the regulatory process of the Canadian Transport Commission

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THE REGULATORY PROCESS OF THE CANADIAN TRANSPORT COMMISSION

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A study prepared for
The Law Reform Commission of Canada

by

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Preface

Fulfillment of the Commission's responsibility to study "the broader problems associated with procedures before administrative tribunals", as our first research program put it, is the justification for this study of the Canadian Transport Commission. The principal author, Professor Hudson Janisch, spent some six months in the Ottawa offices of the CTC in preparing the study. In it, he raises a number of issues of current concern. These include a regulatory agency's relationship with its responsible minister and his department, the use of rule-making and other techniques to improve the fairness and efficiency of an agency's impact on affected groups, as well as the access to information issue — in particular, a party's access to staff studies.

Professor Janisch's research was completed in September, 1975, and a revised draft of the study was submitted to the Commission in December of the same year. A number of developments since then have been brought to our attention primarily by the CTC's legal branch. These are mentioned in the notes at the end of the study. However, the Commission's major objective in publishing studies of federal agencies is to shed light on how an agency functions rather than to provide a current statement of the law in a regulated area.

We hope this study, like its companions in our series on federal administrative agencies,* will prove useful to the CTC, as well as to persons interested in administrative law and administrative tribunals generally.

Comments on this study are welcome and should be sent to:

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Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
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* Immigration Appeal Board, July 1976
Atomic Energy Control Board, March 1977
The Parole Process (National Parole Board), March 1977
Unemployment Insurance Benefits, May 1977
National Energy Board, October 1977

Foreword

This Study has been undertaken for the Law Reform Commission as part of its Administrative Law and Procedure Project. The emphasis in these agency studies has been on the actual workings of the tribunals under review in order to obtain a better understanding as to how best to set about possible reform. To that end six months were spent during the summer of 1974 and 1975 working in the Canadian Transport Commission under contract with the Law Reform Commission. We wish to record our thanks to all those who gave us so generously of their time and assistance.

To an expert in the area of transportation law and regulation, our approach, particularly in the first chapter, might seem somewhat simplistic. This is because the Study is designed for a non-expert audience in the sense that the ideas it contains have to be capable of broad application as part of a wider survey of federal administrative agencies. In other words, we have sought to obtain some real insight into one particular agency without discarding the universal principles generally applicable to all agencies.

The most serious problem immediately confronting any researcher in this area of the law is that of ready access to decisions. At the time our research was undertaken there was no systematic publication of decisions in a readily usable form. As a result a great deal of time had to be spent at the outset of our study laboriously compiling our own digest of decisions. The proposed new series of reports, *Canadian Transport Cases*, under the editorship of a former Commissioner, Laval Fortier, should hopefully remedy this problem.

Another potential source of information, the Commission's Annual Reports, proved to be of only limited assistance. Although it has grown from 20 pages for 1968 to 60 pages for 1974, the Report remains inadequate. It provides only the broadest survey of Commission activity with occasional glaring omissions of very significant decisions. In terms of statistical information, inconsistencies in reporting and wording make it difficult to draw inferences, other

than those of the most general nature. By way of contrast it might be noted that the 1974-75 Annual Report of the Canadian Radio-television Commission is over three hundred pages long and contains a wealth of detail on the workings of the Commission.

A comprehensive annual report would be a most valuable document not only to researchers and students of the regulatory process but also internally to the Commission as a means of introducing new commissioners to their responsibilities and as an encouragement to greater inter-modal concern at a senior staff level. Considering the potential value of such a publication, it is unfortunate that at present so little attention is given to its preparation.

I wish to record my profound and sincere thanks to my research assistants, Andrew Pirie and Bill Charland. Both were students at the Faculty of Law, Dalhousie University at the time the research was undertaken for this Study.

H. N. Janisch

CHAPTER I

The Legal and Political Context

Underlying the legislation that established the Canadian Transport Commission in 1967 were two significant commitments — to competition and to a single and integrated federal regulatory agency for all modes of transport. These commitments were not absolute and have changed as ambiguities built into the *National Transportation Act* became apparent and shifts in underlying policies occurred. A sense of the origins of the recent history of the regulation of transport at the federal level in Canada are prerequisites to understanding the context in which the CTC has functioned. This does not require a full scale chronological account of the development of transportation in Canada from the days of the voyageurs to the present, but merely a brief excursion through more recent events.

A. *THE NATIONAL TRANSPORTATION ACT:* ITS BASIC PREMISES

The recent origins of the CTC's enabling legislation can be found in the MacPherson Report. The Royal Commission on Transportation, appointed in mid-1959, submitted this three-volume Report in 1961. Often described as an investigation of "transportation", the Commission's actual terms of reference were far more circumscribed. It was called upon to ". . .inquire into and report upon the problems relating to railway transportation in Canada and the possibility of removing or alleviating inequities in the freight rate structure".[1]

Although the Commission soon found that a broader perspective was necessary, the original terms of reference and not the Commission's title reflect its primary concern. This was to free the railways from the "dead hand" of restrictive rate regulation that appeared to prevent them from effectively meeting the growing competition of road transportation and abandoning uneconomic services. Keeping the railways running required massive support from the public coffers. There had been a valid rationale for this sort of regulation when rail virtually monopolized the transportation field. But by 1960, this had largely disappeared. For by then, ". . .the railways' principal competitors — the trucks — operated almost entirely outside of federal jurisdiction and while some of the provinces did regulate certain aspects of the trucking industry's activities, there was little attempt made to exercise any real control over their rate policies".[2]

Freeing the railways from rigid and counter-productive regulation required the consistent opening of all modes of transportation to greater competitive freedom. This emerges clearly from the Commission's summary of its general conclusions.

1. The regulation of transportation in Canada should be minimized as much as possible, consistent with the protection of the public interest, and such regulation as is retained should bear in a reasonably equitable fashion on all carriers.

2. The rationalization of railway plant and operations should be actively encouraged by public policy and where, for national policy reasons, it is considered necessary to retain rail operations such as unprofitable passenger or branch line services, the railways should be entitled to payment from public funds to cover their deficits on such services.

3. No particular form of transport should be singled out as an instrument of national policy if any burden is involved in the performance of the function *unless* sufficient compensation is provided to that mode of transport to prevent distortions in the competitive transport market.

4. Assistance to transportation which is designed to aid, on national policy grounds, particular shippers and particular regions, should be recognized for what it is and not be disguised as a subsidy to the transportation industry. Moreover, whenever assistance of this kind is distributed through the transportation medium it should be available on a non-discriminatory basis to all carriers.[3]

What had started out as an investigation of railway rates ended in a broad sweeping recommendation for greater competition as a national transportation policy in itself.

> In brief, the broad aim of public transportation policy should be to ensure — consistent with the other goals of national policy — that all the various modes of transportation are given a fair chance to find their proper

> place within a competitive system. The application of such a policy is, we believe, essential if we are to obtain — at a minimum cost — a balanced and efficient transportation system which is fully adequate to meet the nation's transportation requirements.[4]

While competition was recommended as the predominant value, it was not to hold exclusive pre-eminence because there was always that reference to "the other goals of national policy". Aware that it was recommending a major break with the past, the Commission was careful to point out that should the "national policy" require regional or other subsidies, then such considerations could and should, to the required extent, push competition aside.

Canada always had to overcome great distances and rugged terrain, sparse population, scattered resource location, and, most significant of all, the strong economic and political attraction exerted by the United States of America. As a result, government from the beginning had played a predominant, positive role in transportation and had never confined itself to regulation alone.[5] To think in terms of a private enterprise model for a national transportation system was, as a result, conceded to be naïve. It would be unrealistic to believe that a transportation policy designed to transcend commercial considerations could be attained without considerable continued public financing. "At the same time, however," the Commission added, "we would point out that the means whereby this outlay may be kept to a minimum by deploying it in the most efficient and economic manner, has been one of our chief concerns in framing our recommendations as to the National Transportation Policy".[6]

Indeed, the MacPherson Commission sought a fundamental shift in emphasis which, while not amounting to a clean break with the past, would result in profound change.

> Historically. . .national transportation has been a great deal more preoccupied with the question of how effectively the transportation system was functioning as an instrument to fulfill national policy objectives, than with the question of how well it was functioning as an economic enterprise. There were, of course, good reasons in the past why this was so. It is our view, however, that there are now equally good reasons why it should no longer be so.[7]

This greater commitment to competition was carried over into the *National Transportation Act*. But the other cardinal feature of the Act, namely the need to have a single regulatory authority having jurisdiction over all modes of transportation, was specifically rejected by the Commission.

The Commission distinguished between the "negative" or regulatory authority and the "positive" or promotional role of government. With respect to regulatory authority, it concluded that the single agency approach was not desirable. "Such central authority", it observed, "would have to be so large that the division of labour necessary would follow the lines of agencies already in existence".[8]

The Commission was, nevertheless, convinced of the need for a positive or promotional central authority. It suggested a national transportation advisory council made up of part-time members drawn from industry and government to advise the Ministry of Transport. This council, and not the regulatory authorities or the Ministry of Transport, was seen as the primary vehicle for policy formulation.

B. *THE NATIONAL TRANSPORTATION ACT:* THE DEBATE

In much the same way as railway concerns had been of prime importance to the MacPherson Commission, so too were the debates leading up to the adoption of the *National Transportation Act* largely concerned with railway matters.[9]

The environment in which the Act was passed reinforced the primacy of short term objectives over a full scale re-assessment of national policy. The Act had originally been introduced in September of 1966, at a time when a national rail strike had been called. Legislation had been required to force railway workers to return and the government was faced with the immediate prospect of massive wage increases. Railway rates had been frozen since 1959 and this meant that by 1967 Canadian taxpayers were being asked to pay more than $100 million a year to cover railway deficits.

One of the Act's primary purposes was to reduce this financial drain, and the Act outlined three possible approaches: (1) subsidies were to be abolished over an eight-year period; (2) the railways were to be free to set their passenger and freight rates so as to meet competition; and (3) the railways would be allowed to abandon uneconomic branch lines and passenger services, and, where required to provide uneconomic service in the public interest, they would be directly and specifically compensated for their losses.

This was considered by the government to be the most important part of the Act, "even more important than the establishment of the Canadian Transport Commission". It was described as carrying out,

> . . .the principle enunciated in the MacPherson Commission, namely that those services which parliament requires the railways to perform in the national or social interest, but which are not remunerative, should have their losses largely paid for out of Treasury.[10]

The Act, however, did not stop at this "liberation" of the railways. It sought as well to set their new-found freedom in the broader context of the "competitive era" in Canadian transportation policy as announced by the MacPherson Commission. As Mr. Pickersgill, then Minister of Transport and later first President of the Canadian Transport Commission, was to explain:

> The basic approach of the report was a new one. It was that there had been a development of alternative and competitive modes of transport in most parts of the country for most classes of travel, and the kind of regulation of railway charges which may have been needed in the past was no longer essential for the protection of the public. . .
>
> It is also necessary to make sure that we do not burden the public with services which have ceased to be essential because other modes of transportation have taken their place. . .Our transportation services must be as efficient and as economical as possible.[11]

The Parliamentary debate on the Act reveals that some people were sceptical about the reality of competition in transportation. While much of the debate was of a partisan political variety, some speeches raised a number of the basic issues.

The major attack on this new reliance on competition came from the New Democratic Party. It questioned both the existence of competition and the desirability of having national goals set by what the NDP leader, Mr. Lewis, described as the "laws of the jungle".[12] "One cannot operate a transportation system in the same way one operates a soap factory", one member remarked in launching a frontal attack on competition.[13] Other members referred to "some mystic benefit" supposed to be derived from competition, "this myth about the value of competition".[14] Another pointed out that even if some degree of competition did exist it was unlikely to work to the advantage of primary resource provinces.[15]

The other major change in the Act was the creation of a single regulatory authority to replace the three existing modal agencies. This had not been favoured by the MacPherson Commission, but the reason for it was stated by the Minister of Transport.

> I have reached the conclusion that one of the most important things of all is to have one unified organ of government divorced from any of these different modes of transport which will look at all of them, compare one with another, and, when considering the regulation of one, would take account of what is happening in the other fields and determine whether we were getting the best value by spending public money on railways, for example, or whether it would be better to scrap a branch of a railway and concentrate on a highway or an airline.[16]

Strangely, there was little opposition to this grandiose scheme and few pointed out that this was not what the MacPherson Commission had recommended. But one member who did cautioned that ". . .we are going too fast by placing regulatory and research functions in the same body and by placing all modes of transportation under one commission".[17]

C. *THE NATIONAL TRANSPORTATION ACT:* THE AMBIGUITIES

While the Act created a single trans-modal regulatory authority and emphasized a commitment to competition, certain significant modes remained outside its ambit. Rail, air, water and truck transportation came under the Act, but oil and gas pipelines did not, no doubt because of the existence of the National Energy Board. In fact, the new agency was to share the regulation of commodity pipelines with the NEB, although none as yet exist. Although the Act contained provisions to bring inter-provincial trucking under direct federal control, these have not been activated.[18]

Difficult practical problems can, and do, result from this divided jurisdiction. For example, in 1968, the CTC's Railway Transport Committee allowed Canadian National to discontinue its trans-Newfoundland passenger rail service popularly known as the "Newfie Bullet".[19] This was done on the clear understanding that CN would replace the rail service with "unquestionably clean, modern [and] fast buses". At the time questions were raised as to how the Committee with no jurisdiction over buses could ever ensure the adequacy of the alternate service.[20] Fortunately for CN, the Newfoundland Board of Public Utility Commissioners, which did have jurisdiction, initially approved the type of bus service proposed by CN. But four years later, when CN applied for a fare increase, the Board was highly critical of the way the service was being run and refused to grant any increase until such time as CN could show its actual operating costs.[21]

The extent of the *National Transportation Act*'s commitment to competition has required clarification. The operative theory behind the Act argues that the various modes of transportation should be treated equally in order to reap the maximum benefits of inter-modal competition. But the Act did not always spell out clearly how equality should be achieved where conflicts arose because of divided jurisdiction and other legislative instructions. For example, section 11(*x*) of the *Lord's Day Act* empowers the Canadian Transport Commission to exempt a trucking concern from the prohibition on operations contained in the Act for any work that it, ". . .having regard to the object of this Act, and with the object of preventing undue delay, deems necessary to permit in connection with the freight traffic of any transportation undertaking". In 1974, the CTC's Motor Vehicle Transport Committee found it necessary to consider the criteria to be applied in determining whether a trucking company, as well as the railways, should be allowed to operate on a Sunday.

The majority of Commissioners on the Committee concluded that the exemption in the *Lord's Day Act* should be construed broadly and predicated their position on their view of the commitment to equal competition.

