect costs attributable to it, it will ensure that the most economical mode inherently and the most efficient carrier within that mode⁹⁹ will gain the traffic being competed for, and at the same time there will be no undue burden on non-competitive intermediate points and commodities. There will doubtless be a bigger differential between the rates and it may even be that the intermediate rate would be higher than the through rate, but that is unavoidable and perhaps above reproach so long as the rate previously charged was not unreasonable. The only palliative to the intermediate point shipper in these circumstances is the injection of more competition from other modes but that is not the function of the regulatory authority or legislation.¹⁰⁰ The "one-and-one-third rule" introduced in 1951¹⁰¹ on the recommendation of the Turgeon Commission was from this point of view somewhat short sighted and in any case it was effectively avoided by the railways either by refusing to meet competition on the transcontinental traffic and thus losing it to the water carriers, or by the method of agreed charges, described below, which was declared by Mr. Turgeon not to have been contemplated when he recommended the rule in 1951.¹⁰²

⁹⁶ *E.g.* Water carrier in intercoastal transport: see *infra*, p. 348 ff.

⁹⁷ *E.g.* under s. 328 *Railway Act*, *supra* n. 88.

⁹⁸ See Locklin, *supra* n. 1 at 487-88; Doyle Report, *supra* n. 6 at 146-148.

⁹⁹ After bearing the full real cost of resources, facilities and services provided at public expense, and after being subject as far as possible to controls similar to other carriers and modes in competition.

¹⁰⁰ The Special Study Group of the U.S. Senate Committee on Commerce recommended that the long— and short-haul provision should not be extended to permit "meeting the competition" unless justified by cost considerations: see Doyle Report, *supra*, n. 6 at 444.

¹⁰¹ See below, p. 319.

¹⁰² Royal Commission on Agreed Charges, Report (1955) at 9.

In its review of the market structure in the transportation industry, the MacPherson Commission found that overall competition was so widespread that barring a few cases of captive areas and traffic, the long- and short-haul provision was unnecessary, and in the 1966-67 revision of the Railway Act, it was wiped out although by Section 16 of the National Transportation Act the Canadian Transport Commission is directed in considering complaints of prejudicial rates, to investigate whether the rates created any unfair disadvantage beyond that inherent in the location or volume of the traffic, etc. It is unlikely that Parliament intended to keep alive the prohibition against long and short-haul discrimination in this indirect manner and it will be interesting to see what interpretation the Commission will place on S. 16 as a whole.

III. *Regulation and Competition*

Existence of monopoly profits in an industry attracts competition in the long run in the absence of legal or economic barriers; in fact, the potential threat of competition is sufficient to restrain a monopolist from making full use of his economic power over the market. The capital intensive nature of the railroad industry where a high proportion of assets are permanently and irrevocably sunk, is an effective barrier, and once rail facilities are in optimum supply, new lines become uneconomic for the entire industry.

The first major dose of competition came from within the industry itself and in the struggle that ensued in the early phases of its history, many railways went bankrupt and were taken over by the government which set up the Canadian National System in 1923.

A. *Competitive Tariffs*

To meet competition from within, and also from the water carriers operating on the St. Lawrence River and Great Lakes, and along the coasts of the Maritime Provinces and British Columbia, the railways were at an early period authorized to issue competitive rate tariffs¹⁰³ which were necessarily below the normal "class" and "commodity" rates. The rates were required to be filed with the Board of Railway Commissioners and to state the intended effective date. The Railways were entitled to meet competition, if they wished, from whichever quarter it appeared and the Board in numerous decisions upheld this privilege, subject only to the prohibitions in

¹⁰³ By s. 259, *Railway Act*, Stat. Can. 1903, c. 58.

the *Railway Act* with respect to unjust discrimination;¹⁰⁴ and they were also entitled to revert to the former rates when competition ceased.¹⁰⁵ Since it was within discretion of the railways whether or not to meet competition, shippers could not compel them to reduce rates.¹⁰⁶

This free hand in instituting competitive rates widened and even aggravated disparity in rates in outlying regions where there was no effective competition from other transportation agencies; and until the advent of motor truck competition these areas were in the great land mass west of the Great Lakes and to a significant extent in the Maritimes on that volume of traffic moving out of that region to the West. The railways justified this practice by arguing that if they were not to meet competition the traffic would be lost and their cost of operation, especially overheads, would have to be borne by a shrinking volume of traffic.

The opening of the Panama Canal in 1914 posed a serious threat to the transcontinental traffic of the railways. This traffic consisted not only of indigenous trade¹⁰⁷ but also of direct imports from foreign countries such as United Kingdom, Europe, the United States and the Orient,¹⁰⁸ and in order to keep its share of the traffic the railways were compelled to publish low transcontinental rates. This resulted in anomalies which in some instances were so extreme that provinces in the intermediate territory — again the West — were gravely affected.¹⁰⁹ So long as the intermediate rates were just and

¹⁰⁴ See, e.g. *B.C. Sugar Refining Co. v. C.P.R.* (1910), 10 C.R.C. 169.

¹⁰⁵ *Regina Board of Trade v. C.P.R.* (1917), 22 C.R.C. 315. In *Salada Tea Co. v. C.F.A.* (1924), 30 C.R.C. 153, the Board held that if two stations adjacent to each other on the same line or route are subject to the same competition, the railways may not give a reduced rate to the shipper at one station without giving it also to the shipper at the other station in the same common district.

¹⁰⁶ *Regina Board of Trade v. C.P.R.* (1917), 22 C.R.C. 315.

¹⁰⁷ Traffic of goods of Canadian origin, e.g. Canadian canned fruits and vegetables, which were normally carried from one point in Canada (the east) to another (the west) by rail, and which because of low rates quoted by steamships could go to the latter.

¹⁰⁸ Here the loss of traffic affected not only the railways but also the indigenous industry which had to compete with foreign products, such as steel and cast iron pipes carried at very low rates by foreign ships.

¹⁰⁹ For many years these extreme anomalies had been a sore point in the Province of Alberta, particularly in Calgary and Edmonton, which paid the highest intermediate rate of any distributing point short of Vancouver. E.g. the rate on canned vegetables from Toronto to Calgary was \$2.65 per 100 lbs. when the rate on the same article to Vancouver was \$1.40 per 100 lbs. See Turgeon, Report, *supra* n. 34 at 98-99.

reasonable under Section 328 of the *Railway Act* in the absence of competition, and there was no undue discrimination, the railways were well within their rights to lower rates on transcontinental traffic and not reducing the intermediate rates. The Turgeon Commission in order to pacify the province of Alberta, recommended the magic "one-and-one-third" formula which ensured that whenever competitive transcontinental tariffs were published by the railways, the intermediate territory rates for the same commodities on the same line do not exceed the transcontinental rates by more than one-third.¹¹⁰ This recommendation was accepted and incorporated in Section 337 of the *Railway Act*.

Section 337 worked as a restraint on the power of railways in lowering the transcontinental rate, but since the volume of traffic not affected by water competition was more lucrative in the absence of the limitation, the railways in many instances either decided not to meet the water competition or to revoke their reduction, rather than accept the enforced reduction for the shorter haul. This situation however did not last long since the railways discovered that the one-and-one-third rule may not be attracted if they resorted to the system of agreed charges that the *Transport Act* had authorized them in 1938. This position was upheld by the Board of Transport Commissioners in 1953 much to the dismay of the Province of Alberta, and Mr. Turgeon, whose Royal Commission had recommended the rule in 1951, was called upon to explain this development in 1955.

With the growth of highway transport in the 1920's and the feverish road building programmes of provincial governments, trucking got a tremendous boost and became the principal competitor of the railways wherever the highways existed, and highways came to be constructed in areas hitherto linked primarily by railways. Competition was most intensive in the densely populated regions of central Canada which were already well served by water carriers, but to a small extent in the West. In these regions, especially in Ontario, trucking had almost a free hand to compete, and was not saddled with any such restrictions as the railways were subject to under federal legislation. Hence the trucks concentrated their attention on the high revenue yielding traffic but they were content to leave the chaff to the railways who, by law, were required to take all traffic that was offered to them, meal and malt. Thus they almost drove away the railways from the most profitable short hauls in which they had distinct cost advantages. This development had

¹¹⁰ *Ibid.*, at p. 101.

serious repercussions on the railway revenues and threw the whole rate structure into chaos. In order to retain and recapture traffic the railways were compelled to lower rates wherever necessary and possible and to make up their revenues they had to pass the brunt to the low rated traffic which the trucks would not touch. The effect of this narrowing of the gap in rates between the high value and low value commodities was two-fold. It brought rates more in line with costs of operation of the agencies of transport and it also upset the nice balance hitherto maintained by the railways in their rate structure which plucked the geese without their cackling. The effect of meeting competition in areas of high traffic density meant further aggravation of regional disparities in which the West suffered most although it cannot be determined with precision what the impact was on the location of new industries or expansion of those already existing.

The Turgeon Royal Commission¹¹¹ recommended the inclusion of a new provision in the Railway Act to ensure that competition actually existed, that in their struggle to retain or recover traffic the railways did not lower their rates below the compensatory level and that the rates were not lower than necessary to meet the competition. This recommendation was accepted by the Government and the present section 334 was added to the *Railway Act*.¹¹² At the same time, to prevent competitors from forestalling changes in rates, the law with respect to filing and publication was amended so that the railways could act upon a competitive rate and put into operation immediately upon issue and before filing. The Turgeon Commission further recommended that the railways should not be denied the right not to apply these same tolls to other regions where intermodal competition was non-existent. This seems to accept the theory that the proximate cause of regional disparities was not the railway rate practice but the weakness of competition from other modes. The western provinces, therefore, in order to obtain the advantages enjoyed by shippers in the east would under this policy be required to induce competition by pumping more funds into road building programmes and pipeline construction and promote those media. This no doubt is not the solution because any such programme has to be economically justifiable and that is possible only if the general industrial development of the regions warrants

¹¹¹ Turgeon Report, *supra* n. 34 at p. 36.

¹¹² Stat. Can. 1951 (2nd Session), c. 22, s. 7. The section required the Railways to supply pertinent information justifying the competitive rate, as recommended by the Turgeon Commission.

it. Until this is brought about, the real answer lies in the direction of subsidies to the shippers put in disadvantageous position by the rate disparities.

B. *Agreed Charges*

The practice of agreed charges was imported in 1938 into railway rate making in Canada from the United Kingdom which made history by its introduction in the *Road & Rail Traffic Act of 1933*.¹¹³ Up to that time all tariffs of tolls were published by the railways in such a way that shippers were free to take them up or to use them merely as a lever in bargaining rates with competing intermodal carriers. Even the lowest competitive rate did not assure the railways any fixed proportion of the traffic for which they bid.

The agreed charge procedure was a major breakthrough for the railways and enabled them to negotiate with individual shippers and make contracts for the carriage of a guaranteed volume of freight over a period at rates mutually agreed upon. It thus provided the railways with a potent instrument to compete effectively with other carriers, especially trucks which were making serious inroads upon their business by methods which the railways themselves were legally prevented from following.¹¹⁴

In 1938 the Canadian Parliament passed the Transport Act¹¹⁵ and in Part IV sections 32 and 33 conferred upon the railways this new, well-tested power¹¹⁶ to make contracts with shippers, with the object of enabling them to meet competition from trucks.¹¹⁷ When first enacted, the Board of Transport Commissioners was required to approve of every agreed charge before it became effective. Objections were often raised by persons who were not parties to the agreed charge which led to hearings and final disposition of com-

¹¹³ (1923-33), 23-24 Geo. V s. 37, now incorporated by reference in the (British) Transport Act, (1953), 1-2 Elizabeth II c. 13, s. 20.

¹¹⁴ See *Turgeon Commission Report on Agreed Charges* (1955) 12, 13.

¹¹⁵ Now R.S.C. 1952, c. 271. The authority for making Agreed Charges is to be found in s. 32 of this *Act* and not in the *Railway Act*. The Interstate Commerce Commission in 1961 declared this practice unlawful in the U.S. and the U.S. Supreme Court upheld the decision. See 194 F. supp. 947 (1961); affirmed 368 U.S. 349 (1962).

¹¹⁶ In ocean shipping, conference lines have used this power of making exclusive contracts with shippers with great success. The practice was legalized in the U.S. in respect of ocean shipping by an Act of Congress.

¹¹⁷ As was to be expected, both the Canadian Trucking Association and the Canada Steamship Lines protested to the Turgeon Commission, 1951, that the use of the agreed charge by railways would "force these carriers to the wall".

plaints, and resulted in considerable delay in its implementation. The railways complained bitterly against this shackling procedure but the matter was brought to a head by the Province of Alberta when its complaint that the railways were violating the "one-and-one-third rule" laid down in S. 337(2) of the *Railway Act* by means of agreed charges on transcontinental traffic was dismissed by the Board of Transport Commissioners as not applying to agreed charges.¹¹⁸ On the representation made by Alberta to the Federal Government, the matter was referred to a Royal Commission in 1955 headed by W. A. Turgeon whose Commission in 1951 had recommended the introduction of the "one-and-one-third rule" to prevent undue discrimination against "intermediate" territory shippers.¹¹⁹ This Commission then recommended that an agreed charge should become effective twenty days after it was filed with the Board, and the Act was amended accordingly.¹²⁰

Under the system, a contract is negotiated between the railways and shippers and a charge for carrying goods for a minimum period of one year is agreed upon.¹²¹ During negotiations the railways and shippers consider mainly the cost of transport by alternative modes of transport and the long-run variable cost of handling the goods by rail. When an agreement is concluded, any other shipper may with the consent of the carrier become a party to it by filing a notice of intent with the Board (now the Commission) and the agreed charge takes effect in relation to that shipper as from a date to be agreed upon by the parties.¹²² Similarly, water carriers¹²³ who have

¹¹⁸ In the *Agreed Charge on Transcontinental Movements of Cast Iron Pipe* (1954), 71 C.R.T.C. 28, the Board of Transport Commissioners approved an application of the Canadian Freight Association fixing a charge on cast iron pipes from Toronto, Ont. and Trois Rivières, Que., to points in British Columbia.

¹¹⁹ See *supra* p. 319.

¹²⁰ S. 32(7) *Transport Act*, *supra* n. 115. The agreement must be filed within seven days.

¹²¹ S. 32(11) *Transport Act*. Ninety days written notice of withdrawal after one year is sufficient, notwithstanding any agreement to the contrary. This does not tie the shipper for more than a year to the railways in the absence of deferred rebates, which privilege is common with ocean conference carriers but which is prohibited to the railways.

¹²² S. 32(9). In view of the right granted by s. 32(10) to shippers of identical or similar goods who can persuade the Commission that their business is or will be unjustly discriminated against by an agreed charge, the Railways cannot unjustifiably refuse to include them as parties under ss. (9).

¹²³ Those regulated under the *Transport Act*, see *infra* at 348 ff. Regulated inland water carriers may make independent agreed charges under s. 35 of this *Act*. There is nothing in any statute to prevent trucking from making similar arrangements with shippers.

established through routes and interchange arrangements with railways are entitled to become a party to the agreement made by the railways with shippers and to participate in such agreed charge on a basis of differentials to be agreed upon. In view of the policy of co-ordination and harmonization of services envisaged by the *National Transportation Act*,¹²⁴ the Railways should be required to make through route arrangements and joint charges with all other modes of transport and legislation should also extend to those modes the privilege of becoming party to an agreed charge.

The practice of agreed charges has greatly assisted the railways in obtaining for themselves an assured share of the freight market and thus effectively counteract the tactics of truckers who used the railway rates as a barometer to set their rates and take away the railway's business.¹²⁵ Naturally the truckers took every opportunity to attack this practice as being conducive to creating a monopoly by the railways by binding shippers to them. Some shippers in the same industry opposed them because the practice would discriminate against those who are unable to take advantage of agreed charge arrangements since their operations and goods may not easily fit into the system. Increased use of agreed charges if close to cost level would very probably increase the burden of rail rates on the remaining shippers who are compelled to use rail services.¹²⁶ While the shippers may use the provisions of Section 32(9) in attacking an agreed charge, the other interests involved may attack them only under section 33 after it has operated for at least three months. Under this latter section, competing rail, water or truck carriers (the last only through their national or provincial association) or the boards of trade or other body or association representing the shippers of any locality, may attack an agreed charge on the ground that it unjustly discriminates against them or places their business at an unfair disadvantage, by complaining to the Minister of Transport who may, if satisfied that public interest requires the matter to

¹²⁴ Stat. Can. 1966-67 c. 69. Under ss. 1 and 14 of this *Act* and under s. 3 of the *Transport Act*, the Commission is directed to co-ordinate and harmonize the operations of all types of carriers and to give the regulating enactments such fair interpretation as will best attain that objective.

¹²⁵ From a one percent sample of Waybills the *Board of Transport Commissioners* in their *62nd Annual Report for 1966* report that the freight carried under Agreed Charges accounted for approximately 25.3% of total railway revenue. Approximately 200,000 Waybills are reviewed annually. There were in effect, at the end of 1966, 1504 separate agreed charge arrangements involving some 2457 different shippers. See their Report at 32-33.

¹²⁶ See the submissions to the *Turgeon Commission on Agreed Charges* (1955) at 27-30.

be investigated, then refer the complaint to the Commission for investigation which must then consider the various criteria laid down in subsection 3 and make the proper order.¹²⁷ In view of the policy of fostering intermodal competition laid down by the *National Transportation Act*¹²⁸ and the minimum rate provisions of section 334 of the *Railway Act*,¹²⁹ an agreed charge that is found to be compensatory may only be struck down on the ground that it unjustly discriminates against shippers of identical or similar goods which are offered for carriage under substantially similar circumstances and conditions as the goods to which the agreed charge relates, *i.e.* under S. 32(10); in other words, since an agreed charge arrangement is normally made to meet competition from other modes of transport, these latter can have no grounds of complaint unless the agreed charge is non-compensatory; thus the complaint provisions of S. 33 appear to have no efficacy. This conclusion is fortified by the decision reached by the Supreme Court of Canada on the prejudicial effect of a competitive rate on the statutory advantages conferred on Maritime shippers and industries under the *Maritime Freight Rates Act*,¹³⁰ which decision rendered the protection given by Section 7 of that *Act* illusory.

C. Section 334: *Minimum Rates must be Compensatory*

Changes in transportation conditions since the beginning of this century, and more profoundly in the last forty years, have provided shippers with numerous alternatives, and it is now possible to ship freight not only by rail but also by motor vehicle, water, air and pipeline, including various combinations of these. Moreover, the shipper is able to utilize common carriage, contract carriage, or his own privately operated transport facilities, alone or in such combination as he chooses to suit his convenience.

This growth of alternatives for shippers has resulted in a marked reduction in the relative importance of the railways, and that in turn has posed the fundamental question whether the traditional control of rate making serves any useful purpose at the present

¹²⁷ The Minister of Transport under s. 33(1) may on his own motion refer the matter to the Commission without any formal complaint by the various interests referred to.

¹²⁸ Stat. Can. 1966-67, c. 69, ss. 1 & 14.

¹²⁹ R.S.C. 1952, c. 234.

¹³⁰ *Potato Freight Rate Case*, see *supra* at footnote 65; S. 34 of the *Transport Act* preserves the rights conferred under the *Maritime Freight Rates Act* and obligations imposed under ss. 319(9), 328 and 329 of the *Railway Act*.

time except on the basis of equality of treatment of all modes of transport. The traditional measures to protect shippers against "discrimination" and to ensure that railways establish "just and reasonable" rates, which were sound in principle in the by-gone days of monopoly are meaningless in an era of effective competition. "To persist in a policy which enforces standards of behaviour on one mode but not on its competitor is to assume an Olympian position, with powers to determine the economic fate of industries and regions."¹³¹

The basic position adopted by the MacPherson Commission in light of these changed developments, therefore, was that government should regulate all industries alike and that none should be singled out for special treatment. Under free competition, only the lower limit need be set to ensure that no firm or mode of transport would indulge in cut-throat competition and wage rate wars in order to drive the rivals out of business and thus dominate the market; in strict theory even this control is unnecessary because under perfect competition rates will tend to attain an equilibrium approximating cost-levels and economically inefficient units will make way for efficient, viable ones. However, since conditions of perfect competition do not obtain in practice, the MacPherson Commission recognized the need for a floor which ideally should apply to all modes but which, because of "administrative difficulties as well as economic reality make it less essential for the trucking industry so long as freedom of entry of new firms is permitted".¹³² In order to combat non-compensatory rate competition from trucking, however, the minimum permissive rate set for the railways should not be the long-run margin cost, but at the level of out-of-pocket costs for the particular movement facing such competition.

This is flying in the face of reality. The railways enjoying long-run marginal cost of 70 to 75 per cent, and even lower short-run costs, would be able by this permissive policy to trample upon the trucking industry experiencing very little leeway between direct and fixed costs, and rates in practice fluctuating narrowly within that range. Although one might expect that a few trucking firms would indulge in below out-of-pocket competition, such a situation cannot be general in a competitive region, since otherwise it would force groups of firms into bankruptcy, and the Commission's hope that "penalties of over-indulgence in the practice for short-run advantages must

¹³¹ MacPherson Report, (Vol. 2) *supra* n. 6 at 32-33.

¹³² *Ibid.*, at 34.

remain the responsibility of management in view of the tendency to dominate",¹³³ is not justified.

It would appear from the approach adopted by the MacPherson Commission that they were unduly paternalistic in recommending a floor rate and the shipper interests have not been given proper weight. Although the Commission does not advert specifically to the interests of the users of service, "the main justification for regulating minimum rates is not the protection of producer interests, but rather the maintenance of a sound, diversified transportation system for the benefit of all users. Minimum rate regulation influences the structure of the transportation industry and the nature of intermodal competition. It is this function of minimum rate controls that provides the main justification for such policy in the public interest".¹³⁴ Furthermore, "minimum rate policy can perform a vital function in helping to ensure that relative advantages of different modes are recognized and preserved by contributing to the accomplishment of this result; minimum rate policy, properly conceived and implemented, is consistent with the long-run interest of users of transportation services."¹³⁵ This is recognized by the National Transportation Policy in Section 1 of the *Act*.¹³⁶

A vital condition for a workable minimum rate is the availability of suitable cost data; a minimum rate based upon inaccurate cost information is no better than absence of any control whatsoever. Minimum rates above actual costs represent floors which are too high, encourage unregulated rivals (especially the private carriers) and produce excess capacity in the regulated industry; this is detrimental to the long-run interests of both the producers and the users of transport services. If rates are set below the actual costs, producers are in effect given a licence to go bankrupt.¹³⁷

Parliament did not find itself in accord with the recommendation of the MacPherson Commission that the minimum rate should be set at the level of out-of-pocket costs, rather than at long-run marginal costs, and in laying down one of the most important regulatory principles in Section 334 of the *Railway Act*¹³⁸ it seems to have set the long-run costs as the basis for determining the compensatoriness of rates. Under this section, all freight rates other than those specif-

¹³³ *Ibid.*, at 35.

¹³⁴ Doyle Report, *supra* n. 6, at 417.

¹³⁵ *Ibid.*, at 420.

¹³⁶ *National Transportation Act*, Stat. Can. 1966-67, c. 69.

¹³⁷ Doyle Report, *supra* n. 6 at 421.