> ... A denial of these applications, in view of the specific exemptions already in operation in the Act and in the jurisprudence, implies inescapably that Parliament intended at the time of the 1967 amendment to the Act to discriminate against one of the four principal modes, motor vehicle transportation, to the extent at least that the *Lord's Day Act* could bear on the long distance over-the-road transportation undertakings more onerously than upon their competitor, the railways.
>
> This is so completely contrary to [our] understanding of Parliament's policies, both as regards transportation and as regards the critically necessary function of competition in transportation, merchandising and commerce generally and is, on the other hand, so devoid of a rationale of why Parliament might do this, that [we] have to reject it as an untenable hypothesis.[22]

In sharp contrast, the minority considered that the issue could and should be resolved by a literal interpretation of the *Lord's Day Act*, and that this outweighed any policy in favour of equal opportunity in competition between modes set out in the *National Transportation Act*.[23]

The National Transportation Policy is contained in section 3 of the Act, as follows:

> It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests

of the users of transportation and to maintain the economic well-being and growth of Canada, and that these objectives are most likely to be achieved when all modes of transport are able to compete under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,

(*a*) regulation of all modes of transport will not be of such a nature as to restrict the ability of any mode of transport to compete freely with any other modes of transport;
(*b*) each mode of transport, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that mode of transport at public expense;
(*c*) each mode of transport, so far as practicable, receives compensation for the resources, facilities and services that it is required to provide as an imposed public duty; and
(*d*) each mode of transport, so far as practicable, carries traffic to or from any point in Canada under tolls and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or
(ii) an undue obstacle to the interchange of commodities between points in Canada or unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports;

and this Act is enacted in accordance with and for the attainment of so much of these objectives as fall within the purview of subject matters under the jurisdiction of Parliament relating to transportation.[24]

The Policy contains the same type of limitation on competition as the MacPherson Report — ". . .having due regard to national policy and to legal and constitutional requirements" — as well a disconcerting hesitancy in the assertion that an economic, efficient and adequate transportation system will "most likely" be achieved through competition.

The most obvious illustration of an unwillingness to rely exclusively on the market place are the various subsidies still paid to carriers. Even so, section 3(*c*) has had the effect of introducing equality into subsidization. For instance, subsidies under the *Maritime Freight Rates Act*, originally available only to the railroads, now cover trucking as well.[25]

In a truly free and competitive environment, rate regulation, as such, would not be necessary. While emphasizing competition, the National Transportation Policy, in section 3(*d*), recognized the broader implications of competitive rates. To cope with these, the Act contains

a number of important residual rate controls that have acted as a check on the extensive rate de-regulation of the railways. For example, section 23 allows anyone to challenge rates established by "a carrier or carriers pursuant to the Act or the *Railway Act*" where the person "has reason to believe. . .that the effect of any [such] rate. . .may prejudicially affect the public interest. . .".[26]

Predictably, the ambiguities in this basis for challenging rates have spawned a number of CTC decisions that have taken a considerable amount of time to make.[27] In the famous "Rapeseed Case",[28] four rapeseed processing firms in Western Canada complained that the railway freight rates on rapeseed oil and rapeseed meal discriminated against them in favour of oilseed processors in Eastern Canada and thus were prejudicial to the public interest. Their challenge was supported by the governments of Alberta, Saskatchewan and Manitoba. It was opposed by the railways, the governments of Ontario and Quebec and four firms processing oilseed in Eastern Canada. Evidence was presented at a series of public hearings in Saskatoon, Toronto and Ottawa, lasting thirty-seven days.

The CTC's lengthy decision (some 24,000 words) reviewed the history of the rapeseed processing industry, its markets and the three different rate structures involved. As an interim measure, the Commission directed the railways to eliminate what were found to be prejudicial features in rapeseed meal rates pending yet further CTC investigation of the rate structure for rapeseed products during the 1973-74 crop year.

Section 23's ambiguities are a potential quagmire for the Commission, as a procedural ruling during the "Rapeseed Case" indicates. The Railway Transport Committee ruled that the *prima facie* onus placed on an applicant is a relatively easy one to discharge[28] and that section 23 was to be broadly construed in order to provide ready relief to the public.[29] This approach could easily lead the Commission into a vast uncharted area of discretionary power and political decision-making,[30] as one observer noted some time before the Committee's ruling.

> (Issues involving) rates prejudicial to the public interest. . .involve decisions which are essentially political rather than economic because they involve a redistribution of income at the expense of a more efficient allocation of resources. The costs of decision-making by Parliament and by Governor-in-Council may warrant delegation of specific political decisions regarding branch line and passenger trains to the Canadian Transport Commission, but it is hard to believe that the general considerations that will arise under section 23 are appropriately decided upon by the Commission.[31]

Furthermore, the Commission would be forced to take into account regional considerations and whatever the outcome, ". . . section 23 is sufficiently vague that it confers on the Commission much more potential power to make political decisions than existed prior to 1967 under the *Railway Act*".[32]

While the *National Transportation Act* was designed to encourage inter-modal, and not intra-modal competition, it may not have provided enough direction to the CTC about the latter. In air transport regulations, for example, limitation on entry and strict route allocation are established regulatory policies, and competition as such is only allowed in certain very limited categories of speciality services. There has been a continuing disagreement between the Ministry of Transport and the Canadian Transport Commission to extend the scope of this competition.[33] Where two carriers operate on the same route, what competition there is, is normally of a service variety, although there have been a few recent instances of fare cutting.[34]

The ambiguities we have raised — residual rate regulation and other limitations on competition as well as the lack of symmetry in jurisdiction, particularly with respect to motor carrier undertakings — are only symptoms and not the problem itself. The *National Transportation Act* contains at its heart a crucial internal self-contradiction that in our view threatens the ability of the Canadian Transport Commission to undertake effective regulation.

Well into the debate on second reading and after five years of discussion of the MacPherson Report, a crucial amendment was made to the Act. Until then, the policy to be enshrined in legislation had referred to the need for an "economic and efficient" transportation system. The amendment had originally been suggested in Manitoba's submission to the Standing Committee on Transportation and Communications when it considered the legislation. It was formally proposed as an amendment during second reading by a member from the prairies concerned at the prospect of wholesale branch line abandonment in the west.

> . . .the word "adequate" should be added so that (the policy) would read
>
> > It is hereby declared that an adequate, economic and efficient transportation system. . .
>
> That may appear to be unimportant, but I suggest that it means a great deal when one considers the wording of that clause and the attitude of representatives of railway companies, particularly in the prairie provinces. What is the most "economic and efficient" transportation system? Perhaps one track running through the heart of the prairies would be the most economic and efficient, but that is taking efficiency and economics to the n'th degree.[35]

This amendment was shortly thereafter accepted by the Minister of Transport with the word sequence reversed to read "economic, efficient and adequate".[36] As long as the declared purpose of the Act was to bring about an "economic and efficient" transportation system through competition, the regulatory mandate of the Canadian Transport Commission was reasonably clear. An "efficient" transportation system could be attained by regulated competition, but will it be "adequate"? And should a regulatory agency be left to decide what "adequate" means?

The MacPherson Commission had clearly recognized that Canadian governments had always sought to reconcile the two competing interests in the transportation system.

> We must, if we are to obtain an adequate understanding of the complexities of transportation policy in Canada, recognize the fact that the transportation system that has become established in this country is essentially dualistic in nature — reflecting both its function as an instrument of national policy and as a vehicle of a private nature operating along the lines of commercial principles. The existence of this situation has meant that national transport policy has traditionally had to serve two masters — the dictates of public necessity and the requirements of commercial enterprise.
>
> Since the objectives of the former are not necessarily consistent with the latter — they are, in fact, often in conflict — the successful execution of transport policy in Canada has never been a simple task.[37]

Be that as it may, the Royal Commission's recommendations gave the nod to "commercial enterprise". And that bias would have been carried over into the Act but for the "adequacy" amendment. The Canadian Transport Commission was thus called on to serve two masters — "efficiency" and "adequacy" — with an indication that the former was satisfied by inter-modal competition but without any direction as how to meet the latter or resolve the inevitable conflicts between the two.

A practical illustration of the resultant difficulties is the *norOntair* decision.[38] The Government of Ontario, with the avowed aim of improving northern transportation, purchased a number of locally manufactured aircraft and made them available to an existing carrier at a nominal rental. The understanding was that the carrier would service small communities to which air service would not be provided in the normal course of events.[39]

The Commission treated the resultant route applications as it would any others. When one set of route applications was denied, and

the decision was appealed to the Minister of Transport, the agency was sharply rebuked by the Minister for not taking into account the Government of Ontario's intention to promote "adequate" air service in remote areas.

A related matter is the extent of the CTC's responsibility to order adequate service. One of the few legislative provisions considered by the Commission as granting it a positive regulatory power is section 262(1) of the *Railway Act*. This requires railway companies to "furnish, . . .adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway".

Acting under this section, the Railway Transport Committee, ordered CN to provide a commuter service between Barrie and Toronto.[40] Less clear is whether the section gives the Commission the power under section 262 of the *Railway Act* to order "adequate" provision of box cars for grain shipments when these were obviously in short supply. This issue arose when the President of the Canadian Transport Commission, Mr. Edgar Benson, was asked during an appearance before the Standing Committee on Transportation and Communications whether the CTC could order the railways to purchase the needed equipment. Mr. Benson replied that while the Commission might have the power in a very general sort of way, it could not order the railways to purchase specific equipment.[41]

A week later the same question was directed to the then Minister of Transport, Mr. Jean Marchand, by a member of the Standing Committee, Mr. Rose. The resulting exchange revealed great uncertainty as to who should take responsibility.

Mr. Rose: I was interested though in one of your remarks where you said that you had no power to require the railways to provide certain rolling stocks for all traffic.

Mr. Marchand: Not as a Minister.

Mr. Rose: Is it not your responsibility to administer the *Railway Act*? Is that the CTC's job?

Mr. Marchand: Part is the CTC's responsibility. Power in many fields is theirs.

Mr. Rose: Section 262, for instance, is devoted precisely to the provision of rolling stock by the rail lines. Whose responsibility is that? Is that yours, Mr. Minister, or is it Mr. Benson's?

Mr. Marchand: It is the CTC's.

Mr. Rose: The CTC's when I asked Mr. Benson, he did not want it either.

Mr. Marchand: No? And the railways do not want it either. This is why we do not have cars.[42]

It seems possible, as was suggested when the Act was being passed, that the failure to choose clearly between "commercial enterprise" and the "dictates of public necessity" has or will result in a transportation system that is neither efficient nor adequate.

> This (Act) is somewhat schizophrenic: it says we are going to have competition, but at the same time we are going to lay an extremely heavy hand on that competition and see that it does not get out of control. I think we will wind up getting the worst of both worlds. We will not benefit from the advantages possible under a competitive system in those areas where competition will work effectively; neither will we get the benefit of a regulated system for which the transportation field seems to call.[43]

D. POLICY SHIFTS SINCE 1967

Recent events indicate to us, and apparently to the government as well, that the ambiguities and policy conflicts accepted in 1967 must now be resolved. This may mean that the Canadian Transport Commission will soon have to grapple with a revised statement of the National Transportation Policy.

In the face of mounting criticism concerning the inadequacies of the existing system, especially as demonstrated by an inadequate number of box cars to move grain, the then Minister of Transport, Mr. Marchand, announced in 1974 a shift in emphasis away from competition.[44]

> We said (in 1967). . .that transportation should work in the same way as other things in other sectors of the economy. We suggested that we should have competition between the railway companies as well as competition between the railways and the trucking industry and between the trucking industry and the shipping industry. We felt in that way we would be sure of getting the best deal possible in this field. I was here at that time and I do not remember hearing any indication of any reservation about this principle. I can tell you now in all honesty from my experience that this fundamental principle is wrong in Canada. It is not entirely wrong but is partially wrong, because if you look at the size of this country and the distribution of its population you will see that you cannot have a transportation network which is economic everywhere; you cannot have an economic system of transportation to service the north, for example, or to service those regions of the country where the population is very thin. You cannot have an economic system for regions which are remote from the centre.[45]

During the federal election campaign of 1974, the government promised massive aid to city transit systems, a complete revamping of

railway rate structures and a Crown corporation to run passenger train services.[46] For a time it was thought that major changes would soon be made.[47] It emerged that this would not be so[48] and the long-awaited government policy statement in June, 1975, was for many observers an anti-climax.[49]

Nevertheless, the policy statement did contain two elements of importance for the future of the Canadian Transport Commission. The first indicated that the government wished to shift away from reliance on competition, in regulating transport undertakings. The second emphasized the need for a strong government role in the formulation and implementation of transportation policy.

The policy statement was premised on the stated belief that there have been "dramatic changes" in the social and economic environment of the world and of Canada since 1967. These included a rapid rise in the prices of bulk commodities, northern development, a demand for more resource-efficient and cleaner transportation, an increased awareness of the disparity of opportunity within Canada, and the need for an integrated approach to transportation problems.

These changes, it was argued, required a fundamental reconsideration of the role of competition. Competition could now be viable in some segments of the transportation system and not a primary factor in transport regulation generally. The objective selected was an "accessible, equitable and efficient" system (rather than "economic, efficient and adequate") that could only be attained through strong government leadership.

The then Transport Minister, Mr. Jean Marchand, summarized the government's proposals for the Commons Committee on Transport and Communications in these words:

> The present *National Transportation Act* sees as the objective of the national transportation policy an economic, efficient and adequate transportation system. My new policy revises this in favour of an accessible and equitable and efficient transportation system focusing on service to users of the system as well as efficiency.
>
> The present Act assigns a primarily passive role to government. I am proposing that government take an active leadership role in development. The present Act assigns a large policy responsibility to the regulatory body, the Canadian Transport Commission; I am proposing that this responsibility be assumed by the Minister. The present Act states very little about passenger service in Canada; I am intending that passenger service be an important aspect of national transportation policy. The present Act sees transportation as primarily an economic service; I am proposing that it should be an instrument of public policy.[50]

It seems then that the environment in which the Commission will work may differ from the environment in which we have observed it working. The emphasis on competition will lessen. The scope for policy-making by the CTC may be reduced. But we think a new transportation policy emphasizing equity and efficiency will have just as much inherent tension as one that stresses adequacy and efficiency, whoever or however these criteria may be defined. The catch-words may change but the discordant melody will linger on.

CHAPTER II

The Structure of the Commission

This chapter is designed to give the reader a general overview of the structure of the Commission. A detailed description of the powers of the Commission is contained in the next chapter.

A. THE COMMISSIONERS AND STAFF

The Commission as established under the *National Transportation Act* consists of not more than seventeen members appointed by the Cabinet. Each member, or Commissioner, holds office during good behaviour for a maximum ten-year term.[51] Re-appointment is possible but a Commissioner "ceases to hold office upon reaching the age of seventy years".[52] Other than assigning Commissioners to the various modal committees, the Act requires that one Commissioner be appointed as President. Two others are to be named as Vice-Presidents,[53] one having legal and the other research responsibilities. The "legal" Vice-President must have been a lawyer in good standing for at least ten years, and is specifically charged with superintending the work of the modal Committees. When present at any proceeding before the Commission, he shall preside (unless the President is present) and his opinion on a question of law prevails.[54] The "research" Vice-President has charge of the study and research programs that are under sections 3 and 22 of the Act.[55] The "legal"

Vice-President is charged under the Act with the duty of general superintendence over the modal committees and is continually involved in a heavy schedule of hearings.

A study of the past and present Commissioners reveals that only six of the original sixteen appointed in 1967 remain. Five of the original appointees resigned before expiration of their terms. Six of the sixteen Commissioners in office during our research had legal backgrounds.[56] Eight came to the Commission with practical experience of the transportation industry.