¹³⁸ R.S.C. 1952, c. 234 as amended by Stat. Can. 1966-67, c. 69.

ically provided for in the *Act*¹³⁹ must be compensatory. A freight rate is deemed compensatory when it exceeds the variable cost of the movement of the traffic concerned as determined by the Commission,¹⁴⁰ the variable cost to include in its computation, the costs of capital and depreciation, and the Commission to prescribe all costs that are relevant for this purpose giving due regard to the principles of costing adopted by the MacPherson's Commission, to future developments in railway costing methods and techniques, and to current conditions of railway operations. The Commission is empowered to disallow, i.e. to order cancellation after being in force, any freight rate filed with it, which, after investigation either on complaint or on its own motion, it finds non-compensatory. A heavy onus is thus placed on the Commission to be abreast of the latest techniques in costing methods on which depends the success or failure of the new regulatory policy of the *National Transportation Act*.¹⁴¹

The new policy on minimum rate levels is intended to promote a strong and viable railway system and its natural corollary is the freedom flowing from such a policy to abandon uneconomic railway services. The policy concerning abandonment is laid down in Sections 314A to 314H¹⁴² and its discussion is not within the scope of this paper.¹⁴³

D. *The Captive Shipper and Maximum Rate Control*

With the recognition of competitive conditions in the transport industry, a fundamental rethinking of the 19th century regulatory regime was inevitable in order that the railroads may not be unduly shackled to the detriment of that sector and, as a result, of the economy as a whole. Under the new policy therefore almost all controls preventing competition were abandoned in an attempt to give a "square deal" to the railways, and with this abandonment were swept away the obligations of undue preference and equalization of charges.

¹³⁹ Crow's Nest Pass Rates, Maritime Freight Rates and "At and East" Rates.

¹⁴⁰ It would appear from this section, and ss. 387A and 387B of Stat. Can. 1966-67, c. 69, which should be read together, that the variable cost referred to is the long-run out-of-pocket, or marginal cost, i.e. the cost incurred for a particular movement over a long period, and not the short-run cost which ignores cost of capital and depreciation.

¹⁴¹ Stat. Can. 1966-67, c. 69.

¹⁴² *Railway Act*, R.S.C. 1952, c. 234, as amended by Stat. Can. 1966-67, c. 69.

¹⁴³ This relates to abandonment of uneconomic branch lines; ss. 314I and 314J of the *Railway Act* as amended, provide for discontinuance of passenger services.

The *National Transportation Act*¹⁴⁴ does however recognize that imperfect competition that exists at present in the transportation industry is uneven in geographical incidence. The MacPherson Commission found some evidence that for some rail movements the rates were many times higher than costs, indicating that a significant degree of monopoly still existed in at least a few commodity areas. This is true especially of primary commodities such as coal, potash and other minerals in areas not well served by trucking or other transport as in land-locked Saskatchewan or the Maritimes, either because of insufficient volume or unprofitability for other modes or for other reasons. To prevent the railways from abusing their newly found freedom and thus exploiting their monopoly power by charging the maximum those commodities are capable of bearing short of withdrawing their traffic, the MacPherson Commission recommended that a maximum rate control be built into the system of regulation in place of the crippling obligations referred to above. Such a maximum rate would more likely than not fall well below the limit set by economic conditions of demand for the railway services beyond which, in any event, the railway cannot go.

The MacPherson Commission's recommendations were accepted and embodied in the revised Section 336 of the *Railway Act*. Under this section a very important protection is given to shippers who find that they have no "alternative effective and competitive service by a common carrier other than a rail carrier or carriers or a combination of rail carriers". These shippers are pretty well tied to the railways and if they regularly move carload quantities they may seek "captive" status under the section. The decision to seek captive status rests with the shipper. His reason for initiating Section 336 procedure will normally be dissatisfaction with the rate he is forced to pay, probably dictated by the competitive disadvantage he is placed in as compared with his rivals in his business. His first step would be to attempt to effect adjustment from the railway company concerned. If he fails to get satisfactory settlement his next step would be to apply to the Canadian Transport Commission for an examination of his rate by the criteria established for maximum rate control. The application should set out the rate paid, origin and destination of the movement, the alternative shorter route if any, seasonality of the movement, approximate minimum tonnage at indicated intervals, and details of the nature of the commodity shipments for assessment of load-

¹⁴⁴ Stat. Can. 1966-67, c. 69.

ability, fragility, damage-ability, perishability, etc., and information on the type of equipment required.¹⁴⁵ On the basis of this information the Commission will advise the shipper of the probable range within which his maximum rate would lie. If the shipper feels it is worth his while to ascertain specifically his maximum rate he must make a second application and the Commission will then make a special study of the cost of movement and set the maximum rate at an amount equal to the long run variable cost¹⁴⁶ of moving carloads of 30,000 lbs.¹⁴⁷ in standard railway equipment plus one hundred fifty per cent of that cost which latter figure is, according to the MacPherson Royal Commission, a reasonable share of the burden of fixed costs to be borne by the captive shipper.¹⁴⁸

On receiving this information the shipper would have 30 days to decide whether to declare himself 'captive'. Unwillingness to assert this status would mean that he has or hopes to have alternate modes of transport available to him. If he decides to take advantage of the maximum rate, he would be required to enter into a written undertaking with the railway company concerned to ship all his goods for a minimum period of one year on the basis of the information given to the Commission in his application to set the rate.

After the agreement has been in force for a year either party may seek to end it, the shipper by serving a ten-day notice of his intention, the railway company by proffering evidence to the Commission showing that the shipper is no longer captive to them. The Commission may at any time after the expiration of one year vary the rate fixed under the section on being satisfied of a change in the variable cost of the movement concerned, and if the shipper does not accept this variation the agreement will terminate.

The agreement may be determined at any time if it is proved that the shipper has defaulted on his undertaking (and for this purpose the Commission has a right of access to the shipper's books, records and invoices) and the railway company is entitled

¹⁴⁵ These details are given in MacPherson Report, (Vol. 2) *supra* n. 7. at 53. The fees to be paid by the shipper are subject to a maximum of twenty-five dollars under s. 336(9).

¹⁴⁶ S. 336(3) as contained in Stat. Can. 1966-67, c. 69, includes costs of capital in computing the long-run variable cost.

¹⁴⁷ Pro-rated figures for carloads of 50,000 lbs. or more are given in s. 336(5)(b)(ii) and (iii), Stat. Can. 1966-67, c. 69. If the goods could be moved by alternative routes of two or more railways, the long-run variable cost is to be based on the lowest cost rail route: s. 336(3)(d).

¹⁴⁸ MacPherson Report, (Vol. 2) *supra* n. 7 at 52.

to recover the loss of profit suffered by it and, in addition, liquidated damages at the rate of ten percent of the maximum rate on all goods shipped in contravention of the agreement.¹⁴⁹

Section 336 has been criticised as not going far enough to protect a captive shipper from exploitation and that even the status of captivity is susceptible to very restrictive interpretation.¹⁵⁰ The long run variable cost, admitted by the railways to be as much as 70% of their total costs, includes such items as capital cost (*i.e.* interest on investment) and depreciation on rolling stock and facilities. Assuming the cost of moving a carload of potash (for argument accepting the 30,000 lb. capacity) is \$100 from Saskatchewan to the Pacific coast, the railways would be entitled to charge \$250 per car which is 175% of total costs (approximately \$143) and an excessive burden on the captive shipper especially if, as often is the case, he is a primary producer.¹⁵¹ In other words, primary producers whose traffic is not very attractive to trucking, the principal alternative mode of transport, would hardly ever be able to resist a rate increase by the railways who can set the rate at a level discouraging potential competition and at the same time not high enough either to attract the application of section 336 or to force shippers to withdraw traffic completely by being uncompetitive in consumer markets. These primary producers are the ones needing protection and not the high value commodity shippers whose traffic is always attractive to competing modes and who are most unlikely to declare themselves "captive".

Secondly, the pegging of variable cost to a carload capacity of 30,000 lbs. was a convenient unit to compare a truckload with a carload but is very unrealistic in view of far heavier loadings¹⁵² on cars which raise the railway's profit margin much higher than 175%.¹⁵³ It is therefore questionable whether Sections 336 affords any meaningful protection to the captive shipper. It was for this reason that two leading transportation economists, Professors Wil-

¹⁴⁹ The Commission may under s. 336(5)(a) authorize the shipper to use another mode of transport for experimental purposes, presumably to assess relative cost of transportation.

¹⁵⁰ See E.I.U. Report, *supra* n. 66 at 116-122; Currie, *supra* n. 16 at 156.

¹⁵¹ The figure would be somewhat less after pro-rating under s. 336(5)(b)(ii) and (iii). See *supra*, n. 147.

¹⁵² Loadings of up to 170 tons per car. The smallest car is now about 45,000 lbs. or 22.5 tons.

¹⁵³ Even after passing on half the savings effected on the heavier loading under s. 336(5)(b)(ii) and (iii).

liams and Borts challenged the basis of Section 336 before the MacPherson Royal Commission and suggested that the section should be thrown out.

The definition of "captive shipper" under the section is much narrower than is desirable as the Commission may interpret it very restrictively to denote a condition where the railways have virtual monopoly of the movement. Many so-called captive shippers may be unable to assert themselves captive because of the existence of some amount of competition, actual or potential, and thus may be subject to monopolistic and discriminatory pricing. Such semi-captive shippers should come within the protection of Section 336 if that section is to be effective.

The operation of Section 336 over the four year experimental period provided for in the *Act*¹⁵⁴ should provide the Commission with some experience on the value of the protection afforded to the shippers, and the Commission is required under subsection 16 to report on it to the government after holding public hearings. At that stage it may be clear whether or not the railways have been crossing the line of reasonableness in rate disparities and what the effect has been on communities relying exclusively on the railways for their sustenance.

E. Section 317 and the L.C.L. Captive Shipper

While Section 336 makes available the machinery of maximum rate determination to a captive carload shipper who has a regular offtake, there is no protection available to irregular shippers or regular shippers in less-than-carloads except that provided by section 16 of the *National Transportation Act* and Section 317 of the *Railway Act*.

Under Section 317 the Commission may investigate the tariff of tolls charged by railways to shippers of commodities under 5,000 lbs. who are captive to them, and disallow such tariff or any portion thereof if it is found that the railway company is taking undue advantage of its monopoly position. The Commission may even prescribe the maximum rates if the railway refuses to substitute reasonable rates.

Since there are thousands of commodities on the railway classification, any meaningful exercise of the power conferred by this section would involve a colossal amount of work and therefore the Commission will have to rely primarily on stray complaints

¹⁵⁴ R.S.C. 1952, c. 234, as amended by 1966-67, Stat. Can. c. 69.

from disgruntled shippers who can make out a *prima facie* case on the unreasonableness of the rate charged to them. Otherwise the Commission will find itself embroiled in a task which it is not equipped to handle and which in reality was not envisaged as its principal function.

F. *Section 16 of the National Transportation Act —
Rate not in Public Interest*

Although the MacPherson Commission recommended that maximum and minimum rate control should be the only regulation in the rate structure and that all other forms of control should be abandoned as being redundant,¹⁵⁵ Parliament while repealing the pertinent provisions of the *Railway Act* touching upon these aspects seems not only to have kept alive some of the salutary features of the old regime¹⁵⁶ by providing in section 16 the *National Transportation Act* what in effect are the same basic protections to shippers, though in simplified form, but has extended the principles to all other modes of transport under its legislative jurisdiction.¹⁵⁷

Section 16 does not provide a system for the setting of rates, but it does secure to anyone who feels that a rate which has been set prejudicially affects the public interest, a right to appear before the Commission and if he can make a case, get the rate changed. The expression "public interest" includes the public interest as described in section I setting out the national transportation policy, *viz.* the establishment of an "economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost." It is clear from section 16 that even where a particular mode has an obvious monopoly, the limits of reasonableness are set by the minimum and maximum levels discussed above. Under depressed economic conditions, particular producers may have a legitimate beef against the railway rates and may be backed by strong political action at provincial levels, but short of a compromise or showdown, it is unlikely that the Commission would reverse a line of decisions handed down by its predecessor that the test of reasonableness of rates should not be gauged by such economic facts. It thus appears that only under exceptional circumstances could these producers obtain any

¹⁵⁵ Even these, when competition has become pervasive in all areas, will be found unnecessary, according to the MacPherson Commission.