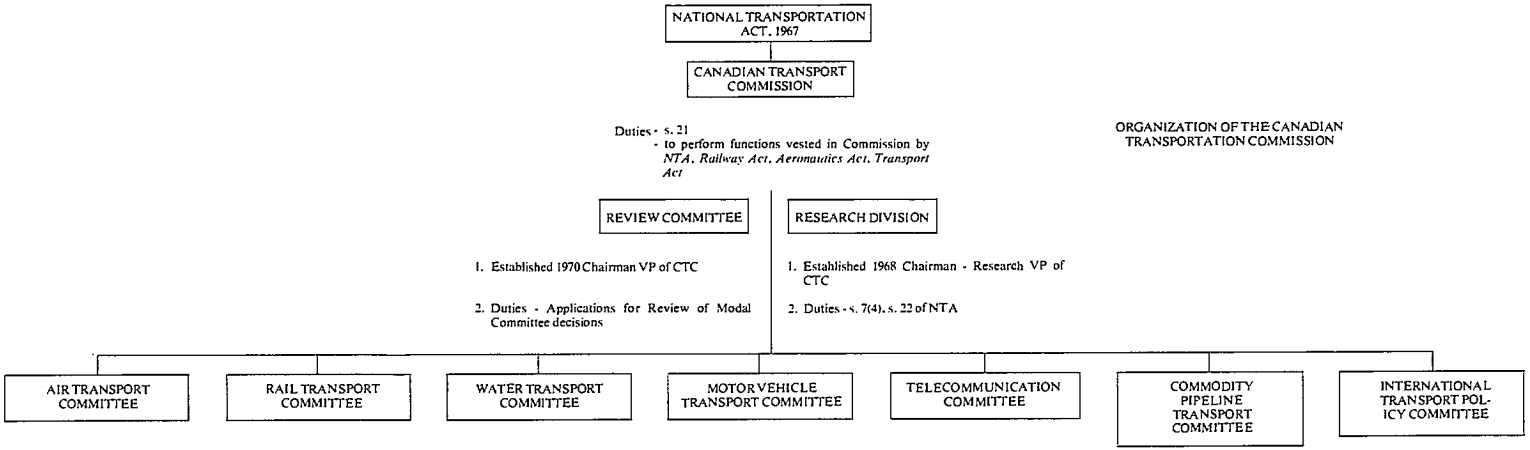
The high turnover of Commissioners merits comment. We learned from sources inside as well as outside the CTC that an appointment may not be attractive for some qualified individuals. Lack of security and the level of remuneration for the work-load involved were frequent explanations. Pension rights, in particular, were thought to be less than adequate and the ten-year term with no guarantee of re-appointment was considered a disincentive for potential appointees more than ten years away from retirement.

The Act also provides for the appointment of ". . . such other officers and employees as are necessary for the proper conduct of the business of the Commission".[57]

The duties of the Secretary, appointed "during pleasure", are spelled out by the Act and concern the recording and maintaining of records of all Commission proceedings.[58]

Since the Commission was established, its staff has increased from 335 (in 1967) to 647 (in 1974). This reflects increased activity as well as the complexity of the Commission's regulatory functions. It also emphasizes the growing importance of staff members in the regulatory process.

Although we later attempt to assess the overall impact of the CTC's staff, it seems more appropriate to mention recruitment difficulties and backgrounds here. First, to assist the Commissioners in performing their numerous regulatory functions, the CTC needs qualified individuals with technical expertise and experience. These experts form the backbone of the Commission. Yet, for some of the same reasons mentioned for Commissioners, staff positions are considered by many to be unattractive.[59] Second, the need for expertise and experience in particular transportation modes perhaps inevitably introduces industry perspectives into the Commission.


NATIONAL TRANSPORTATION ACT, 1967
CANADIAN TRANSPORT COMMISSION
Duties - s. 21
- to perform functions vested in Commission by NTA, Railway Act, Aeronautics Act, Transport Act
ORGANIZATION OF THE CANADIAN TRANSPORTATION COMMISSION
REVIEW COMMITTEE
1. Established 1970 Chairman VP of CTC
2. Duties - Applications for Review of Modal Committee decisions
RESEARCH DIVISION
1. Established 1968 Chairman - Research VP of CTC
2. Duties - s. 7(4), s. 22 of NTA
AIR TRANSPORT COMMITTEE
1. Powers and duties under Aeronautics Act
2. Jurisdiction over air carriers operating commercial air services
RAIL TRANSPORT COMMITTEE
1. Powers and duties under NTA, Railway Act, Maritime Freight Rates Act
2. Jurisdiction over Railways, railway companies or persons having authority to construct or operate a railway
WATER TRANSPORT COMMITTEE
1. Powers and duties under Transport Act, Ferries Act, Shipping Conferences Exemption Act, Pilotage Act, Canada Shipping Act
2. Jurisdiction over transportation of goods and passengers by ship with selected geographical exceptions
MOTOR VEHICLE TRANSPORT COMMITTEE
1. Powers and duties under NTA, and exemptions from Motor Vehicle Transport Act, s. 5, Lord's Day Act, Atlantic Region Freight Assistance Act
2. Jurisdiction over extra and interprovincial transportation of goods or passengers by truck, bus or any highway vehicle
TELECOMMUNICATION COMMITTEE
1. Powers and duties under Railway Act, s. 320
2. Jurisdiction over telegraph and telephone company's tolls, charges for private wire services (Telex, TWX)
COMMODITY PIPELINE TRANSPORT COMMITTEE
1. Powers and duties under NTA, National Energy Board Act, Parts III & V
2. Jurisdiction over commodity pipelines, combined pipelines
INTERNATIONAL TRANSPORT POLICY COMMITTEE
1. Established 1968 acts on behalf of Commission in intergovernmental and international dealings in Transportation under federal jurisdiction
2. NO regulatory functions

Some critics believe that the staff of the Railway Transport Committee contains too many ex-railway employees. For example, all railway safety inspectors have previously worked for railway companies. Some argue that this makes enforcement by the Commission less effective.[60]

B. THE COMMISSION'S ORGANIZATION: THE MODAL COMMITTEE SYSTEM

The Canadian Transport Commission's birth on September 19, 1967,[61] meant that a single federal regulatory authority replaced and absorbed the staffs and responsibilities of three separate agencies — the Board of Transport Commissioners for Canada,[62] the Air Transport Board[63] and the Canadian Maritime Commission.[64] In addition, the Commission acquired partial and potential jurisdiction (as we previously described) over transport by interprovincial or international commodity pipelines[65] and by motor vehicle undertakings.[66] Thus, all modes of transport falling under federal jurisdiction came within the authority of a *single* administrative agency.

The simplicity of this regulatory scheme was complicated, however, by its sub-structure of modal committees. Undoubtedly sensitive to the MacPherson Report's opposition to a single regulatory authority, the *National Transportation Act* provided that

> . . .the Commission shall establish the following committees consisting of not less than three commissioners, exclusive of the President who shall be *ex officio* a member of every such committee:
>
> (*a*) railway transport committee
> (*b*) air transport committee
> (*c*) water transport committee
> (*d*) motor vehicle transport committee
> (*e*) commodity pipeline transport committee; and
> (*f*) such other committees as the Commission deems expedient.[67]

The Commission held its first meeting on September 20, 1967, and established modal committees for rail, air, water, motor vehicles and commodity pipelines. The International Transport Policy Committee was formed in November of 1968, a Review Committee in 1970 and, because of mounting activity in telephone and telegraph rate regulation, a Telecommunication Committee in 1972.[68] Although forming a crucial part of the overall structure, research functions have been kept separate from the modal committees.

As the *National Transportation Act* states, all CTC committees may exercise any of the Commission's powers and duties, and a committee's orders, rules or directions have effect "as though they were made or issued by the Commission".[69]

The membership of the modal committees reflects an important principle enunciated by the framers of the *National Transportation Act*. Each committee has not less than three Commissioners as members, with one of these persons appointed by the Commission as Chairman and Chief Executive Officer of the Committee.[70] In simple mathematical terms, since the maximum number of Commissioners is seventeen, some Commissioners must sit on more than one committee. The government in 1967 saw great value in multiple committee responsibilities for Commissioners.[71]

Such a divison of work was seen as encouraging an inter-modal approach to transportation regulation, recognizing that regulatory influence on one mode of transport may have profound effects on another.

The approach was continued in the Review Committee. That has as its members the chairmen of the modal committees and as its chairman, the "legal" Vice-President. The establishment of committee membership in this manner was an attempt to derive maximum benefit from the single agency approach.

But the inter-modal grand design has not worked out as well as was hoped. The chairmen of the modal committees have tended to be the dominant figures in regulatory activity with committee members involved primarily at public hearings. Our research indicates that communication between committees is minimal,[72] so the potential impact of inter-committee membership has presumably been indirect, if at all.

Another factor affecting inter-modal approaches is the provision in the *National Transportation Act* that two commissioners may form a quorum.[73] Given the practical problems of time and workload, this program may be unavoidable but certainly it does little to promote the desired information flow. Furthermore, while the potential for communication among the modal committees exists, little has been done to promote it. An appropriate vehicle, one would have thought, for this — the Review Committee — has apparently limited its own jurisdiction recently in a manner that reduces its effectiveness as an inter-modal forum.[74]

During 1974 and 1975, steps were taken to increase communication between modal committees. A senior member of the Commission's staff with inter-modal experience was appointed Director, Program Coordination and Corporate Planning. Two new committees were established — the Management Advisory Committee and the Operations Committee — in an effort to bridge the gap between the modal committees.[75]

Despite these efforts, the modal committees still seem to stand in isolation from each other. As the MacPherson Report had warned,

> . . .such central authority would have to be so large that the division of labour necessary would follow the lines of agencies already in existence.[76]

However, two comments on the efficacy of the structure should be made. First, the structure of the Commission in our view still holds the potential for a valuable flow of inter-committee information thereby emphasizing the importance of inter-modal relationships. Second, even if it does not function at its maximum potential, a unified structure provides a significant improvement over the fragmentation which would inevitably result had separate modal regulatory agencies been maintained.

C. THE RESEARCH COMPONENT

The *National Transportation Act* casts substantial responsibilities for research on the Commission, and specifically on one of its Vice-Presidents. It calls for ". . .programs of study and research necessary to achieve the objectives mentioned in section 3 and to the performance by the Commission of its duties under section 22."[77]

The duties under section 22 can be classified into two categories: research undertaken for the Commission's own regulatory purposes, and research in policy areas for reporting to the Minister. The first category involves research on

- the economic aspects of all transport modes, and
- the regulation and licensing of any mode, control over rates and tariffs and administration of subsidies.[78]

Research to be reported to the Minister includes studies on:

- measures to assist in sound economic development of the various modes of transport;

- measures to achieve coordination in development, regulation and control of the various modes;
- financial measures for direct assistance to any mode of transport;
- merchant marine economic policies and measures [the Commission] considers necessary; and
- general economic standards as criteria for federal investment in the various modes.[79]

Signs of a shift of responsibility for research away from the Commission began with the establishment of the Canadian Transportation Development Agency in 1970. Some parts of the Commission's research program and some of its professional staff formed the nucleus of this Agency, which has been funded by the Ministry of Transport.[80]

The Commission's Research Division is very active and covers a very wide range of transportation matters. The Division has also engaged in programs to encourage university research in the transportation fields with significant commitments to the Universities of British Columbia, Toronto and York. As well, it participated in the establishment of the Canadian Institute for Guided Ground Transport at Queen's University, in cooperation with the Canadian National and Canadian Pacific Companies.

CHAPTER III

The Powers of the Commission

At this stage of the study, it is necessary to have a closer look at the powers of the Commission. We shall examine the powers exercised by the modal committees as well as two general powers possessed by the Commission — control over acquisitions, and sanctions and enforcement.

Jurisdictional details are necessary in order to add flesh to the skeletal committee structure already sketched. The responsibilities of the Commission, taken as a whole, could well be confusing for some. Not only must it aspire to develop "an economic, efficient and adequate transportation system" but also, it must undertake to "coordinate and harmonize the operations of all carriers engaged in transport by railways, water, aircraft, extra-provincial motor vehicle transport and commodity pipelines".[81] The promotional/regulatory conflict evident in the Commission's broad mandate necessarily permeates into the detailed jurisdictional responsibilities of its various committees.

A. POWERS EXERCISED BY THE MODAL COMMITTEES[81a]

1. Railway Transport Committee

To begin, the Railway Transport Committee has jurisdiction over "transport by railways to which the *Railway Act* applies".[82] The *Railway Act* applies to all railway companies, railways and any person

having authority to construct or operate a railway within the legislative competence of the Parliament of Canada.[83] The *National Transportation Act* divides this authority into what may be characterized generally as judicial and legislative powers.

There are two ways in which the Railway Transport Committee may exercise its judicial functions. First,

> the [Committee] has full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested:
>
> (*a*) complaining that any company or person has failed to do any act, matter or thing required to be done by the *Railway Act* or by any regulation, order or direction made thereunder. . .or is doing any act, matter or thing contrary to or in violation of the *Railway Act*. . .
>
> (*b*) requesting the [Committee] to make any order, or give any direction, leave, sanction or approval that by law it is authorized to make or give.[84]

Second,

> the [Committee] may order and require any company or person to do. . . any act, matter or thing that such company or person is or may be required to do under the *Railway Act*, and may forbid the doing or continuing of any act, matter or thing that is contrary to the *Railway Act*. . .[85]

In exercising its legislative powers:

> the [Committee] may make orders or regulations
>
> (*a*) with respect to any matter, act or thing that by the *Railway Act* is sanctioned, required to be done or prohibited,
>
> (*b*) generally for carrying the *Railway Act* into effect.[86]

Most of the Committee's judicial activity involves inquiring into, hearing and determining applications. This falls into five areas.

(*a*) First, the location and construction of main lines or any section of a main line requires the approval of the Committee.[87] Similarly, the construction of branch lines, not exceeding twenty miles in length from the main line, requires Committee authorization.[88] These branch line provisions also apply to the construction of industrial spurs.[89]

(*b*) The abandonment and rationalization of railway lines of operations also comes under the jurisdiction of the Railway Transport Committee since "no company shall abandon the operation of any line of railway without (its) approval".[90]

(*c*) A railway company is required to furnish adequate and suitable accommodation for receiving, loading and delivering all traffic

offered for carriage upon the railway. Proper appliances, accommodation and means necessary for this duty must also be furnished.[91]

> If in any case such accommodation is not, in the opinion of the (Committee) furnished by the company, the (Committee) may order the company to furnish the same. . .[92]

Despite the generality and forbidding nature of this power for railway companies, it is rarely used.[93]

(*d*) The Railway Transport Committee continues to have certain limited responsibilities for railway tariffs despite the reliance by the *National Transportation Act* on competition as a regulatory factor. The Committee administers three residual safeguards. All freight rates must be compensatory,[94] thus establishing a rate floor. Where there is no effective and competitive service by a common carrier other than a rail carrier, a ceiling formula exists for these "captive" shippers.[95] Finally there is a catch-all provision in the *National Transportation Act*, as mentioned before, requiring the Committee, after a *prima facie* case has been made, to determine if any rate established pursuant to the *Railway Act* may prejudicially affect the public interest.[96]

(*e*) Railway safety also falls within the Committee's jurisdiction. Every company must give notice with full particulars to the Committee of the occurrence upon the railway of any accident resulting in personal injury or rendering the railway unfit for immediate use.[97] Provision is made for the Committee to appoint inspectors to inquire into all matters and things that it deems likely to cause or prevent accidents and the circumstances of any accident and to act on an inspector's report.[98] This is an important area where the Committee may take a more active role in regulation.[99]

The legislative functions of the Railway Transport Committee are less expansive. In only two areas have they been prominent. First, there have been safety regulations passed on operations and equipment.[100] Second, a complex Costing Order was issued in 1969 to facilitate the process of determining the "actual loss" in railway branch line and passenger train service discontinuance applications.[101]

Finally, the Committee administers the subsidy program under the *Maritime Freight Rates Act*.[102] This provides that a subsidy formula should be applied to rail freight shipments moving within the "select territory" as designated in the Act or westward from the select territory. A recent amendment makes the subsidy applicable to select commodity movement rather than simply to movement from or within the select territory.

2. Air Transport Committee

The Air Transport Committee has jurisdiction over transport by air that is governed by the *Aeronautics Act*.[103] This Act[104] applies to any person who operates a commercial air service that involves any use of aircraft in or over Canada for hire or reward.[105] Again, the jurisdiction of the Air Transport Committee may conveniently be divided into judicial and legislative aspects, like that of the Railway Transport Committee.[106] Further, the majority of the Air Committee's regulatory activities likewise fall under the power to "inquire into, hear and determine any matter. . .".

Since no person may operate a commercial air service unless he holds a valid and subsisting licence,[107] the licensing power of the Committee is of utmost importance.

> [It] may issue to any person applying therefor a licence to operate a commercial air service in the form of licence applied for or in any other form.[108]

The statutory criteria for issuing licences are extremely broad and seem to have encouraged *ad hoc* decision-making

> The Committee shall not issue any. . .licence unless it is satisfied that the proposed commercial air service is and will be required by the future public convenience and necessity.[109]

But there are exceptions to this licensing discretion. The Committee must grant to Air Canada, or one of its subsidiaries, such licences to operate a commercial air service as will enable it to perform any agreement made with the Minister of Transport.[110] And certain specialty air services are excluded from the public convenience and necessity requirement although they still require a licence.[111]

The Air Transport Committee also has some authority over air carrier tariffs and tolls. All tariffs must be filed with the Committee to become effective in not less than 30 days.[112] It may suspend, disallow or require the air carrier to substitute a tariff or toll, or prescribe another[113] if the tolls are not just and reasonable.[114]

The legislative activity of the Air Transport Committee is reflected in the Air Carrier Regulations established May 1, 1972 pursuant to section 14 of the *Aeronautics Act*.[115]

Two exclusions from the Air Transport Committee's jurisdiction should be noted. First, in striking contrast to the railway situation, the Committee has no jurisdiction over safety in air carrier operations.

This responsibility rests with the Ministry of Transport.[116] Second, there is no direct control over the equipment acquired or used by an air carrier in its operations.[116a] Policy problems between mainline, regional and third level air carriers have been increased because of the acquisition of jet aircraft unsuited to short haul routes by the smaller carriers. The acquisition of larger long range aircraft would appear sometimes to have been used by the regional carriers as a lever to justify expansion of existing routes in competition with the mainline carriers.[117]

3. Water Transport Committee

The Water Transport Committee has jurisdiction over transport by water under federal authority generally, and the *Transport Act* in particular.[118] This Act applies to all transport of goods or passengers for hire or reward by means of ships from one Canadian port or place to another in areas selected by the Cabinet.[119] Again, the jurisdiction of the Water Transport Committee may be divided into judicial and legislative aspects. Less onerous in appearance than those of the two previously described Committees, its judicial functions under the *Transport Act* involve licensing and the approval of tariffs and tolls. No transportation by water is allowed by means of any ship other than a ship licensed under the Act.[120] Again, as for air transport the criteria to be used in issuing a licence are wide, and call on the Committee to determine "whether public convenience and necessity require such transport".[121]

All licensees must file a standard tariff of tolls with the Committee and this must be approved by it before becoming effective.[122] Furthermore, the Committee may disallow any tariff that it considers to be unjust or unreasonable, require the licensee to substitute a tariff satisfactory to it or prescribe other tolls.[123]

The legislative authority of the Water Transport Committee concerns the classification of freight, financial returns and procedures for the filing of tariffs.[124]

Besides its jurisdiction under the *Transport Act*, the Committee must

> exercise any other powers, duties or functions in relation to water transport conferred on or required to be performed by the [Committee] by or pursuant to any other Act.[125]

As a result, the Water Transport Committee has responsibilities under a number of other statutes. One results from the exemption by the *Shipping Conferences Exemption Act*[126] of certain shipping conferences from the *Combines Investigation Act*. A condition to this exemption requires that tariffs and certain other conference documents be filed with the Water Transport Committee.[127] This information is used by the Minister of Transport in a report submitted to Parliament each year.

Under the *Pilotage Act*[128] proclaimed in 1972, the Committee acquired a jurisdiction over pilotage charges. Public notice of proposed tariff changes must be given. If an objection is received by the Committee, it must investigate the pilotage charge, and hold public hearings as deemed necessary to determine if the charge is prejudicial to the public interest.[129] A *binding* recommendation is then made to the pilotage authority concerned.[130]

Administration of the *Ferries Act*,[131] under which federal licences are granted for inter-provincial and international ferry operations, was delegated to the Committee by the Minister of Transport in 1969. The Committee may also determine special appeals regarding acts, omissions or rates of licensed water carriers as well as objections to proposed acquisitions by water carriers.[132]

Despite its wide jurisdiction, most of the Water Transport Committee's activities flow from what could be described as administrative responsibilities. Section 22(1)(*d*) requires the Committee to administer subsidies voted by Parliament and section 22(2) to examine, ascertain, record and report to the Minister on a wide variety of shipping matters. Meeting this latter responsibility has become a technical and extensive operation that extends beyond the Committee.[133] Related to the collection of this detailed statistical information is a mandatory duty that requires the Committee to

> inquire into and recommend to the Minister from time to time such economic policy and measures as it considers necessary and desirable relating to the operation of the Canadian merchant marine, commensurate with Canadian Maritime needs.[134]

4. Motor Vehicle Transport Committee

The Motor Vehicle Transport Committee has jurisdiction over

> transport for hire or reward by a motor vehicle undertaking connecting a province with any other or others of the provinces or extending beyond the limits of a province.[135]

This jurisdiction is divided by Part III of the *National Transportation Act*[136] into, once again, judicial and legislative functions.[137] The former involves both licensing and rate approval.

First, no person to whom Part III applies, can operate an extra-provincial motor vehicle undertaking without a valid and subsisting licence issued by the Committee.[138] While the licence issued may vary from the licence applied for,[139] the Committee cannot issue any licence (or indeed amend, suspend or cancel any licence)

> . . .unless it is satisfied that the proposed motor vehicle undertaking is and will be required by the present and future public convenience and necessity.[140]

The second aspect of the Committee's adjudicative function involves tariffs. These must be filed with the Committee.[141] It may disallow any tariff that is not compensatory and not justified by the public interest. Disallowance is also possible if the Committee discovers that a captive shipper situation exists and considers that the tariff takes undue advantage of the monopoly situation.[142] Substitute tariffs or prescribed other tariffs may be ordered.

The Committee's powers of licensing and rate setting, while broad, remain dormant. Before they can become operative, the federal Cabinet must take back the responsibility for regulating extra-provincial undertakings delegated by Parliament in 1953 to provincial authorities.

The legislative mechanism involved is the *Motor Vehicle Transport Act*.[143] It states that if

> . . .a licence is by the law of the province required for the operation of a local undertaking, no person shall operate an extra-provincial undertaking unless he holds a licence issued under the authority of this Act. . .(this licensing to occur). . .upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.[144]

Delegated in the same way is the determination and regulation of tariffs and tolls charged by a federal carrier for extra-provincial transport.[145] The *Motor Vehicle Transport Act* does, however, expressly provide for Cabinet reversal of provincial control back to federal hands. The Governor-in-Council has the power to

> . . .exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act.[146]

The harmonizing provision in Part III of the *National Transportation Act* limits its application only to such motor vehicle undertakings or

such part thereof as is exempted from the provisions of the *Motor Vehicle Transport Act*.[147]

The Motor Vehicle Transport Committee has nonetheless had some impact on provincial regulation.[147a] Occasionally, the section's potential has served as a lever to force provincial compliance by suggesting the possible exemption of a particular carrier from provincial control. Considering the importance of the trucking industry to the overall transportation system, this is hardly by itself an effective or efficient way of providing direction to the industry.[148]

Apart from this rather limited regulatory jurisdiction, the Committee performs several other functions. First, by the *Atlantic Region Freight Assistance Act*[148a] of 1969, the Committee has the responsibility for the approval of claims for subsidies for highway trucking shipments from and within selected territories in the Atlantic Provinces, consistent with those made to the railways since 1927 under the *Maritime Freight Rates Act*. A recent amendment substituted select commodities as the criteria for subsidization.

A second function for the Committee arises under the *Lord's Day Act*[149] which authorizes it to exempt from the Act's prohibition against operations on a Sunday

> . . .any work, having regard to the object of this Act, and with the object of preventing undue delay, it deems necessary to permit, in connection with the freight traffic of any transportation undertaking.[150]

A third function for the Committee stems from section 27 of the *National Transportation Act*. While applicable to all modes of transportation, the section has particular significance for the trucking industry. It requires the Committee to investigate proposed acquisitions involving motor vehicle undertakings and other transportation carriers.

5. Commodity Pipeline Transport Committee

The Commodity Pipeline Transport Committee has jurisdiction over

> transport by a commodity pipeline connecting a province with any other or others of the provinces or extending beyond the limits of a province.[151]

The *National Transportation Act* defines a commodity pipeline as a pipeline for the transmission of commodities including all necessarily

incidental components, but does not include a pipeline for the transmission solely of oil and gas.[152]

Provisions in Part II of the *National Transportation Act*[153] confer both judicial and legislative powers on the Committee. One judicial power involves the issuance of certificates of public convenience and necessity,[154] a mandatory prerequisite to operating a commodity pipeline.[155] The Committee may issue such a certificate if it is satisfied that the commodity pipeline is and will be required by reason of present *and* future public convenience and necessity.[156] This broad criterion is defined in the *National Transportation Act* to include the economic feasibility of the pipeline, the financial structure of the applicant and the extent of Canadian participation in the development.[157] This should be compared to the "public convenience and necessity" criterion for water transport licensing and the lack of similar clarifying guidelines for air and motor vehicle transport licensing.

A second judicial power involves tariffs and tolls — the jurisdictional powers of the Committee regarding filing,[158] the disallowance, substitution or prescription of tariffs is similar to those of the Motor Vehicle Transport Committee.[159]

The Commodity Pipeline Transport Committee's legislative power flows from its authority to make regulations similar to those that may be made by the National Energy Board, the agency that shares regulatory responsibility for this area with the Committee.[160]

Presently, the Committee's activities are negligible since no commodity pipelines have as yet been constructed although there has been considerable research into their potential use. While its licensing and tariff responsibilities remain unexercised, the Committee has drafted some regulations. Its only regulatory activity arose because of the proposed acquisition of Commercial Solids Pipe Line Company (COMSOL) by Canadian Pacific. The matter was dealt with under section 27 of the *National Transportation Act*.

6. Telecommunication Committee

The jurisdiction of this Committee was recently transferred to the Canadian Radio, Television and Telecommunication Commission[161] and will likely be legislatively modified in the near future. The responsibility for telegraph and telephone tolls is conferred by the

Railway Act,[162] and has been for the tolls of Bell Canada and British Columbia Telephone Company. The jurisdiction was enlarged in 1970 to cover charges for private wire services.[163]

Activities within the jurisdiction have been primarily judicial[164] and involves rate regulation. All telegraph and telephone tariffs of tolls must be filed[165] and,

> . . .shall be just and reasonable and. . .under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.[166]

Just and reasonable is defined to exclude unjust discrimination, undue or unreasonable preference or advantage, and undue or unreasonable prejudice or disadvantage.[167] The statutory power also has been conferred to suspend, postpone or disallow any tariff that in the regulator's opinion may be contrary to these criteria.[168]

7. Review Committee

The Review Committee's primary role is to

> . . .review, rescind, change, alter or vary any order or decision made by [the Commission], or. . .(to) re-hear any application before deciding.[169]

Under the General Rules of the Commission, the Committee shall

> . . .determine whether the order or decision should be reviewed and may then, in its discretion, either dispose of the application or refer it for review to the Committee that had made or issued such order or decision.[170]

A particular task of the Review Committee concerns what could be described as the review of trans-modal objectives. Operators of one mode of transport may object to a Committee order, rule or direction related to another mode of transport that is not a matter of a specific rate, licence or certificate.[171] The requisite grounds for objection are that the order, rule or direction discriminates against or is otherwise unfair to the objector's operations. Such objections are to be considered by the Review Committee, without the possibility of referring the matter back to the deciding Committee.[172] This type of review by the Committee is a mandatory role that, because it encompasses Committee orders, rules and directions, may be somewhat broader than the Committee's discretionary review of orders and decisions.[173]

8. International Transport Policy Committee

Another Committee without a direct regulatory responsibility is the International Transport Policy Committee. It has jurisdiction to

> . . .participate in the economic aspects of the work of intergovernmental, national or international organizations dealing with any form of transport under the jurisdiction of Parliament, and investigate, examine and report on the economic effects and requirements resulting from participation in or ratification of international agreements.[174]

A great deal of the work of this Committee has involved international civil aviation matters, particularly the negotiation of bilateral air agreements.[175] The importance of the Committee's advisory capacity on route allocations, stems from the profound impact of international transportation agreements on transport within Canada. An indication of this was the 1974 renegotiation of the Canada-U.S. bilateral air agreement.

As an international route matter, it was a cabinet decision that awarded twelve trans-border routes to Air Canada, one to C.P. Air and two routes to regional air carriers. There was bitter reaction to this decision from C.P. Air and the regionals. They saw their development within Canada, under the guidance of the Commission, as proceeding differently on and away from the restrictions on competition with Air Canada implicit in this Cabinet decision. Indeed, one regional carrier, Quebecair, had purchased a Boeing 727 in anticipation of receiving the Quebec City - New York route. It felt the decision was "a calamity" for regional airlines.[176] Because of the Commission's regulatory responsibilities for domestic routes, one might argue that it should have a stronger role in determining which carrier receives trans-border routes.

B. GENERAL POWERS OF THE COMMISSION

1. Control of Acquisitions

All modal Committees have a potential but significant regulatory involvement in assessing proposed acquisitions of transportation companies. Federally regulated transportation undertakings must give the Commission notice of such proposals.[177]

An objection to a proposed acquisition activates an investigation by the Commission, and the holding of public hearings as it deems necessary, to determine if the acquisition will unduly restrict competition or otherwise prejudice the public interest. Under the Commission's *General Rules*, this investigation is carried out by the Committee exercising jurisdiction over the mode of transport in which an interest is proposed to be acquired.[178] This may, rather arbitrarily, diminish consideration of the inter-modal relations in transportation, recognized by the *National Transportation Act.*[179] The scope of the Commission's control of proposed acquisitions may also not extend as far as it should. Only companies and persons engaged directly in transportation are covered. Consequently, a holding company, without any initial involvement in transport, might acquire, for example, interests in motor vehicle and water transportation businesses without coming under the Commission's scrutiny.[180]

Exceptions to the general approach to proposed acquisitions exist for railway and airline companies. Agreements between railway companies for sale, lease or amalgamation must be submitted to the Commission for consideration and recommendation to the deciding authority, the Cabinet.[181] No provision is made, for hearings, objections or other methods for reviewing. Notice of a proposed change of control, consolidation, merger, lease or transfer of any commercial air service must be given to the Air Transport Committee. It must then assess the proposal as if an objection had occurred following the general approach described above.[182]

2. Sanctions and Enforcement

Three sanction and enforcement matters deserve mention. The first concerns railway safety, the second, air carrier licence suspensions and cancellations, and the third, illegal operations by unlicensed air carriers.