¹⁵⁶ *E.g.* Undue, unjust or unreasonable discrimination, discussed *supra* at page 298 ff.

¹⁵⁷ S. 16 includes highway, water, air and pipeline transport.

relief in the national interest, a circumstance inviting strong resistance from different regions since the burden of carrying these products at rates below compensatory levels has to be spread over all regions, the carriers on whom the duty to carry is imposed being required by national policy to be compensated in the form of subsidies.

G. *Other Measures Adopted by the Railways to Meet or Beat Competition*

Various devices have been adopted by the Railways in order to meet competition either from within the industry or from without, the principal intra-industry measures being expressly or tacitly agreeing on rates, pooling traffic or revenue, and dividing territory and, inter-industry, acquiring carriers especially those engaged in highway and water transport.

The legal status of the intra-industry arrangements, which really restrain trade and hence against public policy, was doubtful but in any case they were prohibited at a very early stage by the *Railway Act* of 1903.¹⁵⁸ The *Railway Act* was however amended to permit pooling on a limited scale, and in fact the *C.N. — C.P. Act*¹⁵⁹ encouraged the two major railways to co-operate voluntarily in various respects, including pooling and division of earnings. The revision of 1966-67 has dropped the prohibition entirely and it would appear that railways in future are entitled to co-operate in such agreements as far as possible.¹⁶⁰

The intense competition from trucking industry stirred the railways into action, and in addition to dieselizing trains they introduced containerization and trailer-on-flat-car service, commonly called piggyback, whereby they would haul an entire truck trailer (without

¹⁵⁸ Now R.S.C. 1952, c. 234, s. 318.

¹⁵⁹ Now R.S.C. 1952, c. 39, Part II, s. 17(2)(b) etc. This Act has been repealed by the *National Transportation Act*, Stat. Can. 1966-67, c. 69, s. 76. At the same time, however, the prohibition against pooling contained in s. 318, *Railway Act*, has been lifted by the *National Transportation Act*, s. 44. "To what extent pooling prevailed in Canada it is difficult to ascertain, but if it did exist it must have been upon a very limited scale." Jackman, *Economic Principles of Transportation* (1935) 334. In the United States, the *Transport Act* of 1920 legalized pooling agreements when approved by the Interstate Commerce Commission. The I.C.C. was given guide-lines in approving of such agreements and was empowered to lay down terms and conditions.

¹⁶⁰ Pooling is one of the principal methods of effecting economies and has long been used with considerable advantage by shipping companies participating in the Conference System.

the power unit) at a very competitive charge. Piggyback service was initially designed by railways to haul their own trailers, but the *Railway Act* has now ensured that any firm requiring this service should be offered the same facility at comparable charges and terms and conditions.¹⁶¹ By this process of rationalization, innovation and improvement of technology the railways have been able to stop or slow down the steady erosion of their business by the trucks. They have also sharpened their costing tools and concentrated on market research so that they could better gauge and meet market demand.

A process that has been going on for some considerable time has been the abandonment of uneconomic branch lines and this has been put on a firmer footing by the formula enacted by the *National Transportation Act* which added Sections 314A to 314H to the *Railway Act*.¹⁶²

Competition between railways and trucks not being on even terms, the latter's cost characteristic being entirely different, with small investment, and no fixed plant comparable to the railroad permanent way, and a small margin between variable and fixed costs, all of which necessitating the handling of high priced goods, the railways found themselves prisoners of their own system of rate determination, and responded by taking over trucking firms, thus competing with the truckers on the highway itself.¹⁶³ Although most provinces required certificates of public convenience and necessity, the two principal railways entered the field before regulations were enacted and thus secured what are called "grandfather" rights to operate. Starting with Pick-up and Delivery Service they now operate large fleets of trucks in areas where they had faced intense competition, although they do not control any significant proportion of such firms, and although in certain cases, notably Alberta, provincial authorities have been hostile to the idea of railways owning trucks. To the extent that provinces regulated motor carriers it was an unintended benefit to the railways. There is no doubt that the Federal Government could legally overreach the provincial authorities in interprovincial licensing though intra-provincial road carriage is outside its jurisdiction.

The Railways, again in highly competitive regions, acquired inland water carriers, and thus were able to offer coordinated rail-

¹⁶¹ *National Transportation Act*, Stat. Can. 1966-67, c. 69, s. 45(3), adding subsection 9 to s. 319 of the *Railway Act*, R.S.C. 1952, c. 234.

¹⁶² Discussion of this subject is not within the scope of this article.

¹⁶³ This take-over bid was not confined to the railways. Water carriers, especially Canada Steamship Lines, did the same.

water-highway-rail services in any combination that was desired, although it involved high handling and transshipping costs. From a very early stage they have also engaged in ocean carriage and, by a very clever arrangement, had for a long time retained export and import package goods traffic from the interior to themselves, whether the goods were sent by their own vessels or by competitors' vessels.¹⁶⁴

For a number of decades, the two major railways have had their own air service although this right in the case of the Canadian Pacific was conceded after political wrangling.¹⁶⁵ Recently, the Canadian Pacific has also invested substantial capital in the rapidly growing pipeline transportation for the movement of coal in the form of slurry, from the Alberta border to the Pacific coast.

Competition has thus had a very healthy impact on the railways but the real beneficiaries by and large have been shippers of high value commodities whose rates now more closely approximate cost of service. To the extent that trucking rates which the railways tried to meet did not truly reflect the real cost of providing those services it has been a misallocation of resources and hence a national loss. At the same time, competition narrowed the gap between class and commodity rates by the twin process of lowering rates on high value goods and increasing rates wherever possible on raw materials. Besides the readjustment in location of industries and consumer values and preferences for products that will inevitably take place in some directions in the long run, the displacement of the rate structure will immediately affect those areas where competition is not strong enough and those areas that specialize in primary production. This is unavoidable if the railways are to survive and the burden of this displacement should be the concern not of private enterprise but of public policy. It may well be that this policy may, *inter alia*, insist that trucks carry a proportion of the low priced raw materials as a condition of their obtaining a licence to operate, bear a fairer share of real resource costs, and require

¹⁶⁴ This was on the c.i.f. trade whereby sellers could discount their bills of lading with banks only if through arrangements were made, and through bills of lading were not given to trucking firms for a long time until the practice was effectively stopped by the Board of Transport Commissioners in the case of *Irish Shipping Ltd. v. Railway Association* (1954), 72 C.R.T.C. 243. See the Report of the Restrictive Trade Practices Commission (1965) at 32-34.

¹⁶⁵ The *Aeronautics Act*, R.S.C. 1952, c. 2 s. 15(2) prohibited ownership of air services by other transportation media, but C.N.R. and C.P.R. were exempted.

co-ordination of the two principal competing modes with a view to achieving the most efficient carriage, thus equalizing as far as possible their conditions of operation.¹⁶⁶

If, after adopting all these measures of innovation, co-ordination and equalization of operational conditions, the railways still cannot economically survive the onslaught of the newer modes, it is an indication that they are being rendered obsolete, and no tears need be shed at such displacement just as none were shed when the stage-coach was displaced by the railroads and by the automobile in the past. Until this stage is reached, the task of regulation is to remain neutral among types of carriers and agencies and not deal a death blow sooner than is absolutely warranted by economic reality.

III. REGULATION OF HIGHWAY TRANSPORT

The years since the end of the last war have witnessed highway transport growing more rapidly than ever with the improvement in motor vehicles and the extension of hard-surfaced roads, and overshadowing water transport as the principal competitor to the railways. Their competition has been keenest for short-haul less-than-carload shipments which had been the mainstay of railways' business and the foundation of their rate structure. Competition has been more intensive in the thickly populated regions of the country, such as central Canada, where they could snatch lucrative business far more easily, and support a substantial proportion of their number, than in the predominantly rural and agricultural Prairies where shippers are left to the mercy of the railways.¹⁶⁷

The emergence of motor vehicle competition has had profound effects not only on the economy but also on the railways themselves. It has led to many changes in methods of organization, marketing and merchandising, in food processing, in manufacturing and in the location of industries which were formerly dependent upon railways. These firms are now in a position either to use trucking as a "leverage" in bargaining for favorable rates with railways or to acquire their own fleet of trucks, depending upon the economics

¹⁶⁶ The Lyman Duff Royal Commission's proposals made in 1931 still have some validity in this regard. See their Report (1932) 102-105, esp. at 105.

¹⁶⁷ The dominance of Central Canadian trucking firms gives Prairie firms very limited opportunities for long distance trucking (assuming it to be an economical proposition otherwise) because the East or West bound hauls are heavy and return loads light. Return load factor is an important consideration in determining the profitability of any particular route.

of the situation. The tremendous shifting of traffic that took place and continues to occur¹⁶⁸ has rudely awakened the railways from their doldrums; in fact, the history of railway innovation which includes rationalization and rolling up branch rail-lines, improvement in services, dieselization, "piggyback" carriage, containerization, and even diversification of investment, has been the history of competition from trucks, and the principal beneficiaries have been the high rated less-than-carload shippers moving their goods over short distances on whom the railways had placed the bulk of their revenue demands in the past.

Confinement of their operations principally to short-haul, high rated small shipments has been necessitated by the peculiar nature of operating costs experienced by the trucking industry; these are only marginally lower than total costs which include cost of the vehicle, cost of licence, etc. Since the road beds are public property and responsibility, the trucks are spared a very expensive item of investment which the railways have to finance themselves.¹⁶⁹

The small amount of investment required to operate a trucking business has two very significant effects on the industry itself and on its ability to compete with other modes not experiencing similar cost characteristics. In the first place, unlike the railways, the ratio of capital investment to gross revenue in trucking is small, so that there is a very small margin between variable cost, *i.e.* those costs directly attributable to the movement concerned, and fully

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 INTER-CITY TON-MILES PERFORMED IN CANADA BY TYPE OF CARRIER

Year	Total (billions)	Rail %	Road %	Water %	Air %	Oil Pipeline %	Gas Pipeline %
1938	53	51	3	46	*	**	**
1946	77	72	5	24	*	**	**
1951	105	61	8	30	*	1	**
1956	145	54	7	27	*	11	**
1961	152	43	11	26	*	14	6
1965	201	42	9	27	*	14	8

Source: Dominion Bureau of Statistics.

* Less than one-tenth of one per cent.

** Negligible or non-existent.

¹⁶⁹ The massive public expenditure on the highway network opens up opportunities to trucking to intensify its competition with railways, and thus tips the scale in its favour.

allocated costs,¹⁷⁰ with the result that freight classification has really no place in the highway rate structure.¹⁷¹ In consequence the prospect of achieving economies of scale are seldom possible.¹⁷² Secondly, almost anyone with a small amount of capital to buy or hire-purchase or lease a truck, the transport unit, and with physical ability to drive a heavy vehicle, can enter the industry and make a living, unless restrained by regulatory controls, and just as easily fold the business when times are bad and realize a substantial part of the investment if any has been made. These characteristics mark out trucking as a distinct industry epitomizing the classical mode of "perfect competition". Trucking has thus remained, in the main, a small scale industry with a very large number of extremely mobile, independent organizations each owning a few trucks, each with its own operating characteristics and costs and its own specialized traffic and area of operation. It also includes a larger and more diverse group of private carriers which comprises everything from nationwide corporations down to individuals owning a single vehicle.

The economic effects of this diversity of the industry are two fold; firstly, the ease of entry results in a tendency for overcapacity to develop and persist, leading to ruinous competition which in turn leads to deterioration in stability of service and safety, evasion of regulation, financial irresponsibility, and even bankruptcy. Secondly, the ability of such an industry to withstand competition from other modes such as the railways and water carriers, is limited in the short run, though in the long run¹⁷³ they may be the most economical agency of transport; so that predatory pricing or selective pricing backed by the financial "leverage" that the stronger modes have, could easily drive the small truckers out of business.