A "first" impression might characterize as massive the Railway Transport Committee's enforcement "problems" in safety matters. In fact, as members of the Committee and its staff confirm, the railway companies themselves assume considerable responsibility in this regard. This is not to say that there are not occasions on which it is necessary for the Committee to adopt a tough stand. For example, two years ago, the Committee investigated a fatal run-away accident in Halifax. At the hearing it became apparent that the accident had

resulted from an unauthorized practice of using wooden chocks rather than an adequate number of brakes. Assurances were forthcoming that this practice would be stopped. Rather than make a decision then and there, the Committee deferred its final decision and ordered its inspectors to check to see whether, in fact, the practice had stopped. When they produced photographic evidence that it had not, senior officials of the company were "called on the carpet" in Ottawa. New undertakings were given and the monitoring program was continued.

It then appeared that the practice could not be effectively prohibited without amending the *Uniform Code of Operating Rules*, that govern the railways' operating procedures. As a result, the final decision was further postponed to allow for further inspections and the preparation of the amendment to the *Code*. Delaying the final decision is evidently a useful enforcement technique.

A common problem for licensing tribunals is their limited range of sanctions. Although they are granted draconian powers allowing for the suspension or cancellation of licences, they lack lesser powers that might be more appropriate to most situations in which licensees fail to meet their legal obligations. In practice, it is extremely difficult to suspend or cancel a licence that has been granted in recognition of a public need (except in those rare cases where a licensee is providing no service at all) because of the inevitable adverse affect on the public.

This phenomenon of regulatory "overkill" was recently illustrated in decisions of the Air Transport Committee in 1973 involving St. Andrews Airways. This company had been licensed in April, 1971, to provide a Class 4 charter service in northern Manitoba. Its business grew rapidly, perhaps because it provided a free bus service from downtown Winnipeg to its base of operations and began to arrange regular flights for its passengers. In effect, the company had begun to operate services for which it was not licensed. There were, in fact, operators in the area licensed to provide these services, but whose services apparently left much to be desired. Consequently, St. Andrews was able to pick up business which, legally, should have gone to those operators. In April, 1973, St. Andrews applied for a Class 3 Specific Point Licence which would have regularized its unauthorized services. The existing Class 3 licence holders vigorously objected to what they considered to be an illegal bootstrap operation.

This placed the Committee in a dilemma. On the one hand, there was ample evidence of the need for both the unauthorized service and for the service St. Andrews wished to regularize. On the other hand,

the applicant was seeking to benefit from its illegal operations and had, after all, somewhat cavalierly disregarded the terms of its licence for charter operations. Moreover, the matter also involved public dependence on St. Andrews' services. Isolated communities had grown to rely on St. Andrews and any restrictive action taken against the company would hurt them directly.

The Committee decided on a vigorous course of action. The application for a Class 3 licence was deferred and a "Show Cause Order" was issued requiring St. Andrews to show cause within thirty days why its charter licence should not be suspended or cancelled for operating in an illegal manner. In its words:

> The Committee will not condone illegal operating practices by a carrier and has a responsibility for the orderly and lawful development of air services in the country.[183]

The explanation provided by St. Andrews was not satisfactory to the Committee. It ordered a thirty day licence suspension commencing thirty days from the date of the order,[184] an order that flooded it with letters of protest. Many of these pointed out the absurdity of invoking the statutory formula of public convenience and necessity when the result was to deprive persons, who depended entirely on air service of the use of the only carrier who was willing to provide an adequate service. The Committee summarized this indignant outpouring as follows:

> . . .the Committee received a number of letters protesting the suspension on grounds, *inter alia*, that such suspension is undeserved; that it will create undue hardship in the area; that the service authorized by the licence is necessary for the transportation of supplies and necessities of life; that there are people in the bush who must be picked up during the period when the suspension will be in effect; that the services provided by the Licensee make provision for the needs of Indian people who do not speak English and who have occasion to visit Winnipeg; and the representations contain an expression of general confidence in and appreciation of the particular service afforded by the Licensee. . .[186]

The result was that the Committee had to back down completely. It withdrew the suspension and granted St. Andrews its Class 3 licence. *Sic transit gloriam!*

It may well be that some thought should be given to devising new sanctions for the Commission. One possibility is for Parliament to grant the Commission the power to levy fines. Fines have the weakness, of course, of being regarded by some operators as a cost of doing business, illegal or not. Licence suspension or cancellation might then prove to be the only effective remedy. Nevertheless, a power to fine

would increase the utility, range and flexibility of sanctions available to the Commission.[187]

Despite its growing concern, the Air Transport Committee has not been heavily involved in the prosecution of illegal air carrier activity.[187a] Prosecutions under section 17 of the *Aeronautics Act* are usually undertaken by local lawyers retained by the Department of Justice with the investigative work being done by the Royal Canadian Mounted Police. As a result, the quality and vigour of prosecutions appears to vary widely. As well, the nature of the type of case involved makes prosecution difficult. Too often, an illegal operation is seen by the communities it serves, as providing a useful supplementary service. Obtaining the necessary evidence is usually not easy, nor is persuading a local judge of the seriousness of the offence.

The Air Transport Association of Canada is apparently greatly concerned about what it considers to be inadequate action to prevent illegal operations.[188] It may well be that effective prosecution of unlicensed operators would require a more systematic organization, perhaps involving a special "Bureau of Enforcement" and regional field officers of the Committee to cooperate with local R.C.M.P. officers and prosecutors.

CHAPTER IV

The Workload of the Commission

Before proceeding to the central issue of the procedures adopted by the Commission it would be well to survey briefly the work of the Committees.

The Railway Transport Committee is one of the most active of all the modal Committees. Reference back to its wide jurisdictional responsibilities supports this conclusion. Certain activity of this Committee has previously been noted — freight rate appeals, formulation of the Costing Order and the General Inquiries into railway safety. However, more detailed statistics disclose the extremely heavy workload the Committee must bear. Passenger train service and branch line discontinuance applications consume much of the Committee's time. The extent of this activity is indicated in the following statistics. By 1969, C.P. Rail had filed discontinuance applications for all its passenger services. And by 1971, C.N.R. had followed suit. By the end of 1974, the Committee had issued decisions on 71 passenger service discontinuance applications, approving only 12. Despite the Orders-in-Council prohibiting prairie branch line abandonment, these lines were still eligible for reimbursement if an actual loss occurred. In fact, in 1974 the Committee approved payments of more than $186 million to railways in compensation for uneconomic services they were required to provide.

No discontinuance of a passenger train service has been allowed without a public hearing. As a result, the Committee has spent an annual average of some sixty days in formal proceedings. In addition,

the Committee makes an average of 2,500 orders per year. While many of these are routine, seven orders per day from a regulatory body indicates a high degree of activity. The Committee must, as well, administer the Railway Grade Crossing Fund which provided over $26 million in 1974 to improve railway crossing safety.

The railway's discontinuance applications have been paralleled by commercial air service applications coming before the Air Transport Committee. Indeed, other than certain studies into the adequacy of air service in parts of Canada and the issuance of reports annually since 1973, on the Canadian helicopter operating industry, that Committee's main activity has been licensing. Because of the rather uncertain state of mainline, regional and especially third-level carrier policy, this function has been extremely arduous. There has been a steady increase in the number of licence applications from 377 in 1967 to 695 in 1974. However, the Annual Reports note a decrease in the number of applications granted.

AIR TRANSPORT COMMITTEE

PERCENTAGE OF LICENCE APPLICATIONS GRANTED OF THOSE CONSIDERED

1967	1968	1969	1970	1971	1972	1973	1974
96%	91%	81%	79%	82%	79%	73%	82%

It is probably fair to say that the Committee's emphasis on restricted competition and purely economic factors, as articulated in their decisions, is in accordance with the falling success rate. With this heavy workload of licence applications, it is understandable that the Committee has averaged only nine public hearings per year since 1967, with six held in 1973 and twelve in 1974.[189]

In sharp contrast is the activity of the Water Transport Committee. As previously noted, the main function of this Committee has been to maintain detailed statistical records on vessel and commodity movement for use, it would appear, primarily outside the Committee. A number of studies have been undertaken from 1967-1974, usually at the request of the Minister, for example: the report on Canadian ship ownership and registration in 1969; the coasting trade report in 1971; and the report on the economic feasibility of a Canadian deep-sea merchant fleet. Proclamation of the *Pilotage*

Act in 1972 resulted in public hearings on tariff increases by both Laurentian and Atlantic Pilotage Authorities.[190]

Because there have been no exemptions under the *Motor Vehicle Transport Act*, the Motor Vehicle Transport Committee's activities have been limited. It does, however, devote some time to preparing for the eventual acquisition of jurisdiction over extra-provincial motor vehicle undertakings,[191] even to the extent of drafting possible regulations. Under the *Atlantic Region Freight Rates Act*, subsidies approved by the Committee have risen rapidly from $200 thousand in 1969 to over $20 million in 1974. Applications for exemptions from the *Lord's Day Act* are beginning to take on greater significance and regularity.[192] Finally, the Committee has received an average of some sixty notices of acquisition annually. However, only one or two objections to these acquisitions have been registered each year, and an even lesser number of public hearings have been held. No proposed acquisition has been disallowed.

As mentioned earlier, the Commodity Pipeline Transport Committee has not been an active committee. Until the proclamation of Part II of the *National Transportation Act* in 1972, the Committee had worked on procedures and rules to be followed in applications for operating certificates. Another activity was a decision in 1973 on the proposed acquisition of Commercial Solids Pipe Line Company (COMSOL) by Canadian Pacific. The acquisition was allowed.

The primary activity of the Telecommunication Committee during its short life involved rate regulation. Despite having been established only in 1972, the Committee set records in terms of the amount of time spent in public hearings. In 1972, 31 days were required to hear evidence and argument in an application by Bell Canada. This rose to 37 days in 1973 with Bell Canada's Application "A". Finally in 1974, 55 days were taken up hearing Bell Canada's Amended Application "B".

In 1974, the Review Committee considered forty applications for review. In eighteen cases it found no grounds for review. Of the twenty-two cases reviewed, seven original decisions were modified; fourteen original decisions were re-affirmed, and one case remained undecided at the end of the year. In its recent COMSOL decision, the Review Committee stressed the need for finality at the initial decision level. The decision went to some lengths to describe the circumstances in which review could occur. Although review with the intermodal perspective that would be possible if all chairmen of modal committees

were members of the Review Committee, would seem logical, the intermodal makeup of each committee was emphasized in support of the Review Committee's argument for finality in *COMSOL*.[193]

The activities of the International Transport Policy Committee are, as mentioned previously, of considerable importance. In the negotiation of bilateral air agreements, the expertise of the Committee has been described as essential. There is, however, no Committee input into route allocation after formation of the air agreement. Government reliance on Commission experts in negotiations suggests an extension of such a working relationship which could plausibly extend to other policy matters.

CHAPTER V

Procedure before the Commission

The procedures of the Commission are best approached by considering, first, those that are related to its formal and informal hearings, and second, those used in its "file hearing" approach to dealing with large numbers of applications. The role of staff in the hearing process will also be reviewed as well as the related question of the use of confidential information. Finally, the issue of broader participation in the hearing process will be discussed.

A. FORMAL HEARINGS

As apparent from the preceding description of Committee activity, there has been extensive use of formal public hearings by many CTC Committees. Increases in the frequency and length of hearings were particularly evident with the Telecommunication Committee. It is reasonable to assume that this demand for more and more public exposure of the issues dealt with by the CTC will continue to grow. Because of the heavy workload of many Committees on more routine matters, the amount of time spent at public hearings becomes critical. The Commission has clearly recognized this problem and is making determined efforts to meet it. Its attempts to reduce the time spent in public hearings can be categorized into four areas.

First, there has been considerable use of the authority in the *National Transportation Act* allowing the Commission to

> . . .authorize any one of the commissioners to report to the Commission upon any question or matter arising in connection with the business of the Commission.[194]

This single commissioner has all the powers of a quorum for receiving evidence and his report may be adopted as the order of the particular Committee. Use of a single commissioner has normally occurred where the CTC believes that information must be obtained through a public hearing and no major dispute on the conclusions to be drawn from the information is anticipated. Most often, a Commissioner's report is adopted with few modifications. While this process may not reduce the time required for the hearing, it does free commissioners from the time constraints imposed by a rigid quorum requirement. Furthermore, there are many cases where a hearing by a single commissioner is clearly adequate.

A second way of reducing the time Commissioners must devote to formal hearings is through the appointment of hearing or inquiry officers. In the United States, hearing officers attached to regulatory agencies conduct public hearings in the normal course, hear evidence, make preliminary rulings and finally submit a report to the agency. The similarity to the "single commissioner hearing" described above is apparent. Even closer, however, is the potential and innovative use the CTC could and has put of its power to

> . . .appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Commission, or upon any matter or thing over which the Commission has jurisdiction. . .[195]

A recent example of the value of using this section is described in the decision of the Telecommunication Committee on Bell Canada's amended Application "B" in 1974.[196] Besides public hearings in Ottawa, the Committee decided that hearings were also necessary in parts of the Northwest Territories. It appointed a senior staff member as an "examiner" under the provision quoted above to hear representations at Frobisher Bay and Coral Harbour. Daily transcripts of the proceedings and evidence introduced at these hearings together with the examiner's report were entered into the official record of the proceedings. The amount of time this technique saved the Committee members was obviously substantial.

A third effort by the Commission concerns the simplification of procedures. Public hearings have tended to be rather complicated and lengthy because of the unique features of the hearing and the ways in which the massive amounts of technical data had to be presented.

Sometimes, the formal procedure can and should be avoided. Rate appeals by shippers are a case in point.[197] At the request of the Minister, the Commission produced a preliminary report in 1973 designed to simplify the process and reduce time and costs to parties. This was taken a step further as indicated by Mr. Benson before the Parliamentary Standing Committee by the CTC in a number of cases when the Commission successfully encouraged shippers and railroad company officials to "sit down together" and "work out their differences" informally rather than going through the statutory appeal procedures.[198]

Similarly, procedure before the Telecommunication Committee was lengthy because of the amounts of financial data necessary to justify rate increases. A rate adjustment formula could very well decrease the frequency of rate hearings by dealing objectively with certain uncontrollable costs of the telecommunications carriers as they arise. Such a formula has been proposed.[199]

A fourth area of improvement involves a practice established by the Telecommunication Committee which is designed to reduce the length and tedium of public hearings and to improve their effectiveness. The texts of the evidence-in-chief of witnesses are circulated in advance of the hearing in order to dispense with oral delivery of the evidence when the witness is called. Instead, after the witness is qualified and the evidence placed on record, he is then open to cross-examination on his evidence in the normal way. As noted by Commissioner Jones, Chairman of the Railway Transport Committee:

> The practice has much to recommend it in cases in which complex financial, economic or technical questions are at issue. It permits all Parties and Intervenors to prepare their cases with full knowledge of the issues they must meet and its most important result is that it saves the time of all those who participate in what tend to be lengthy and expensive hearings.[200]

This practice depends, however, on the consent of counsel. Where, as in the *Newsprint Rate Case* in 1972,[201] that consent is not forthcoming, submission of written evidence in advance cannot be insisted upon. In view of the obvious advantages of this type of procedure, it might well be desirable to amend the General Rules of the Commission to require this practice where the Commission is of the opinion that it would substantially improve the quality of the hearing and would not place an unfair burden on any of the parties.

The *Newsprint Rate case* did contain one innovative procedural technique which could possibly be more widely adopted. A significant

number of hearings are marred at the outset by a lack of agreement on basic facts. Without some sort of agreed data base, rate cases, which are complicated enough anyway, can get bogged down.