¹⁷⁰ Locklin, *supra* n. 1 at 647 says that "The Bureau of Transport Economics and Statistics of the I.C.C., considers that not more than 10% of the motor carrier operating costs can be considered as constant."

¹⁷¹ Therefore, there is very little scope for personal and place discrimination which is a distinctive feature of classification.

¹⁷² The greatest field of usefulness of the truck is for the movement of *high class* goods over short distances. Although a great volume of goods and bulk shipments are handled by some large firms in long-haul traffic even 1,500 miles in length, "the greatest concentration of inter-city motor truck activity is on routes between 20 and 600 miles in length." Currie, *supra* n. 16 at 490.

¹⁷³ The working life of the truck being short compared to the railways, the long run for trucks is really a short span of about seven to eight years.

A. *Need for Regulation*

The famous saying "The least regulation is the best regulation" which is particularly applicable in a competitive situation, has not commended itself to the legislative authorities so far as the trucking industry is concerned, where the mushrooming of many small, financially suspect firms, competing at uneconomical prices for the available business and then going bankrupt, could easily jeopardise the stability and growth of the entire industry. Although perfect competition assumes this constant exit from and entry by newcomers into it, it places the industry in a state of continuous instability and depresses the rates to such an extent that in the long run higher costs are likely to prevail.

The main justification for law regulating the industry however is not really to protect producers' interest, though ostensibly it is so, but to protect the interests of the entire public. Continued depressed conditions in an industry do not provide any stimulus to substantial investments, technological advances or innovations, so that rates are not necessarily the lowest possible under perfect competition, and social cost of bankruptcies have to be borne by the public. A soundly conceived policy of regulation is therefore consistent with the long run interests of users and of the public since it would ensure a viable, diversified, transportation system. The users of the service benefit by a more stable system of rates under regulation, reasonable rates and dependable service, and the producers are better able to meet their financial responsibility in respect of claims for damage or loss to goods carried by them.

Under a national system of regulation, public policy in relation to highway transport has to be reconciled with the legitimate interests of other modes, especially railways and water carriers, with a view to attaining an economic, efficient and adequate transportation system. National policy as laid down in the *Act*¹⁷⁴ calls for equalization of operational conditions as far as possible, but Part III of that *Act* recognizes the fact that there are significant differences obtaining in these diverse modes and that the criteria established for railways do not have much application to the trucks.

B. *Feasibility of Regulation*

It is one thing to regulate a few large firms as in railway or water carriage, but quite a different thing when a very large number

¹⁷⁴ *National Transportation Act*, Stat. Can. 1966-67, c. 69.

— thousands — of carriers are engaged in one form of transport; furthermore, the difficulties are accentuated by the existence of different types of carriers with costs and other characteristics peculiar to each though not varying substantially, and by the division of legislative authority.

Almost every country recognizes the right of an individual to carry his own goods and most also treat carriers engaged by a few shippers on a contract basis on a different footing from those carriers offering their services to the public, to whomever is prepared to hire them at pre-established rates. It is this tri-level grouping of carriers that is characteristic of regulation in Canada, in which the most closely regulated are the public or common carriers. Regulation in both spheres raises very significant economic arguments which will be dealt with below.

In a federal system the jurisdiction over many fields of activity are divided and in Canada the control over highway transport is shared by both the provinces and the Dominion, the former regulating purely intra-provincial carriage, and the latter the extra-provincial. By far the largest part of truck traffic is intra-provincial and therefore the exclusive preserve of the provinces. The authority of Parliament to regulate commercial vehicle transportation that crosses provincial or national boundaries had never been doubted but it was settled once and for all by the Privy Council as recently as 1954 in the leading case of *Attorney-General for Ontario v. Winner et al.*¹⁷⁵ Furthermore, even though a trucking firm does almost all its business within a province and its extra-provincial business is only casual and unscheduled, its entire operations fall within the jurisdiction of the Dominion if some part of the business is extra-provincial.¹⁷⁶

However, since a very small part of the traffic moves out of a province,¹⁷⁷ the Federal Government did not choose to introduce legislation of its own but instead allowed the provinces, subject to certain exemptions, to regulate the interprovincial trade on the same basis as the home trade. For this purpose, Parliament enacted the *Motor Vehicle Transport Act*¹⁷⁸ conferring power on the transport boards of those provinces which chose to adopt the legislation.

¹⁷⁵ [1954] A.C. 541 (P.C.).

¹⁷⁶ *Re Tank Truck Transport* [1960] O.R. 497; 25 D.L.R. (2d) 161. *Regina v. Cooksville Magistrate's Court, Exp. Liquid Cargo Lines Ltd.* (1965), 46 D.L.R. (2d) 700.

¹⁷⁷ Only about 2,000 companies in Canada out of 12,000 do this work but they are generally the larger carriers and, by and large, the ones that matter.

¹⁷⁸ Stat. Can. 1954, c. 59.

This *Act* has created difficulties by the decisions of courts in two provinces which have held that section 3(2) only confers authority on provincial boards in respect of traffic operating "into" or "through" the province, not over traffic operating "from" the province,¹⁷⁹ so that a home licence is not required for such operations, nor indeed for any part of the operations, intra-provincial or extra-provincial, so long as the home carrier gets a licence from the province or country(*i.e.* U.S.A.) into or through which it proposes to operate. This is a very unsatisfactory position as it creates a gap in legislation; and this gap apparently has not been closed by Part III of the *National Transportation Act*.

With the development of a unified national transportation policy emphasizing uniformity of regulation as far as possible to attain an "economic, efficient and adequate transportation system", Parliament decided to bring within its regulatory scheme those sections of the extra-provincial motor vehicle transport industry as were "exempted" by Section 5 of the *Motor Vehicle Transport Act*. Unless the term "exempted" covers those sectors that are declared to be outside the provisions of the *Motor Vehicle Transport Act* by the court decisions referred to above,¹⁸⁰ and it is very difficult to see how one can strain the meaning to achieve that result, it is the writer's contention that the gap in legislation still remains.

C. Economic Control Devices Used

The principal controls imposed on the trucking industry are those restricting entry and those regulating rates. Entry into common carriage is restricted in all provinces by the requirement of a licence to operate,^{180a} in most cases being granted only on proof of some

¹⁷⁹ *Kleysen's Cartage Co. v. Manitoba Motor Carrier Board* (1965), 51 W.W.R. 218 (Man. C.A.); *R. v. Beamy* (1967), 1 O.R. 620; 62 D.L.R. (2d) 20 (Magistrate's Court), *Contra R. v. Constable Transport Ltd.* (1967), 1 O.R. 357 a decision of the County Court.

¹⁸⁰ *Supra* n. 179. This does not mean that the decisions are sound; it may well be that the higher courts of other provinces and the Supreme Court of Canada will reject them.

^{180a} R.S.A. 1955, c. 265, s. 3(1), Public Service Vehicles Act; R.S.N.S. 1967, c. 190, s. 6(1), Motor Carrier Act; R.S.B.C. 1960, c. 252, s. 5, Motor Carrier Act; R.S.S. 1965, c. 377, s. 28(1), Vehicles Act; R.S.M. 1970, c. H60, s. 258(1), Highway Traffic Act; R.S.O. 1960, c. 319, s. 2(1), Public Commercial Vehicles Act; 1957 S.N.B., c. 12, s. 3, Motor Carrier Act; 1961 S.Nfld., c. 54, s. 4, Motor Carrier Act; R.S.Q. 1964, c. 228, s. 30, Transportation Board Act; 1958 S.P.E.I., c. 24, s. 2, Motor Carrier Act.

benefit to the public.¹⁸¹ In some cases in addition to proving that service is required it must also be shown that service is not being adequately provided by others.¹⁸² This restriction is designed to prevent overcapacity and it protects established firms to some extent from the evils of cut-throat competition which would otherwise prevail. The question often arises, as to what extent the authorities should consider the effects of entry on other competing modes; in other words, should entry be allowed if it would adversely affect other agencies of transport. Most provinces ignore this effect, and particularly those tied to railways should consider letting in alternative forms of transport, unhampered by such consideration, in order to break away from the shackles imposed on them by railways. However, such a question can only be resolved in a national context, since trucks even if allowed to enter without restriction cannot as matters stand replace railways in moving low-rated bulk goods over long distances, and the destruction of their traditional markets of high-rated traffic could snowball into higher rates on low-rated traffic to the detriment of "captive" provinces. So long as the regulating authority periodically assesses the demand for trucking service and is guided by economic principles and the interests of the public in a viable transport system, the policy of entry control would appear to be sound. There should, however, be sufficient flexibility in such a policy so that new firms proposing to enter, and existing ones wishing to expand, should if they demonstrate the possibility of efficiency, be let in; furthermore, there should be no rigid adherence to the amount of business available to trucks since there is always the opportunity for trucking firms to progressively gain business from other competing media.

If control of entry into the industry is not sufficiently flexible, competition is restricted and existing firms are in a position to earn more than normal profits, which is detrimental to the interests of the users and the public. The only restraint in such a situation will come from shippers who could substitute their own transport.

Provincial regulations make exceptions to the requirement of licensing based upon commodities and area of operation which

¹⁸¹ British Columbia: R.S.B.C. 1960, c. 252, s. 7(2)(b); Saskatchewan: R.S.S. 1965, c. 377, s. 30(2); Manitoba: R.S.M. 1970, c. H60, s. 263(2); Ontario: R.S.O. 1960, c. 319, s. 4(1) — a certificate will only be granted if there exists "public necessity and convenience"; Newfoundland: 1961, S.NfldId., c. 54, s. 5(2)(b); Quebec: R.S.Q. 1964, c. 228, s. 30.

¹⁸² *E.g.*, 1958 S.P.E.I., c. 24, s. 3(4); 1961 S.NfldId., c. 54, s. 5(2)(a); 1957 S.N.B., c. 12, s. 4(4); R.S.M. 1970, c. H60, s. 263(2); R.S.B.C. 1960, c. 252, s. 7(2)(a).

often strain the effectiveness of common carriage. Similarly, "for-hire" carriers engaged by shippers under contracts are normally not required to prove "public convenience and necessity" and instead need only obtain "permits", a far less stringent requirement. Such carriers are not permitted to engage in common carriage. Every province also recognizes the right of an individual or firm to haul his own goods in his own equipment whether for own consumption or for use in his business, free of any economic regulation. If the private carrier finds it economical to use his own truck to haul his goods, nothing should be done to prevent it, and in fact the right to this alternative is a healthy check upon any probable tendencies of regulated carriers to exploit the user; it would also force regulated carriers to prune costs and achieve efficiency as far as possible and thus make private carriage less attractive to the shipper.

The MacPherson Commission as an alternative to restricting entry, preferred "lively and sympathetic highway traffic boards adequately supplied with the necessary data to examine and advise prospective entrants to the commercial trucking industry if it appears to the public authorities that there are too many trucking companies and that this situation is chronic . . . Concentration upon regulation of operations, with freedom of entry based upon knowledge, will promote the type of atomistic competition which brings adequate resources to bear in the provision of road transport at prices for service related to costs and normal returns to enterprise. Incentives to efficiency and the attendant returns are encouraged without the regulatory boards being responsible for any degree of monopoly profit."¹⁸³ The Economic Intelligence Unit¹⁸⁴ similarly recommended that the regulation should be more concerned with financial responsibility of the applicant rather than laying down restrictions with respect to routes served, products carried and rates charged. On the other hand a Royal Commission appointed by the Newfoundland Government to inquire into trucking reached the opposite conclusion.¹⁸⁵ It is the writer's submission that under ordinary circumstances the interests of both the industry and the public can be better served by a system of control of minimum rates devised in such a manner, having regard to the latest techniques in cost accounting, that they reflect the most efficient units in the industry, with sufficient flexibility to enable common

¹⁸³ MacPherson Report, (Vol. 2) *supra* n. 7 at 57 and 58.

¹⁸⁴ V E.I.U. Report, *supra* n. 66 at 162.

¹⁸⁵ Newfoundland Royal Commission on Truck Transportation (1962).

carriers to determine their rates in any manner they deem necessary to meet competition not only from contract and private carriers but also from other modes of transport. Where necessary, these common carriers should be permitted to reduce their charges to out-of-pocket expenses for any empty back hauls they would have to make, thus making private carriage uneconomical. In addition there should be sufficient flexibility in the route rights so that through service can be economically undertaken by the truckers; and an efficient enforcement of regulations so that the common carriers themselves play their part honestly and the contract and private carriers do not engage in free-wheeling operations. Abandonment of all controls except the minimum safety and financial liability requirements would produce the same depressed conditions of an overcrowded industry that is a stark possibility in trucking. Such a permissive policy will no doubt affect railways considerably and perhaps an appreciation of its impact is necessary.

With control of entry can be combined a variety of devices regulating rates, ranging from setting of actual rates,¹⁸⁶ ceiling or floor on rates charged,^{186a} down to mere filing of tariff.¹⁸⁷ Of all these, the most difficult to justify is the actual setting of rates by a provincial board. The firms in the trucking industry even though competitive, and theoretically subject to similar cost levels, in practice widely diverge in cost and financial characteristics, and a small differential may mean success or failure in obtaining the particular business. As the rates are determined on the basis of the "average" firm, whether that average be arithmetical or "modal", some firms will be more efficient than others and the less efficient ones falling below the average are protected under this system. If the cost levels are unrealistic, private carriage would become more economical and the common carriers would lose some of their business to it and this shrinking business in turn will increase their costs. Under such a system, even the efficient firms will suffer because it is illegal for them to undercharge, and those that do so will evade the law by very subtle means. Much the same thing can be said where the legislature lays down minimum rates, if the yardstick firm does not represent the most efficient units in the industry. If it is the most efficient, the other firms are not precluded from charging normal rates and if they lose business

¹⁸⁶ As in Saskatchewan, R.S.S. 1965, c. 377, s. 10(1)(i); British Columbia, R.S.B.C. 1960, c. 252, ss. 24, 27, 28.

^{186a} As in Manitoba R.S.M. 1970, c. H60, s. 255(1)(e).

¹⁸⁷ As in Ontario R.S.O. 1960, c. 319, s. 16(g).

to private firms it is because they are inefficient as compared to them; but that would not penalize the efficient units who will expand their operations and fill up the gap created by the bankruptcy of the inefficient. Umbrella rate making practices which harbour the inefficient high-cost firms are thus detrimental to the industry. It is however essential under this system to develop better techniques of cost finding than we presently have.

The device of maximum rate control is unimportant in highway rate regulation because of the inherently competitive nature of the industry and the checks afforded by private trucking. Maximum rate control is only necessary where there is no real alternative to for-hire trucking and this situation will only prevail if there is collusion among firms and provincial authorities restrict entry.

The fourth device used in rate regulation is the requirement of filing and strict adherence to the tariff thus filed for a period of time.¹⁸⁸ It is often a halfway measure to full control and, apart from the stability in rates that it ensures, is not essentially different from absence of any regulation at all.¹⁸⁹

Opinions on the need for controlling rates differ and advocates on both sides can be found. The MacPherson Commission felt that it is better to scrap all rate regulations.

The Federal *Motor Vehicle Transport Act*¹⁹⁰ empowers provincially constituted traffic boards to determine or regulate:

...the tariffs and tolls to be charged by a federal carrier for extra-provincial transport in that province... in the like manner and subject to the like terms and conditions as if the extra-provincial transport in that province were local transport.

The Federal Government may exempt any carrier or any part of its operation from provincial control.¹⁹¹ Where they have been so exempted, Part III of the *National Transportation Act*¹⁹² may be applied to them. The scheme of regulation is similar to that for railways; the tariff of rates may be filed with the Canadian Transport Commission directly or through Traffic Bureaus and the

¹⁸⁸ As in Ontario.

¹⁸⁹ Newfoundland and Alberta do not regulate rates.

¹⁹⁰ Stat. Can. 1953-1954, c. 59, s. 4. This provision makes the intention of Parliament clear that the rates to be regulated are not only those for goods transported through a province over which the province has no interest, but for those transported "out of" or, quite conceivably, "into" a province.

¹⁹¹ *Ibid.*, s. 5. The intention may be to prevent discrimination by provincial boards, and/or to bring about uniformity in regulations.

¹⁹² Stat. Can. 1966-67, c. 69.

Commission may disallow rates if they are non-compensatory and not justified by public interest or take advantage of a monopoly situation.¹⁹³ The Commission, if an application is made thereto, may conduct an investigation to determine whether any act or omission of or rate established by a carrier is prejudicial to public interest.¹⁹⁴

IV. REGULATION OF PIPELINE TRANSPORT

Pipelines constitute a specialized system of transportation which is growing in importance and may in the foreseeable future overshadow highway truck transport as the principal competitor of railways even as regards low-rated bulky goods. They are predominantly used for moving crude oil, gasoline and other liquid petroleum products,¹⁹⁵ and natural gas, and on a limited scale for moving coal, ores and other solids in suspension in water. Experiments and feasibility studies have also been conducted for moving sulphur, potash, gypsum and wood chips through the medium of oil as the carrier, and pipelines have also been designed to transport solids, especially flowing solids such as grain, in the oil and gas pipelines.¹⁹⁶

Pipelines enjoy a cost characteristic that enables them to reduce costs more than proportionately with increases in size and not only in capital outlay but also in operational costs, they earn economies of scale to a far greater extent than other modes of transport, including railways. The cheapness of transport has influenced location of refining, marketing and distribution centers, and when movement of primary products, especially grain and minerals in capsules, and of package freight, becomes economically feasible, they may effectively replace the high cost agencies in the future. That will no doubt have serious repercussions over the entire transportation system and it was wise for Parliament to have laid down

¹⁹³ *Ibid.*, s. 33. For a discussion of these controls, see *supra* page 324 ff.

¹⁹⁴ *Ibid.*, s. 16.

¹⁹⁵ Traditionally product pipelines carry refined products from oil refineries to truck terminals in large consuming centers, although a new type of product line carrying large volumes of natural gas products such as propane, butane and pentane, has emerged.

¹⁹⁶ The *National Transportation Act*, Stat. Can. 1966-67, c. 69, s. 3(b) defines a commodity pipeline as a pipeline predominantly used for moving commodities other than oil and gas. If commodity pipelines are *capable* of moving oil and gas, or either, they come under combined pipeline regulation: s. 22(a). In ocean transportation, tanker vessels are sometimes used to move grain but due to dangers of contamination and fouling, certain large buyers, such as the United Kingdom, refuse grain in tankers.

policy guidelines for regulation of this mode of transport in Part II of the *National Transportation Act*. Herein lie new prospects for investment by Prairie provinces which are now solely dependent on the railways for transporting their primary products.

At the present time oil pipelines transport oil for a fixed charge and are classified as common carriers but gas pipeline companies, excepting a very few, own the gas they transport; the important exception being the Alberta Gas Trunk Line Company which delivers virtually all of the gas exported from Alberta (which has most of the Canadian gas reserves) to the provincial boundaries where main transmission companies accept delivery. Commodity and combined pipelines will generally be used to carry products manufactured or extracted by other industries and will come under the common carrier category.

Control over intra-provincial pipelines is exclusively within the jurisdiction of each province under section 92(10) of the *British North America Act*¹⁹⁷ but Parliament may declare them to be works for the general advantage of Canada or of two or more provinces by virtue of section 92(10)(c) of that *Act*, even though they are not connected to any interprovincial system, and thus bring them under federal control. Interprovincial and international pipelines are within federal jurisdiction and are subject to regulation both under Parts III, IV and V of the *National Energy Board Act*¹⁹⁸ and Part II of the *National Transportation Act*.¹⁹⁹ The National Energy Board has exclusive responsibility for oil and gas pipelines^{199a} and this includes determination of rates as an incident to such regulation^{199b} and it shares with the Canadian Transport Commission the responsibility for "combined pipelines";²⁰⁰ the Commission however has exclusive jurisdiction over rates charged by commodity pipelines.^{200a}

The regulation of rates for commodity pipelines follows a different pattern than combined pipelines and oil and gas pipelines

¹⁹⁷ 1867, 30 and 31 Vict., c. 3. Some of the Provinces have their own legislation dealing with pipelines carrying commodities within their boundaries.

¹⁹⁸ Stat. Can. 1959, c. 46.

¹⁹⁹ *Supra*, n. 196.

^{199a} National Energy Board Act, *supra* n. 198, s. 44.

^{199b} *Ibid.*, ss. 50, 51, 53, 54.

²⁰⁰ If the predominant use is for oil and gas transmission, the National Energy Board may be given exclusive jurisdiction: *National Transportation Act*, Stat. Can. 1966-67, c. 69, s. 27(2).

^{200a} National Transportation Act, *supra* n. 196, s. 26(1).

which are governed by Part IV of the *National Energy Board Act*.²⁰¹ The *National Transportation Act* requires the Canadian Transport Commission to regulate rates in the same manner as railway and extra-provincial trucking; section 26(1) requires them to be filed with the Commission which may disallow any rates that are not compensatory and not justified by the public interest or that take advantage of a monopoly situation.^{201a}

The exemptions in Section 28 of the *National Transportation Act* are designed to cover private carriers who intend carrying their own products and who do not engage themselves in carrying for others.

The difference in treatment between commodity pipelines and other pipelines is understandable because the former are far more likely to be independent carriers engaged in the exclusive business of transport, while the latter are normally owned by oil or gas companies who will provide their services to other producers for a charge, and there is a greater likelihood of sacrificing the interests of rivals to promote their own.

V. REGULATION OF INLAND & COASTAL SHIPPING

The principal inland waterways used in commercial transportation are the Great Lakes-St. Lawrence River system and the Mackenzie-Yukon watershed, the two differing considerably in importance and in regulation. The "Great Lakes" system is by far the most important and the most heavily traveled waterway in the world,²⁰² draining the mid-continental basin and providing continuous navigation through over 1,800 miles of lake and river to the head of Lake Superior. Indeed the conditions of navigation on these great bodies of fresh water resemble very closely the scale and freedom of ocean transport, even though the direct over sea component of the trade is very small and has not appreciably

²⁰¹ *Supra*, n. 198. Sections 50-59 require the rates to be filed and approved by the National Energy Board (and in respect of combined pipelines, also by the Canadian Transport Commission: by Part II, s. 26(2) of the *National Transportation Act*); the rates must be just and reasonable, and non-discriminatory, and the Board has power to disallow or suspend any rates.

^{201a} *National Transportation Act*, *supra* n. 196, s. 26(3).

²⁰² The Seaway is only open to navigation for approximately eight months of the year, from early or mid-April to early or mid-December, because of ice formation on the narrow channels connecting the lakes.

increased even after the opening of the Seaway to ocean vessels in 1959.²⁰³

However, only a small proportion of this huge movement is closely regulated with respect to rate tariffs, entry and service.