This innovation arose of necessity because it became apparent at the pre-hearing conference that there was no initial agreement as to the rates actually charged for the movement of newsprint by the railways, let alone the inferences to be drawn from "agreed upon" rates. The matter involved an application under section 23 of the *National Transportation Act* alleging that rates for newsprint exports to the United States prejudicially affected the "public interest" by unreasonably discouraging the export trade. Without some agreement on exactly what the rates were, both in Canada and the United States, the proceedings could have ended up as unedifying name calling.

The "road-block" was removed, however, by encouraging parties to meet informally with an experienced staff member of the CTC for the purpose of establishing an agreed set of facts. As a result of a meeting with the parties, the staff member was able to report agreement on a wide range of rate data which was to be incorporated

> . . .in basic working documents (such as the record at the start of the public hearing) that would not have to be proved and could be spoken to by the parties. The existence of such documents does not preclude, in any way, parties from placing in the record additional information with respect to rates and mileages.[202]

B. INFORMAL PROCEEDINGS: MEETINGS, CORRESPONDENCE AND CONCILIATION

Much of the Commission's work occurs outside of formal proceedings like public hearings. Most of the CTC's day-to-day decisions flow from informal processes. To be effective these proceedings have to be flexible and responsive to the issues involved. As a result, distinct types of proceedings are not easily identified. Nevertheless, it is possible to describe and illustrate three major methods used by the CTC in its work. These are informal meetings, correspondence and a process which could be described as conciliation.

Informal proceedings do have some distinct advantages. Compromise and accommodation are not as easily obtained in formal

proceedings in which the parties tend to adopt adversarial stances. In complex regulatory matters, parties sometimes take initial positions that if allowed to harden make future compromise difficult. Being forced at an early stage to face up to the realities of the situation usually helps to ensure more efficient proceedings. What is needed is for someone not subject to judicial restraints to point out forcefully the unreasonableness of initial positions and, if need be, to "knock heads together". This activist role could be played in informal proceedings by an experienced official of the Commission.

There are economies to be gained in getting early agreement on most points. Where, for example, the issues are clearly defined or turn exclusively on a narrow point of statutory construction, the parties may agree to dispense with a formal public hearing, and proceed by way of written submissions.[203]

Some informal meetings are well structured, with agendas that identify the issues. Often everyone hopes the issues can be resolved in the meeting. A recent example of this type of proceeding demonstrates that while resolution of issues is possible, there are inherent limits.

In December, 1973, the Canadian Trucking Association filed a lengthy memorandum on intermodal container handling with the Commission. It outlined a number of complaints concerning railway rate practices affecting the intermodal handling of containers where independent "for-hire" trucking companies were involved in container movement to or from a railhead. The Association noted that negotiations with the railways had been helpful in reducing difficulties in certain respects but they had not been conclusive. Rather than proceed directly to a formal hearing, the Commission decided to invite the railways and the Association to a meeting chaired by a CTC official.

There were six items placed on an agenda for the meeting. Of these, five were resolved during the meeting. The sixth turned on a point of statutory construction of a section of the *Railway Act* and could not be resolved informally. The official chairing the meeting did indicate that another construction of the section was logically possible, a construction that differed substantially from that advanced by the Association. As the Association later wrote

> We appreciate very much CTC efforts in bringing the parties together. The discussions were useful for the purpose of pinpointing outstanding contentious issues.

In less structured informal meetings without an agenda, it is hoped the parties will themselves initiate resolution of the dispute. A recent example of this type of proceeding concerned the provision by Bell Canada of telephone services for the Olympic Games facilities in Montreal. Bell decided to impose a $95 installation charge for phones under authority of Rule 6 (of section 10) of its General Tariff which allows the Company to charge customers the cost of "any unusual expense". Bell contended that service demands generated by the Games would force the advancement of the Company's construction projects in the vicinity. Further expensive equipment would have to be provided for six months or less, causing "unusual expenses" which should be recovered directly from those causing them.

Bell's announcement of the $95 charge provoked widespread complaints from news associations, the main users of the telephones, and demands for a public hearing. Instead, the CTC arranged a meeting between Bell and representatives from the news associations and the Organizing Committee of the Games.[204] Bell was then given an opportunity to explain the extent of the costs involved and why a surcharge was necessary. At this point, the presiding CTC official began to take an active role. When the news associations argued that the costs should be borne by subscribers generally, the official quickly pointed out that at a public hearing the Provinces of Ontario and Quebec might not agree, and the Consumers' Association of Canada would undoubtedly disagree. The official reminded Bell that it might have informed the news association of the reasons for surcharges before announcing them. Moreover, surely, it was possible to work out some compromise group rate through the Organizing Committee of the Games. The parties were then left to arrive at a mutually acceptable solution in the light of the realities disclosed at the meeting.

The Olympic Games situation was unusual. Most complaints are by individuals and are dealt with through correspondence. The company involved is given notice of the complaint and an opportunity to reply. This is then evaluated by a CTC official who drafts a reply for adoption by the Commission.

A common complaint concerns telephone exchange boundaries. Where subscribers are located on the "expensive side" of an exchange boundary near a city, they often complain and request connection to the adjacent exchange to give them free telephone access to the city. In such cases, the telephone company is given an opportunity to reply to the complaint. Meanwhile, a senior CTC official determines the jurisdiction of the Commission. The Commission's jurisdiction is

limited to "unjust discrimination" and does not reach to the establishment of exchange boundaries. The complainant is then informed of this, with the usual explanation that based on the material before it, there are no grounds on which the Commission could act. This does not prevent the complainant from demanding a public hearing or providing new information.

The Commission also attempts to conciliate potential disputes. Here, an effort is made to forestall conflict by seeking to settle possible disputes before adverse positions have hardened. An acute sense of timing and a facility for deft behind-the-scenes manipulation are essential for success. This allows the Commission to act while the situation is relatively fluid and still amenable to compromise and accommodation.

An excellent example of conciliation emerges from the events after the announcement by Canadian National Railways in early 1975 of its intention to cancel less-than-carload rates in the Maritimes. This had previously been done for the rest of the country. Widespread protest followed, since sharp increases for small shippers were foreseen. The whole matter seemed headed for costly and non-productive conflict, as well as cases for political intervention.

A senior CTC official was soon actively involved behind the scenes getting the parties together, suggesting ways of ameliorating the adverse effect of the change on small shippers and generally seeking to defuse the situation. Largely as a result of these efforts, the change in rates occurred with a minimum of disruption. Also assisting was quick action to bring into effect the new tolls and thus provide opportunity under the *Maritimes Freight Rates Act* for subsidization.

C. FILE HEARINGS

The Air Transport Committee began the year 1974 with 389 licence applications in hand and during the year received another 695. It dealt with 759 and so at the end of 1974 still had 325 under examination. The Engineering Branch of the Railway Transport Committee during 1974 approved 1,360 orders; authorized the payment of $26,051,749 towards 387 projects involving improved protection at highway-railway

crossings; authorized the construction or re-construction of 50 grade separations and approved grants for the installation of automatic signals at 194 crossings.[205]

It would be unrealistic to suggest that public hearings be part of decision-making for all of these matters. Yet it must be recognized that these decisions, particularly the licence applications, directly affect the interest of the individuals involved. As we shall see, individual interests are not as directly affected by actions of the Railway Committee. What then is a workable and acceptable procedure which can provide for fair decision making and still act with a reasonable degree of dispatch?

There is considerable truth in the much used adage, "one man's due process is another man's red tape". A delay in order to provide a full opportunity for hearings on an application may be "red tape" to the applicant. Yet his right to have a full opportunity to state his case is his "due process". Here arise the perennial conflict between "form" and "substance", between the lawyer's concern for the right procedure and the administrator's concern for the right decision. Can a decision be right if arrived at unfairly? Lawyers and administrators usually have very different answers to this question. And clouding the debate is the danger that excessive delay can render the fairest decision valueless.

It is against these competing and perhaps antagonistic values of form and substance, expedition and delay, fairness in result and fairness in procedure that one must evaluate the procedures devised by the Commission. In the real world of regulation, can we really expect to have a "Rolls-Royce system of justice".[206] After all, ". . .natural justice does not mean the best possible justice". Yet should it be necessary to trade, administrative efficiency for fairness. Not according to H. W. R. Wade, who has observed that:

> for however wide the powers of the state, and however wide the discretion they confer, it is always possible to require them to be exercised in a fair manner; and if exercised fairly, they will be exercised more efficiently. Justice and efficiency go hand in hand.[207]

Within the CTC, the Air Transport Committee has adopted a procedure designed to ensure an adequate opportunity for input from applicants and intervenors as well as a thorough evaluation of applications and interventions by the Committee's staff. This procedure can best be described as a "file hearing" in that it provides a functional alternative to oral proceedings through the accumulation and exchange of written submissions.

The procedure adopted has much to commend it. There are, however, certain associated problems. For domestic licence applications, the file hearing process operates in the following manner.[208]

1. The Application

The process is initiated by the filing of an application. The Committee's detailed "Guide for the Preparation and Filing by Canadian Applicants of Application to Operate Commercial Air Services" tells applicants about the information they should provide and the manner in which it should be provided.[209] Applicants are instructed that some of the information provided about the air services proposed will be made available to intervenors. Applicants must also give notice of the applications.[210]

The Committee requires extensive disclosure of legal status and financial matters by applicants. A corporate applicant must supply the names, addresses and citizenship of officers, directors and owners of five percent or more of the shares of each class of capital stock. All applicants must declare their interests in other air carriers as well as involvements in ownership, lease, control or operation in any other mode of transportation.

Applicants must specify the total amount of available funds, their sources and a bank reference. A pro forma balance sheet must be submitted showing current assets, fixed assets, deferred assets, current liabilities, long term debt and capital stock accounts.[211]

The Committee understandably requires very detailed information on the nature and scope of the air services to be provided and evidence of the need for such services.[212] If a unit toll service is proposed, the applicant is asked to show what community of interest exists between the points to be served and to provide an annual traffic forecast.

Applicants are asked to indicate the type of aircraft to be used, the proposed method of financing this use, and the aircrafts' operational capabilities and operating facilities. Section 9 sets out in six pages the details to be submitted on "Operating Estimates". They must also file proposed tolls and tariffs.[213]

2. Notice, Interventions, Replies

After the application for the licence is filed with the Secretary of the Committee, a copy is sent to the appropriate regional supervisor who prepares a suitable notice of application. This is then given to the applicant for publication in newspapers read in the area proposed to be served. Intervenors have thirty days to respond and an applicant ten days to reply. Interventions and replies are placed in the file containing the application.

3. Staff Assessment

Five staff divisions of the Committee then assess the application. Two divisions, Audit and Fares, Rates and Services, add a written assessment and recommendation of the application to the file. Two divisions, Operations Analysis and Economic Analysis, add a written assessment and recommendation of the application, as well as interventions and replies. Finally, the Licensing Division consolidates the various assessments and recommendations made by the other divisions and adds its own. In more complicated applications, the Division prepares a detailed "agenda note" which summarizes the entire file. In less complicated matters, a shorter memorandum is prepared.

The concerns of the first four Divisions in assessing the application are, in general, predictable. The Audit Division considers the financial fitness of the applicant and his financial capacity to provide the proposed service. The Division does not, however, assess the economic viability of the applicant. It may well doubt projected earnings but this would not be grounds for an adverse recommendation. A totally inadequate capital structure or no property interest whatsoever in the aircraft the applicant proposes to use would constitute such grounds.

The Fares, Rates and Services Division scrutinizes the proposed tolls and rates as submitted by the applicant to ensure that users are treated equally according to a consistent tariff. The Division does not ensure that tolls are uniform between carriers.

The Operations Analysis Division is concerned with the applicant's operational fitness. Its emphasis is on the operational capability

of the aircraft the applicant proposes to employ and the compatibility of his operation with the overall air transport system. The Economics Analysis Division seeks to identify the economic effects of the applicant's proposed service on existing carriers, the adequacy of alternative traffic modes in the area and the extent of the need for the proposed service.

4. Decision

By the time staff assessment is completed, the file will usually contain enough information and analysis to allow informed decisions by commissioners. It is then circulated among commissioners on the Committee for decision. A quick review of the file will give a good understanding of the arguments for and against the issuance of the licence and the issues involved.

5. Attributes of "File Hearings"

Our examination of a number of files revealed three positive attributes of the file hearing process. First, it reduces a mass of materials to meaningful proportions. In addition to a lengthy application, interventions and reply, a file will often contain many letters concerning the need for the proposed service and other supporting data. This may include complex marketing studies and the like. Obviously, it would be impossible for commissioners to read all this for each and every application. Staff assessment condenses and focuses this material into manageable proportions. A second attribute stems from staff analysis. The recommendations made by the various divisions attempt to relate individual applications to the Committee's general policies for the particular type of service proposed and the area involved. Once again, these enhance the commissioners' decision-making capacity.

The third attribute of the file-hearing process is, perhaps, its most impressive aspect. Final decision-making responsibility continues to rest with the commissioners. The process operates with optimal use of staff expertise but without compromising the statutory duty of the commissioners to make the final decision. The fairness of the division

reports, tolerance of differences of opinion and continuing accessibility of the original material (flagged to make reference easier) combine to make this possible.

The reports observed from the various divisions were carefully balanced documents. Although ending with clear recommendations the reports tended to employ an open reasoning format, allowing the reader to decide whether the conclusion is acceptable. It is not uncommon to find differences of opinion within the reports and in the final agenda note or memorandum. For example, in the Economics Analysis Branch a staff economist is entitled to put forward his own views even if the Director will not concur with his report. This has, of course, only happened rarely. More common than an individual dissenting voice within a division is a difference between divisions. This tolerance of different opinions is a valuable safety valve to ensure balance in the advice given by staff and to ensure that certain convictions of senior staff do not become entrenched.

Adding a relatively free input from staff to the application, the interventions and replies means that the file hearing process can be as valid a forum for the exchange of arguments as a public hearing procedure. Indeed given the extent to which staff become actively involved in the process, it could be said that a file hearing is often more productive for all concerned then a public hearing, since staff contributions ensure that all points of view are presented with equal skill.

6. Difficulties with "File Hearings"

Four problems emerge from the file hearing process developed by the Air Transport Committee: delay; the adequacy of reasons for decision; procedures for introducing new evidence; and criteria for deciding whether to hold a public hearing.

(a) Delay

A persistent complaint of the industry is the time it takes to get a decision from the Committee even on simple matters.[214] During the period of study, a straight-forward licence application took a minimum of four months, an average of nine months and occasionally two years or more to process. Naturally, because of the need to purchase

equipment, the carriers would prefer a much shorter period. During the last few years, the Committee has made determined efforts to reduce this delay by tightening up existing procedures and by seeking the advice of an efficiency expert.

The Committee stated in January 1973 that it

> . . .continues to view with concern the undue length of time required for the processing of applications for licences and amendments thereto. Analysis and evaluation indicated that there are deficiencies in the processing system probably due to the uncertainty of staff as to objectives.[215]

At that time, the Committee noted the steps it had taken to speed up its operations. Staff were instructed to treat licensing work as a top priority and the preparation of division reports was not to be interrupted by other urgent work. Supervisors were to ensure that division reports complied with the detailed format laid down by the Committee in its Manual of Administrative Procedures. Time schedules were drawn up and each division was to report any delays to a newly created Licence Application Control Unit. Each Division was also to establish a production control schedule and to assign its implementation to one staff member. A master control system was established to indicate at any time the current status of all applications. The system was to be the responsibility of the Licence Application Control Unit within the Licensing Division, where responsibility for general surveillance, file control and related matters also resided.