On the other hand, transportation on the Mackenzie River system, the arterial line of the Canadian north, though very insignificant in comparison with the Great Lakes, is comprehensively regulated.²⁰⁴

Although Canada has the second longest coastline in the world, next only to that of the Soviet Union, the amount of coastal shipping is not large. Unlike shipping on the Great Lakes which is open to all nations of the world on equal terms,²⁰⁵ a part of the coasting trade is reserved to ships of Canadian registry,²⁰⁶ the remainder being open to Commonwealth ships on the same terms as Canadian

²⁰³ Because of the limitations of the channels, which now permit vessels drawing up to twenty-seven feet of water, large ocean going vessels have not used the Seaway to the extent hoped for. Even the most important export cargo (grain) is carried largely by lake fleets to elevators along the St. Lawrence River to await later shipments to receiving countries. Only a small volume goes directly by ocean going vessels. During 1969, the total tonnage in the Welland section exceeded 53 million tons (against 58 million tons in 1968). "These 53 million tons consisted of 47 million tons of bulk and 6 million tons of general cargo, . . . Slightly more than 41 million tons transited the Montreal-Lake Ontario section, against 48 million tons in 1968. Of these 41 million tons, bulk cargo accounted for 34 million tons and general cargo 7 million tons, . . ." Iron ore was the most important commodity followed by wheat and iron and steel products. (1969 Annual Report of the St. Lawrence Seaway Authority at page 8).

²⁰⁴ The four Mackenzie Waterway Companies [Northern Transportation (government owned and operated), Kaps Transport, Cooper Barging and Lindberg Transport] carried only 189,690 tons in 1965 but this consisted of very important commodities not otherwise available to the sparsely populated regions, such as foodstuffs, general merchandise, ore, petroleum and mining supplies. A large amount of this cargo is carried by barges. The Mackenzie river empties into the Arctic Ocean and provides navigation to outlying communities to a distance of about 1,200 miles.

²⁰⁵ In practice shipping on the Mackenzie river is confined to Canadian ships and in the domestic trade on the Great Lakes, to Canadian and U.S. ships.

²⁰⁶ The region from approximately Havre St. Pierre (west of the Island of Orleans) on the St. Lawrence River to the Head of the Great Lakes (Thunderbay) has been reserved since 1964 to ships of Canadian registry by the *Canada Shipping Act*, Stat. Can. 1964-65, c. 39, s. 38, adding s. 671(2a) to R.S.C. 1952, c. 29, when it was found that the pre-Seaway *status quo* (when Commonwealth ships seldom took part in that trade) was being disturbed.

ships.²⁰⁷ The volume of intercoastal shipping is negligible although the railways recognize that it represents a real or potential competition in the carriage of transcontinental freight traffic.²⁰⁸

A. Rate Regulation on the Great Lakes

The *Transport Act* of 1938²⁰⁹ began the control of rates charged by vessels of 500 gross tons and over for packaged freight,²¹⁰ and regulation was entrusted to the Board of Transport Commissioners. The freight classification approved by the Board and in use is the same as for the railways,²¹¹ and the tolls are at a differential below the corresponding all-rail tariffs. The system of control which is identical to that which regulated railways before 1967 has not been affected by the *National Transportation Act*;²¹² water carriers of package freight must file their tariffs²¹³ which should not discriminate against persons or places,²¹⁴ and the Board is empowered to disallow any tariff that it considers to be unjust or unreasonable or against the public interest, and it may require the carriers to substitute an acceptable tariff, or on their failure to do so, prescribe

²⁰⁷ Under the *British Commonwealth Merchant Shipping Agreement*, 1931, Part IV, Articles 10-12, Canada as a member of the Commonwealth had agreed to treat ocean going vessels of other members of the Commonwealth equally with its own vessels, but under Part III, Article 9, each Dominion could regulate the coasting trade, sea fisheries and the fishing industry. United States vessels may carry goods from a Canadian to a U.S. port, and even between two Canadian ports provided the vessels call en route at a U.S. port. The U.S. has corresponding restrictions on Canadian vessels.

²⁰⁸ In the year ending June 30, 1966, of the 5.642 million long tons of cargo leaving the West Coast of Canada and passing through the Panama Canal, only six thousand tons were destined for Eastern Canadian ports. "Similarly, of the 689,000 long tons leaving Eastern Canadian ports and passing through the Panama Canal, 13,000 long tons were destined for Western Canadian ports. The total tonnage passing through the Panama Canal and arriving in the Canadian West Coast ports from any origin in, Canada or elsewhere, amounted to 1,151,430 long tons..." The movement in the other direction, arriving at Eastern Canadian ports was 536,764 long tons. (Canada Year Book, 1968, p. 831).

²⁰⁹ R.S.C. 1952, c. 271.

²¹⁰ The *Act*, as seen in s. 31, does not apply to "goods in bulk", as defined in s. 2(1)(d) except those transported on the Mackenzie River. Where a railway company owns vessels and grants through carriage facilities, s. 363 of the *Railway Act*, R.S.C. 1952, c. 234, provides for the application of regulations under the latter *Act*.

²¹¹ E.g. standard, special (or commodity), and competitive tariffs. *Transport Act*, *supra*, n. 209, s. 17.

²¹² *Supra*, n. 196.

²¹³ *Transport Act*, *supra*, n. 209, s. 14.

²¹⁴ *Ibid.*, s. 21.

tariffs on its own.²¹⁵ The Board could also suspend any tariffs for a period of time.²¹⁶ Water carriers are also permitted to introduce competitive tariffs between points which the Board may declare or be deemed to have declared to be competitive points.²¹⁷ Like railways, water carriers could also enter into agreements with shippers whereby freight is carried at an agreed charge.²¹⁸

The bulk commodity exemptions in the *Transport Act*, in which ore, coal and wheat dominate, have been a sore point in the regulation of intermodal transportation as the bulk carriers compete with railways for freight which accounts for over 90% of the Great Lakes movement. The Doyle Report has attacked these exemptions as "destructive to our basic objective of a strong national transportation system built around a core of regulated common carriers by all economic modes."²¹⁹ The exemption was based in part on the belief that such carriage was not competitive with the railways — as a matter of fact it is — and in part because of the freedom to engage in water transportation enjoyed by carriers of all nations. Competition, whether for bulk commodities or for package freight, however is not on equal footing with railways as waterways are public facilities and, except on the St. Lawrence Seaway, are toll-free, the federal government assuming responsibility for and bearing the cost of maintenance of navigation.²²⁰ Tolls are resisted not only

²¹⁵ *Ibid.*, s. 23.

²¹⁶ *Ibid.*, s. 16.

²¹⁷ *Ibid.*, s. 20.

²¹⁸ *Ibid.*, Part IV, ss. 32-35 as amended by Stat. Can. 1955, c. 59, s. 1.

²¹⁹ Doyle Report, *supra*, n. 6, at 530. The *Interstate Commerce Act*, 49 U.S.C.A., grants the same exemptions as Canada.

²²⁰ The tolls charged on the Seaway and lockage charges on the Welland Canal, constitute the sole exception in a toll-free system that has prevailed since the *International Boundary Water Treaty Act*, Stat. Can. 1911, c. 28. Article 1 of the *Waterways Treaty* embodied in the *Act* declared that, "... the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries equally, subject however to any laws and regulations if either country, within its own territory, not inconsistent with such principles if free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries". Tolls on the Seaway were authorized by agreement with the United States in 1951 whereby the cost of operation of the Seaway and amortization of the capital cost of \$470 million (Canadian share being \$330 million) are to be recovered over a fifty year period. So far the tolls recovered have not even covered the interest on the original investment. Though the Seaway has been a commercial success it has been a financial failure. See *St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242, especially ss. 15-17 regarding the charging of tolls.

by shippers dependent on waterways for cheap transportation (especially the iron and steel mills complex in Hamilton which obtains ores, forming a large proportion of the movement, from mines in Quebec and Labrador) but also by the prairie farmers whose wheat will be less competitive on world markets if tolls were imposed. The fact, however, remains that if government is to bear costs and not charge them according to use made of the facilities the general taxpayer has in the end result to bear the burden and that would not be making use of the national resources to the best advantage of the country.²²¹

The only exception to bulk commodity exemption was introduced by the *Inland Water Freight Rates Act*²²² in 1923 following a Royal Commission investigation which found a combine in the grain movement. By section 3 of the *Act*, every shipper after entering into a contract for the carriage of grain from Fort William or Port Arthur to any other port or place in Canada or the United States, and before the grain has been laden in pursuance thereof, has to file a copy of the contract with the Board of Grain Commissioners for Canada, and by section 5 the Board is empowered to prescribe maximum rates if it is of opinion that any rate is unreasonable, excessive or unjustly discriminatory. The Board has seldom found it necessary to exercise its powers since there is normally an abundance of tonnage seeking grain cargo which is coveted not only by grain carriers, but also by package freighters to whom it is a good bottom cargo, and hence competition keeps rates in check.

B. Rate Regulation on the Mackenzie System

On the Mackenzie River system a comprehensive regulation is in force: vessels over 10 gross tons are subject to the *Transport Act*²²³ and rates on all kinds of cargo, bulk as well as general, are subject to approval by the Board of Transport Commissioners.^{223a} This control was necessitated by the intense competition that prevailed on this system, and it has been successful in protecting carriers against their own ruinous actions, and guarded shippers against exorbitant rates.

²²¹ Imposition of tolls would not help and would probably hinder the railways. Both the C.P.R. and the C.N.R. either own or have arrangements with lake carriers engaged in transporting passengers and package freight.

²²² R.S.C. 1952, c. 153.

²²³ *Supra*, n. 209, s. 2(1)(k).

^{223a} *Ibid.*, Part III.

C. Rates on Coasting Trade not Reserved to Canadian Ships

Rates charged by Canadian and Commonwealth vessels on the coasting trade between two sea ports are not regulated, although the Canadian Transport Commission through subsidy agreements controls the fares, rates and services of all shipping companies in receipt of federal subsidies. On the Atlantic coast, rates are partially established by a conference known as the Associated Newfoundland Lines,²²⁴ and on the Pacific coast by the Coastwise Operators Association of British Columbia.

VI. REGULATION OF CIVIL AVIATION

The whole field of legislation in relation to aerial navigation belongs to the Dominion.²²⁵ Federal regulation of scheduled and nonscheduled commercial air transportation is more comprehensive than that of any other mode and is primarily laid down in the *Aeronautics Act*²²⁶ and Regulations²²⁷ made by the Transport Board,²²⁸ the authority acting thereunder.

Two major airlines, Air Canada (a government undertaking)²²⁹ and Canadian Pacific Airlines,²³⁰ form the nucleus of Canada's freight

²²⁴ This conference comprises shipping companies operating from Montreal and Halifax to Newfoundland (See Turgeon Report, *supra* n. 34, at 264).

²²⁵ In *re The Regulation and Control of Aeronautics in Canada* [1932] A.C. 54, the Judicial Committee of the Privy Council declared that the Parliament of Canada had authority to enact s. 4 of the *Aeronautics Act* (R.S.C. 1927, c. 3) and Air Regulations, respecting the licensing of pilots, navigation, etc., and the regulation and licensing of all aircraft, aerodromes and air stations.

²²⁶ R.S.C. 1952, c. 2.

²²⁷ SOR/54-717, which can be found in 1955 *Canada Gazette*, Part 2, Vol. 89. The Rules General Orders and Regulations issued by the Air Transport Board from part of the System of Regulations.

²²⁸ Now the Air Transport Committee of the Canadian Transport Commission (hereinafter referred to as the Commission). See the *National Transportation Act*, Stat. Can. 1966-67, c. 69, s. 82.

²²⁹ Incorporated as a subsidiary of the Canadian National Railways, by the *Trans-Canada Air Lines Act*, Stat. Can. 1937, c. 43. Name changed to Air Canada by Stat. Can. 1964, c. 2, s. 1. Apart from this structural connection, Air Canada is virtually independent of the parent.

²³⁰ Wholly owned subsidiary of the C.P.R. Although s. 15(2) of the *Aeronautics Act*, R.S.C. 1952, c. 2, prohibits ownership of an airline by operators of other modes of transport, the two major railways were exempted.

and passenger air service. Services provided by these two airlines²³¹ are supplemented by regional carriers operating regularly,²³² or irregularly²³³ between specific points, or on charter,²³⁴ or under contract;²³⁵ and, in addition, there are a number of flying clubs²³⁶ and specialty air carriers²³⁷ catering to the special needs of the country.

All these carriers, except Air Canada, are closely regulated by the Commission in virtually all economic and safety aspects of transport or service, although in respect of flying clubs and specialty air services economic regulation is the least.

Air Canada operates under a contract with the federal government pursuant to Sections 15 or 24 of the *Trans-Canada Air Lines Act*²³⁸ and although licences originate from the Commission, they are pure formality;²³⁹ Air Canada is responsible only to the Minister of Transport and Parliament. It carries the major proportion of passengers and freight and operates both passenger and all-cargo planes on a regular schedule. The *Trans-Canada Air Lines Act* requires Air Canada to maintain tariff charges "on a competitive basis with other similar transportation services in North America."²⁴⁰

²³¹ Air Canada and C.P. Air Lines are Class 1 carriers. Air Canada, under government policy, provides more than seventy-five per cent of the total transportation needs of the country; the balance is shared by C.P. Air Lines (major portion) and the regional carriers. In 1967, government announced that C.P. Air Lines could expand its services over the transcontinental route provided that by 1970 it did not take more than twenty-five per cent of the traffic.

²³² The regular regional carriers (Class 2) offer public transportation on a route pattern and with some degree of regularity between specific points. There are five of them now operating: Quebecair, Eastern Provincial, Nordair, Trans-Air and Pacific Western.

²³³ These are called irregular Specific Point carriers (Class 3).

²³⁴ Charter air services come under Class 4 regulations.

²³⁵ Class 5: they do not offer public transportation but operate under one or more specific contracts which have to be approved by the Commission.

²³⁶ Class 6: operated for flying instruction, or recreational flying for the benefit of club members.

²³⁷ Class 7: provide flying training, recreational flying, aerial photography, survey, pest control, advertising, patrol and inspection, etc.

²³⁸ R.S.C. 1952, c. 268.

²³⁹ By s. 15(7) of the *Aeronautics Act*, *supra*, n. 226, the Commission is required to grant a licence to Air Canada under such terms and conditions as will enable Air Canada to perform its agreement with the Minister of Transport.

²⁴⁰ *Supra*, n. 238, s. 15(2)(d).

Government policy with respect to regional carriers was laid down in October, 1966,²⁴¹ whereby regional carriers are to be allowed greater scope in the development of routes and services by means of limited competition on mainline route segments of the two principal airlines, if that would be consistent with their local route requirement; and, in a few cases, by transfer to them of secondary routes operated by the two airlines. Carriers providing services to remote areas where surface transportation is inadequate and where air services are essential to promote development, may also be paid subsidies on the "use it or lose it" formula. Policy with respect to other carriers has been amended from time to time by means of circulars issued by the Board.²⁴² Within the framework of this policy, the Commission restricts entry into the industry on two levels; first, a new firm requires a licence to operate an airline for commercial services and, second, a firm already licenced cannot freely extend its routes to points not authorized by licence, or in the case of contract carriers to additional contracts not specified in the licence. The requirement of a certificate of "public convenience and necessity", which lays down the routes and points serviced, fares and rates charged, conditions in contract of carriage, and insurance to be carried, gives the Commission complete economic control over all carriers under its jurisdiction.²⁴³

All air cargo is carried at the same basic rates with a few exceptions. There is no classification as such but a rule is in force whereby charges are based on the size (250 cubic inches = 1 lb.) or weight of the consignment whichever is the greater. Higher rates on light and bulky shipments are provided in this manner instead of placing them in separate or higher-rated "classes" as is done by the railways. In a few cases low commodity rates for specific articles, such as drugs and cosmetics, electrical appliances, are published to promote traffic in those items, and discounts for volume shipments are also granted. Freight rates are generally based on distance, tapering on a moderate scale. Air Express rates give the benefit of door-to-door service and are somewhat higher than ordinary freight rates where delivery to and collection from the carrier have to be arranged by the shipper and the consignee respectively.

²⁴¹ See Air Transport Board Circular No. 62/66.

²⁴² See *e.g.*, Air Transport Board's Circular No. 51 and General Orders No. 36/63 and No. 37/63 (in respect of class 4, charter air carriers), and Circular No. 8/51 and General Order No. 56/64 (in respect of Class 7 specialty air carriers).

²⁴³ *Aeronautics Act*, R.S.C. 1952, c. 2, s. 15(3). Air Canada is not under its jurisdiction.

Although freight carried in the holds of passenger aircraft is purely a by-product of the service, and the direct out-of-pocket costs are nominal (handling and administrative costs being the only items), rates are based on the cost of movement by an all-cargo plane. These are relatively higher than all other modes of transport and hence air transportation is only used in respect of articles of high value or great perishability, or where speed is much more important than cost of carriage. It is doubtful whether airlines will be able to reduce their rates significantly in the foreseeable future, even though some of the larger and faster passenger jet services which will be rendered obsolete when the jumbo and supersonic transport jets are introduced in the 1970's may be released for cargo service. Even then, if they compete seriously with the surface modes, the regulatory authority would do well to consider the real resource costs of providing the publicly available air terminals and navigational facilities and then set down the minimum rates so that the economic objectives set out in the *National Transportation Act*²⁴⁴ are realized.

The Commission is empowered to regulate the fares and rates charged by air carriers. All carriers except those in Classes 5, 6, and 7 (which are only subject to the Commission's tariff filing requirements) must publish and file with the Commission tariffs of fares, rates, charges and rules applicable to the type of traffic they are licensed to carry, and such tariffs must be available for public inspection. The Commission has power to disallow any tariffs that in its opinion are discriminatory, unjust or unreasonable or against the public interest; and it may determine and prescribe the maximum, minimum or individual tolls.²⁴⁵

Irregular specific point carriers (Class 3) are under no obligation to carry traffic if sufficient volume is not available to ensure a minimum revenue, but they are required to indicate on the fares and rates page of the tariff what they consider to be the minimum. The Commission has made it clear however that (since carriage of goods in passenger planes is only a by-product) "the minimum charges must be related to handling and/or administrative costs and should not be considered as possible revenues from the flight".²⁴⁶

²⁴⁴ Stat. Can. 1966-67, c. 59, ss. 1 and 14.

²⁴⁵ SOR/54-717, *supra*, n. 227. Regulations 13 and 15. This regulation is similar to, but more elaborate than, the pre-1967 railway regulation. The Board of Transport Commissioners (or the Air Transport Board which succeeded it) did not have power to fix rates.

²⁴⁶ Circular No. 20/52 of the Air Transport Board.

Contract Carriers operating under one or more specific contracts are required to file their contracts before operating under any of them, and the Commission has the like power of disallowance, but not the power to determine rates.

Class 6 and 7 air carriers are not required to file or publish tariffs but they must establish and observe "just and reasonable tolls, rules, regulations, terms and conditions of service," etc.²⁴⁷ and the Commission may require them to inform it of their charges, at any time. It has the same power of disallowance and fixing of maximum or minimum tolls.²⁴⁸

The Commission by means of its regulations, rules, orders, or circulars, prescribes the form of accounts to be maintained by air carriers and the annual returns to be submitted to it, and is thus in a position to keep a close watch on their economic operations.²⁴⁹

The Commission is authorized to suspend, or cancel any licence if the carrier has violated any of the conditions attached to its licence²⁵⁰ and a procedure for appeal to the Minister of Transport against the order has been laid down by the Commission by Rule 32/67 dated 17th of May 1967. The same procedure applies for refusal by the Commission to grant air operating licence in the first instance.

Subsidies to civil aviation, indirect as above, or direct as in the case of regional services, upset the equilibrium as between modes of transport, but where there is no alternative to transportation except by the particular mode under consideration which because of small volume is uneconomical, public policy providing subsidies is justified in the interest of the nation as a whole. The policy of limited tied subsidies according to the promotion of service by the carrier (the "use it or lose it" formula) announced in October, 1966 (See Circulars No. 61/66 and 62/66 of the Air Transport Board)

²⁴⁷ Air Transport Board, Rule No. 1/52, Part III and IV effective October 1, 1952.

²⁴⁸ SOR/54-717, *supra*, n. 227, Regulation 17.

²⁴⁹ See *e.g.*, Circular No. 15/52, General Order No. 20/58 (Class 4 Group C Charter Carriers), Rule N. 22/63 (accounts and statistics — filing of returns by all carriers), amend. Rule 24/64.

²⁵⁰ *Aeronautics Act*, R.S.C. 1952, c. 2, s. 15(10). The Supreme Court in *North Coast Air Services Ltd., et al. v. C.T.C.* [1968] S.C.R. 940 declared that these orders and regulations were invalid as the Air Transport Board did not have the power to issue them without approval of the Governor in Council, and the *Act* was amended in 1968 by Stat. Can. 1968-69 c. 13 to give the C.T.C. this power.

shows the concern of the federal government in maintaining services to remote areas, and is in full conformity with the national policy.²⁵¹

CONCLUSION

The *National Transportation Act*²⁵² is a very important piece of legislation that has attempted to solve the transport problem of Canada by laying down objectives of national policy, but the emphasis on railway regulation has obscured national economic goals especially in the relation of each mode of transport to others. While minimum rate control is feasible for railways, where only two major companies are involved, and where one railway, the Canadian Pacific, is the yardstick for measuring costs,²⁵³ imposition of such a control on the numerous firms involved in highway transportation having diverse cost, financial and service characteristics, without any guidelines as to the "yardstick" firm, may accentuate the difficulties of common carriers when faced with intense competition from the unregulated sectors. Furthermore, the need for developing a costing formula is most urgent for trucking firms²⁵⁴ and should be based on far more comprehensive information on costs than presently available.²⁵⁵ This places a very heavy onus on the regulatory authority. Again, in regulating one mode of carriage vis-à-vis another mode, with a view to optimum utilization of national resources, the authority must take account of the real costs involved, and here the problem of equitably apportioning user charges for publicly provided facilities becomes important particularly in highway²⁵⁶ and inland water

²⁵¹ Regional Air Carriers in 1968 carried 31.45 million pounds of freight or 5.36 million ton-miles express baggage and mail (Eastern Provincial and Pacific Western accounting for 23.62 million lbs. of this total) as compared with C.P. Air Lines' volume of 31.07 million pounds and Air Canada's 215.5 million pounds. D.B.S. 51-201.

²⁵² Stat. Can. 1966-67, c. 69.

²⁵³ *Railway Act*, R.S.C. 1952, c. 234, s. 334, confirms the practice adopted by the Board of Transport Commissioners in treating the lower cost C.P.R. as the yardstick railway.

²⁵⁴ Here the problem is more closely bound up with entry control than in other modes. Furthermore, a realistic yardstick will have to be flexible enough to allow lower cost efficient firms to function without restraint from an arbitrarily imposed level of costs; otherwise it would create a rate "umbrella" protecting competitors to the detriment of common carriers as a whole.

²⁵⁵ It must be pointed out here that the Commission has still not been able to devise an acceptable costing formula even as regards railways.

²⁵⁶ The question here is should commercial trucking firms bear the appropriate share of highway costs. The highways are generally financed by all users, commercial and non-commercial.

transportation.²⁵⁷ If this is not done, then modes providing their own facilities will be at a considerable competitive disadvantage.

In emphasizing the economic goals, Parliament has not lost sight of the overriding public interest that requires transportation to be provided at low rates in areas which cannot bear the full burden of costs involved, and except in the case of statutory rates on grain (which question is by no means closed), this imposed public duty will be compensated for out of public funds by way of subsidies or grants.

Finally, in order to achieve a co-ordinated and harmonious operation of the system as a whole, it is necessary that the entire regulatory scheme should be critically examined in order to eliminate inconsistencies in the law, so that every part thereof contributes to the national objective.

²⁵⁷ Govt. policy hitherto has been to make facilities available free of tolls (except on the St. Lawrence Seaway) even though expenditure is incurred in maintaining and deepening the waterways.