In 1974, a consultant from the Bureau of Management Consulting, Supply and Services Canada made a comprehensive study of the file hearing process to determine the extent of unnecessary delays and to devise methods for dealing with them. This resulted in a number of recommendations on which the Committee is apparently going to act. The most important of these called for the introduction of a system of simultaneous advancement of an application through the divisions, as a way of coping with the bottle-necks in sequential processing.

Two ways of speeding up the process of licence applications do not appear to be very attractive to the industry. Extensive or even partial de-regulation would reduce the number of applications, and presumably also reduce delay. At the moment only specialty air services, such as recreational flying, aerial photography, and crop spraying by farmers in areas adjacent to their farms, are exempt from the burden of demonstrating "public convenience and necessity" in order to be licensed. A second way of reducing the time between application and decision would be to give less than the 40 days presently set aside for interventions and reply.

There are, however, no easy answers to the problem of delay — a factor that is inherent in regulating an area in which few applications lack complexity. For example, even an application for a Class 4 charter licence using a small aircraft can easily touch off a host of interventions, all of which require care and time to assess.

Delay might be reduced by spending less time on relatively minor matters. De-emphasis of certain matters is more easily done than actual de-regulation. An example is the treatment of Class III applications for route extensions that do not provide a competitive service and involve the use of existing aircraft.

(b) Adequacy of Reasons for Decisions

An especially disappointing aspect of the file hearing process is the inadequacy of the reasons given for Committee decisions. All too often, decisions merely outline the application, the interventions and reply and then end abruptly with a conclusion. The standard formula states that:

> The Committee has considered the application, the material in support thereof and the interventions referred to and finds. . .[216]

The written decisions do not reflect the high quality of the division reports underlying these. Little or no indication is given of the reasoning behind the decision. The applicant is entitled to wonder how it could have taken as long as it did to come to such an abrupt conclusion which, on its face, could have been arrived at summarily.

Of course, it might be suggested that the decision to grant a licence is intuitive and involves a judgment which cannot be reduced to reasons. It is often very difficult, for example, to explain why one applicant was preferred over another except to say that in the exercise of an informed choice one applicant was judged to be more worthy of a licence than another. It is equally difficult to articulate the "gut feeling" born of intuition and experience which suggests that there will be adverse effects on the provision of service if a new licence were to be granted in a particular location. Furthermore, unlike court proceedings, much of the regulatory process is based on projections into the future. This makes it virtually impossible to give precise reasons. To require full reasons, it might be argued, would be to downgrade judgment in favour of pedantic legal reasoning and make a show of form rather than substance.

Yet a reading of a number of respresentative files suggests that more reasons could be given. Ironically, quite detailed reasons, already

presently contained in the division reports, are never allowed to see the light of day. An Economics Division report, for example, might very well state reasons for granting an application, carefully distinguishing earlier negative decisions involving different circumstances. Unlike the decisions based upon them, the division reports rarely leap from summary of arguments to conclusion.

If reasons are available, why are they not included in decision?

Would giving reasons greatly increase the likelihood of appeal or review? Could ingenious lawyers discover toeholds that could allow the decision to be overturned? On the other hand, an applicant's enthusiasm to underwrite the cost of appeal or review might well be dampened by adequate reasons.[217]

Applicants can always seek the reversal of adverse decisions by the Commission's Review Committee; or by the Minister of Transport, the Cabinet, or the Federal Court. Yet because of the laconic nature of the statements which serve as decisions and supporting reasons, these possibilities offer limited potential. For example, an applicant may believe that inadequate weight was given to one of his submissions because although mentioned it was not actually dealt with or evaluated in the Committee's decision. The Review Committee will probably accept the blanket statement that "all" submissions have been considered.[218] The Federal Court will probably simply state that the common law rules of natural justice do not require reasons.

Do most applicants need to be reassured that their submissions were carefully considered? Perhaps not, but to assume that no applicant requires reassurance is an illustration of regulatory paternalism, quite out of keeping with at-arms-length regulation. In any event, trite as the saying may be, surely it is important that justice be seen to be done.

That reasons ought to be given has been stated even by the Minister of Transport in his decision on an appeal in 1973:

> In Decision No. 3396 the Committee in denying the application merely states that "it finds that the present and future public convenience and necessity does not require the granting of the applications".
>
> It is unfortunate that the Committee did not state on what grounds it came to that finding and I am not prepared to guess what may or may not have influenced the Committee in arriving at that finding. As referred to in my Judgment dated January 22, 1973 in the matter of an Appeal by Fredericton Aviation Limited from Decision No. 3346 of the Air Transport Committee, I consider it a duty of a tribunal such as the

> Canadian Transport Commission to give reasons for its decisions so that those interested may know where they are going. Although the Committee may not be bound by precedent, on the basis of the evidence presented by Raymond Ernest Sande (Sand-Air Ltd.) on the application for a licence at Dease Lake and the evidence presented by Trans-Provincial Airlines Ltd. on the application for a licence at Iskut Village, it seems to me that the Committee should not have granted one application and denied the other, particularly when the application which was denied was based on evidence of greater demand for service than the application that was granted, *without having expressed in clear and concise terms the reasons for the denial*.[219]

The publication of reasons for decisions arrived through the file hearing process need not deprive the Committee of any needed flexibility or lead to a system of rigid precedent. Furthermore, to follow precedent is not to abjure flexibility. It is to introduce an essential element of predictability and to indicate lines of argument which may be followed successfully, which, in turn, will make a hearing a truly meaningful process.[220] Earlier decisions can be readily distinguished by reference to changed circumstances. At the same time a desirable element of consistency and predictability will be introduced. Reasons will then, in the words of the Minister, be available ". . .so that those interested may know where they are going".

A requirement of written reasons rather than simply conclusions is also a valuable check on intuitive decision making. The discipline of reducing one's reasoning tends to clarify and shape the logical bases for decision. But is it practical to ask that all decisions be supported by written reasons? To give more reasons for the large number of decisions made by the Committee would obviously require more staff. Whether to seek additional staff for this purpose is a matter that involves a change in policy and financial implications that initially must be assessed by the Committee. In doing so, it should keep in mind the probable increase in the quality of applications and interventions that would flow from an increase in giving reasons for decision.

(c) Procedures for Introducing New Evidence

Can the file hearing process be fair if the staff introduces new evidence during its assessment of applications? What if new evidence is added which applicants and intervenors have not had an opportunity to meet? The problem is clear where the new evidence concerns particular facts about an applicant, but less clear when general facts about the industry are involved.[221]

The Committee's staff, for example, have received allegations against a particular applicant and wish to include them in its assessment and report. Such documents are not normally released for public scrutiny. However, fairness demands that the applicant have an opportunity to reply to the allegation. This is recognized by the Committee's procedures which provide that "where an allegation is made regarding the service provided by a particular carrier, the comments of that carrier are to be obtained".[222] Our discussions with staff members revealed that they are sensitive to the need for fairness in such instances, apart from any legal requirement for "notice and comment" opportunities when all new evidence is introduced.

At times, however, the need for fairness does conflict with the need to keep certain information confidential. The Economics Division regularly uses statistics provided by the Aviation Statistics Centre (ASC) of Statistics Canada to check the validity of claims by applicants and intervenors. The Centre acts as the agent of the Air Transport Committee in compiling statistics filed by carriers on a confidential basis as required by Part VII of the Air Carrier Regulations. The statistics contain detailed revenue and aircraft utilization figures for individual carriers.

The conflict between fairness and confidentiality may often arise in the following way. An applicant submits an application for a Class 4 charter licence, proposing to operate a small plane close to a major metropolitan area. Similar operations already exist in the area and the application provokes a spate of interventions alleging that an additional service is not needed and, if licensed, would inevitably undermine existing services. The applicant in reply denies this and attempts to show that he will obtain new business rather than take away business from existing carriers. The Economics Division obtains and uses ASC statistics on revenue in aircraft utilization for the existing carriers in the area and assessing the application. These figures are not made available in any form to the applicant and intervenors even though their submissions could be undermined by them. Nor is the use of such statistics consistently mentioned in the Commission's decisions.

Using these statistics presumably makes for more informed decision making. The position of the Commission, as expressed in a recent Review Committee decision, is apparently that these statistics may be freely used internally without disclosure to affected parties.[223] As aids to decision making, it could be said that the statistics do not amount to new evidence, being neutral figures provided by the carriers themselves.

In contrast with this the Committee appears to take the position that when public hearings are held, its decisions must be based on information, or rather, evidence introduced during the hearing and forming, as a result, part of the record of proceedings. Indeed, staff members asserted to us that reliance on the record was a very real restriction placed on them in the drafting of a decision following a public hearing. "If it's not in the record, we can't touch it", was a typical observation. Why then are ASC statistics used in the file hearing process without an opportunity being granted to challenge them? Superficial inferences drawn from unquestioned figures can clearly prejudice the positions of parties. There may, for example, be different explanations for statistics that show a decline in an operator's revenues and aircraft utilization. Is there a declining demand, or is there too much competition? On the other hand, the decline may have been caused by inefficient operation or adverse weather conditions. Should the statistics be used at all, if what an applicant proposes is a substantially different type of service? These are definitely matters on which parties will have opinions, and perhaps relevant information.

What should be done? The statistics provided by individual operators on a confidential basis cannot be revealed. But surely the cumulative thrust of such statistics could be disclosed without a breach of this confidentiality. Applicants might, at least in general terms, want to know the Committee's views on the area he proposes to serve and the economic conditions of existing carriers. Although this could lengthen the decision-making process, it could also improve its accuracy and fairness. At the very minimum, in situations where the success of an application turns largely on existing carrier revenues and aircraft utilization as indicative of the adequacy of existing services, parties ought to know at least the gist of the information available to the Committee. One solution would be to inform the applicant in the following way:

> We note that you allege that the area you propose to serve is presently inadequately served. Figures available to the Committee indicate a recent decline in revenue and aircraft utilization of existing carriers in the area you propose to serve. From this it is inferred that the area is already adequately served. Could we have your comments?

Such an approach would have been extremely useful in a recent Air Transport Committee decision on an application for a Class 4 charter licence at Vancouver. The central issue was whether the seven existing carriers provided adequate service. The majority of commissioners on the Committee concluded that the area was adequately served, given their interpretation of confidential ASC statistics.

> The Committee has considered the application, the material in support thereof, and the interventions referred to. The Committee noted that statistical information indicates that Class 4 Groups A and B revenue hours of four of the larger carriers in the Vancouver area have decreased, and aircraft utilization has decreased from 1973 to 1974 thereby indicating that the seven existing carriers can adequately handle traffic demands in the area and that the charter commercial air business is in a depressed condition in the Vancouver area.[224]

One commissioner dissented largely because he considered that the ASC statistics did not conclusively establish the existence of a business depression. At no time were ASC statistics or related information available to the parties, who, deprived of the crucial facts, could do little more than flounder in generalities. Certainly their input could have been much more focused and useful if they had been able to work with concrete facts.

At times, even knowing the inferences the Committee, or its staff, have drawn from ASC statistics may not be enough. For example, in the Vancouver case, at least one of the intervenors was based outside the market area to be served. To count this intervenor as one of the four carriers with diminished revenues could be misleading. Moreover, statistics may simply be inaccurate, particularly for smaller licensees. They may be "guess-estimates" at best or include revenue hours earned far from the base of operations.

Given these difficulties, the Committee appears to have four options:

1. It could disclose the statistics to applicant and intervenors.
2. It could stop using ASC statistics.
3. It could continue as at present.
4. It could adopt the compromise of informing the parties of the thrust of the statistics, the inferences initially drawn and provide for an opportunity to comment.

The first option has much to commend it. If the statistics reveal a decline in revenues and aircraft utilization, then the interests of existing carriers will be protected by disclosure. If the statistics reveal an increase in revenues and aircraft utilization, then the public interest will be protected by attracting new applicants to the area. The quality of applications and interventions will be improved. Openness will help counter suspicions of misuse of "confidential" information. It would forestall legal attacks on the use of undisclosed information. Moreover, the nature of the information involved does not concern business practices which may have a legitimate claim to confidentiality.

The second option is least attractive. It would deprive the Committee and the parties of relevant information and make informed decision-making very difficult.

The third option is not entirely unattractive. A reading of a number of files in which ASC statistics have played a prominent role indicated that there are internal checks and balances that affect the use of these statistics and questioned the validity of drawing broad inferences from them. Furthermore, divisions sometimes disagree about what the statistics demonstrate. It is possible to find conflicting recommendations based on the same statistics from different divisions!

There are, however, two fundamental objections to the status quo. First, use of the statistics is sometimes not clearly disclosed. It is misleading for a decision to create the impression that only the submissions of parties have been taken into account when, in fact, ASC statistics have played a significant part in the decision-making process. Second, to reveal the use of the statistics *after* the decision is actually made provide an opportunity to challenge their validity. Carriers do not accept that they have somehow impliedly agreed to the use of the statistics by the Air Transport Committee in considering new licence applications.

The fourth option has already been discussed at some length. It has the strengths and weaknesses of any compromise but seems preferable to the status quo.

(d) When Should a Public Hearing be Held?

The Air Transport Committee has the widest discretion in deciding to hold public hearings. It has no direct statutory duty to do so rather than employ the file hearing procedure, although under 17(2) of the *National Transportation Act* a complainant is entitled to a hearing from the Commission.

Perhaps because of the breadth of this discretion the Committee has occasionally been severely criticized for not allowing a matter to be heard publicly. One case in 1970 involved Transair and public complaints by the Attorney-General of Ontario that described the Committee's decision granting Transair permission to operate daily out of Sault Ste Marie as "arbitrary and somewhat arrogant".[225]

The Government of Ontario as well as the City of Sault Ste Marie and the Sault Chamber of Commerce had all asked for a public hearing

when the original application was made, but received no reply to their requests.

The CTC's position on the matter was discussed by its then president before the Parliamentary Standing Committee on Transport and Communication. In response to criticisms about the CTC's handling of the Transair case, he pointed out that the large number of applications received by the Committee made public hearings impractical when requested by affected parties. While recognizing an affected party's right to be "heard", he clearly saw this right met by the opportunity to submit written information and comment. In his words the purpose of a hearing is to make sure that all the evidence the Commission considers would be required to make a judgment is available.

> . . .if the Commission itself feels that it has all the evidence that is required to make the kind of decision that the law requires it to make, it is our duty, our responsibility, to determine whether there should be a hearing. These hearings are inevitably very costly, not merely to taxpayers but also to air lines, and sometimes other people as well. They do hold up the normal work of the Commission and it does not seem to me that it is desirable to hold them merely for the sake of providing further delays, that they should only be held in cases where the Commission believes that somebody has not had a chance to be heard, or that there has not been sufficient evidence to come up with the facts.[226]

The CTC it was asserted had given the Ontario government additional opportunities to intervene, had listened to its counsel and considered written submissions, admittedly without holding a full hearing.

But while the Commission's position in this case was explained, it was apparent that the Committee had not devised a comprehensive set of criteria to help identify the situations in which a public hearing should be held. The Committee's practice, however, has been to hold hearings for applications with national ramifications, such as those involving Air Canada, C.P. Air and the regionals, or where the Committee considers it lacks adequate information. Efficiency can also be a factor when, for example, there are a number of applications in one part of the country. A public hearing in that location may then emerge as an effective tool in sorting out issues and positions.

The Air Transport Committee's decision on whether to hold a public hearing is influenced by the legal and practical requirements for presiding officials. The Committee can use a panel of Commissioners to hold the hearing and decide on the matter, a heavy investment of manpower for a minor application. Alternatively, a single commis-

sioner can be sent to hear the matter and report his findings to the Committee who will then collectively decide. Hearings by single commissioners, while efficient in terms of manpower, have not been used extensively, apparently because of the Committee's reluctance to create embarrassing situations that can arise if a Commissioner's report is not adopted.

The use of examiners by the Committee's predecessor body, the Air Transport Board, seems to have been less problematic. An examiner was normally a lawyer of some experience and stature, asked by the Board to hold a hearing and report back. His factual determinations were normally accepted without question, since he had seen the parties and inspected the area involved. But unlike the Committee with its present single commissioner system, the Board could then make up its own mind as to whether it agreed with the inferences and conclusions drawn from the evidence by the examiner without offending any of its members.

7. File Hearings in the Railway Transport Committee

A file hearing procedure is also used by the Engineering Branch of the Railway Transport Committee. Correspondence and submissions of interested parties are exchanged, a file is compiled, and decisions made without a formal hearing. However, unlike the procedure followed by the Air Transport Committee, informal meetings between staff and the parties occur frequently. The written material in files serves as a background documentation and a collection of the meetings help to clarify the issues, to provide focus, to determine common grounds and reach agreements, if possible, as well as to define through inspection the engineering realities of a given problem.

How costs should be allocated for a multi-million dollar railway line grade separation in the Town of Burlington illustrates this procedure. Written submissions were made by the Town of Burlington and Canadian National Railways on how costs should be shared. Discussions between staff of the Engineering Branch, consulting engineers and planners for the Town of Burlington and representatives of the CNR followed in July, 1970, and again in June, 1972. The Town made a final written submission in August, 1972 and the Railway Transport Committee's decision on the matter was made in September, 1973.[227]

The procedures of the Engineering Branch concerning staff reports are preferable to those of the Air Transport Committee. It is not uncommon for staff of the latter to visit applicants and report back impressions to the Committee. Because of the informality of these visits applicants may not fully appreciate the significance of the visit. Nor do they have an opportunity to challenge the report made to the Committee. In contrast, interested parties are always present when an inspection is made by staff of the Engineering Branch and a copy of the District Engineer's report that follows the inspection is freely available.

D. STAFF STUDIES AND CONFIDENTIALITY

The release of staff studies has been a recurring issue for the CTC, and not just in the context of the file hearing process. Non-disclosure was the position adopted by the then Minister of Transport, and later first CTC president in the debate on the *National Transportation Act*.

> . . .if you have an expert study made and exercise your judgment upon it, and then the expert study is published, it puts both the Minister and the expert in really quite an awkward position. I think it is quite contrary to our system of responsible government to do that. I know there are many distinguished authorities on transportation in Canada. . .who do not subscribe to this view and who think that everything should be done in the full glare of publicity. . .I think, however, that most people who have had experience in government, and not just experience in criticizing governments, would realize that this is not necessarily so. Well, it may have some advantages; and sometimes I think you need to shed a little light in some of these dark places, even in the Department of Transport. . . I think disclosure would depend upon the nature of the studies and depend upon whether or not the government was seeking comment from the public and public understanding and whether or not the government was seeking to inform itself in order to exercise its functions in an adequate and effective manner. I sincerely believe and strongly hope that this function may be just as important and just as useful as the regulatory functions which also will be performed by the Commission.[228]

But the Commission's "self-informing" and "regulatory" functions cannot be separated into two watertight compartments. Inevitably, many of the reports and studies carried out within the Commission focus, by design, on issues in matters requiring decision by the Commission.

Fairness *and* efficiency require the harmonizing of the two functions, so that the advantages of more informed decision making are

achieved, without compromising the validity and acceptability of the hearing process. One approach, a preferable one in our opinion, is to ensure that reports or studies not made available to parties and on which there has not been an opportunity to comment are not relied on in subsequent decision making.

Not disclosing the bases of a decision can raise doubts, whether justified or not, about the decision as well as about the usefulness of the Commission's public procedures. On the other hand, CTC commissioners consider the confidential relationship with the Commission's staff to be an essential ingredient of their capacity for informed and expert decision making. This is illustrated by an exchange between counsel and commissioner at a hearing on passenger air fare increases.

> **Counsel:** I was informed by the Commission's staff and by counsel for the airlines that there is some information which the airlines either have submitted or will be submitting of a confidential nature and that this is information which the Commission may rely on, notwithstanding the fact that it would not be revealed before this public inquiry, and may not be cross-examined on. If that is the case. . .I would move that a summary of that information sufficient to allow us to cross-examine on it be made available to us.
>
> **Commissioner:** . . .The Air Transport Committee is a committee of the Commission, and whenever there is an application, it does examine the application, it does seek reports, data from its staff, and that is privileged between the staff and the Commissioners. If there had not been a public hearing, don't imagine for a minute that we would have made a decision in the dark.
>
> **Counsel:** I didn't suggest that, and I wasn't asking that.
>
> **Commissioner:** The Committee documents are Committee documents and will remain with the Committee. Witnesses are to be produced and you are to be produced and you are entitled to cross-examine the witnesses and you can choose, on what they do state in the box the matters upon which you wish to pursue your cross-examination. For the time being it is out of the question to table any document whatsoever.
>
> **Counsel:** I haven't asked for Commission documents or anything which is the property of the Commission. What I have asked for is if evidence is submitted of a confidential nature or which the airlines choose to describe —
>
> **Commissioner:** The evidence will be submitted here in open court through witnesses which are to be produced by the carriers.
>
> **Counsel:** Fine, then there will be no other evidence apart from that.
>
> **Commissioner:** I hope you don't stop us from applying our wisdom to the case, Mr. Roman.
>
> **Counsel:** Certainly not.

Commissioner: Without consulting you as to our applying this aspect of our wisdom or another aspect?

Counsel: Certainly not, . . .is not my intention.[229]

The Consumers' Association of Canada (CAC) considered the Commission's approach to be in conflict with ". . .all the ordinary rules with respect to fair hearings that a Commission would be prepared to make decisions on the basis of evidence which is kept secret from some of the parties appearing before it, but in the present state of the law in Canada this is apparently what the Canadian Transport Commission is prepared to do.[230]

How the information of a confidential nature is used internally by the CTC and its relationship to staff studies are the understandable concern of intervenants, such as the CAC. If the information forms part of a general study prepared to give commissioners background knowledge of a broad area or topic then the information is used as a "legislative fact" and ought not offend against procedural fairness. If, on the other hand, the information is used in a staff study dealing with a specific issue and particular parties, then the information is used as an "adjudicative fact" and non-disclosure would be perceived as offending procedural fairness. Disclosure of both types of facts and studies, as a matter of policy, if not law, would clearly make the hearing process more meaningful. Disclosure of neither reduces the effectiveness of the hearing, the perceived accuracy of the decisions, and raises concern about the application of the legal rules of fairness, and natural justice.

Staff studies involving adjudicative facts are hardly new and are by no means sinister influences working against the parties in all cases. Staff studies in railway discontinuance and abandonment applications have, for example, played a vital "equalizing" role. The railway companies had argued that the Railway Transport Board should not discount their figures on revenue and expenses as adduced in evidence at the hearings since the figures were not ". . .undermined in any degree at all by cross-examination that was given those witnesses". This approach was rejected. The companies' figures should not automatically be accepted

> . . .simply because none of the parties in opposition have the necessary knowledge to probe them effectively. . .it is the duty of this Board to review the figures presented and to make corrections, if necessary, so that they will represent a reasonably fair picture of the situtation.[231]

Disclosure is now the policy for the Commission engineer's report in railway crossing applications. In a decision in 1970 an affected municipality was given only the "substance" of the report of the

Commission engineer, along with the assertion that ". . .there are no facts unknown to the Railways and the Municipality that would influence our decision one way or the other. . ."[232]. By 1972, a standard practice appears to have emerged of giving the parties copies of the engineer's entire report.[233]

Judicial preference is for disclosure. *Magnasonic*, in 1972, indicated the Federal Court's stance in favour of openness, an approach that is also reflected in a number of more recent decisions.[234] In the absence of statutory provision for confidentiality which in any event could be narrowly construed, the courts in our view, will eventually require that certain staff studies, probably those involving adjudicative facts, be made available to parties by the Commission.

What would the CTC lose through immediate and voluntary disclosure, or by judicially required disclosure? The conventional wisdom argues that disclosure of "confidential" reports adversely affects the candour and frankness of the staff authors. But why should the prospect of public exposure threaten well-grounded analysis and recommendations? Views never exposed to public criticism or the rigours of public debate become entrenched, and unresponsive to changing circumstances. Moreover, as Chief Justice Jackett observed in *Magnasonic*, a statutory right to a hearing.

> . . .at a minimum includes a fair opportunity to answer anything contrary to the party's interest and a right to make submissions with regard to the material on which the Tribunal proposes to base its decision.[235]

The same minimum opportunity, in review, should be available where a hearing is required by the rules of natural justice. After all, Parliament could have chosen a decision-maker who was not subject to the dictates of natural justice, but did not do so. As *Magnasonic* pointed out, the power of decision could have been delegated by Parliament

> . . .to an executive Department of Government with all necessary powers to gather information and to proclaim its findings. There would then have been no right in any "party" to be heard. Parliament chose instead to set up a court of record to make the inquiries in question and provided for such an inquiry being carried out by hearings where those whose economic interests are most vitally affected on both sides of the question would be entitled to appear.[236]

The same reasoning applies to the CTC, and to its "file" and formal hearing procedures.

A related method of exposing staff views to public scrutiny is the calling of staff members as witnesses at hearings. Not being able to do

so could well deprive a party of an effective opportunity to present his case if his arguments are undermined behind the scenes. A party may advance a novel proposal that is strongly opposed by an influential member of the Commission's staff. In these circumstances, should it not be possible to call the staff member as a witness and question his reasoning in the hope of demonstrating the merits of the novel proposal?

On the other hand requiring staff to testify at hearings might, some would argue, severely inhibit the candidness of advice given to commissioners and could inject an undesirable adversarial element into the relationship of trust that ought to exist between commissioners and staff. Furthermore, parties might abuse cross-examination by using it simply to embarrass and discredit staff members.

There are, indeed, some risks involved in requiring staff members to testify. But there are also occasions when the benefits outweigh the risks. One occasion occurred in 1973 and involved the interpretation of the Railway Transport Committee's Cost Order on railway line abandonments and the salvage value of road property. Sharp differences of opinion existed between staff members and the railway company involved. In the interests of fairness and to bring these differences into the open, the Committee allowed its staff advisers to appear as witnesses. The Committee noted that it had to

> . . .decide which of the interpretations placed on section 3 of the Cost Order is correct, the one advanced by the company supporting its claim, the other advanced by the Committee's staff advisers rejecting it. The Committee has been at pains to ensure that both arguments have been fully explored and that Canadian Pacific has had an opportunity to know and answer the position taken by the Committee's staff advisers.[237]

This approach worked well and could be used more frequently. Because the success of the approach depends very much on the attitudes of staff members, we asked a number of senior staff officials whether they thought they should be required to testify. Response varied widely. But prevalent factors included individual self-confidence and the context in which evidence might be given. Some matters, as in the case just mentioned, were more conducive to effective staff participation because the issues were technical rather than emotional, and harassment was unlikely. In situations fraught with political overtones, in matters involving broad policy issues, it was felt that most staff members we interviewed thought their involvement "up front" would not be appropriate.

The Commission has made use of staff members and staff studies to provide non-contentious background information for hearings. In a

number of western railway abandonment cases in 1975, Railway Committee staff prepared booklets giving the historical background of each railway line involved which were issued shortly before the start of the hearings. As well, a senior staff member testified on the first day of the hearings to explain how the Committee's Cost Order would be used. The Air Transport Board for a time called on its staff at the start of a hearing to give general evidence about the conditions of air service in the area involved. These practices are considered to be useful by parties and should be used more extensively.

1. Confidentiality

Closely related to the disclosure of staff studies is the issue of confidentiality. While staff studies are generated internally to the Commission, confidentiality in the context of the CTC's procedures affects access to information given to the Commission on a confidential basis by a party. Here there are interests that may conflict: the protection of a party from the harmful results of the disclosure of his business secrets, and the value of disclosing this information to others in the interests of fairness.

Like the disclosure of staff studies, the issue was to some extent aired in the Parliamentary debates that resulted in the enactment of the *National Transportation Act*. The then Minister of Transport, when questioned about the availability of cost information in railway abandonment proposals, affirmed that when necessary to the fair resolution of contentious issues, openness would prevail. As he said:

> . . .the Commission has the power to make public any information that is given to it if it considers that it is the public interest to do so. However, there might be occasions where the Commission, in order to reach its own conclusions, wishes to get some information and it would not feel it was necessary to make it public. But where there is anything in contention, obviously no decision could be reached on the basis of information that was not available to both parties involved in the dispute.[238]

The Minister in his reference to "contention" apparently indicated a recognition that where facts in dispute run to the heart of the issues before the Commission, the parties should have the opportunity to test those facts. While relevant as a statement of general principle, the Minister's statement falls short of the issue of confidentiality.

A classic example occurred recently in an intervention by Maritime Telephone and Telegraph, New Brunswick Telephone and

the Council of Maritime Premiers, against a proposed rate of microwave facilities proposed by CN/CP Telecommunication Corporation (Canadian Overseas Telecommunications Corporation). In the past, these facilities had been provided by the local telephone companies. The intervenors argued that the proposed rate, far below any rate they could afford to charge, gave COTC an undue or unreasonable preference or advantage contrary to section 321 of the *Railway Act*.

In filing a copy of the agreement between the Canadian Overseas Telecommunications Corporation and CN/CP Telecommunications with the CTC, CN/CP requested that the agreement be treated as a confidential document for the following reasons:

> . . .This agreement was entered into as a result of competitive tender on which CN/CP and the intervenors entered a bid. It would be inherently wrong if competing carriers were permitted to review a contract on which they bid unsuccessfully.
>
> . . .The intervenors in this case are not federally regulated carriers and CN/CP would not have a comparable forum before which to request information similar to that now sought by the intervenors if the situation were reversed.[239]

Counsel for the intervenors requested production of the agreement, or at least such portions of it as could be released without divulging information of "a truly confidential nature". CN/CP replied that the agreement contained information

> . . .which in the trade is considered confidential [and] that actual harm would flow if this information were divulged because it would weaken the respondent's competitive position. . .

The Committee ruled that the agreement should be made available to the intervenors, with the exception of information in one appendix on the techniques to be used by CN/CP in meeting COTC's performance requirements.[240] This approach ensured that as much information as possible was made available but still provided confidentiality where justified by competitive necessity. Above all, the approach avoided a crude all-or-nothing "documents of a confidential nature" classification. It contrasts favourably with a decision of the Water Transport Committee made several months later.

A licenced operator on the Mackenzie River challenged the sale of a rival operator to a large, national transport undertaking, a transaction that had to be approved by the Committee.[241] The challenge was based on an argument that the sale in fact amounted to a sale of the licence. An examination of the confidential agreement of sale would show that the purchase was not of the physical assets of the company, but of its

navigation rights. As a result, access to the agreement was essential for a fair determination of the matter. As counsel put it:

> . . .to state it as bluntly as possible, I think the denial of our application to have this document produced would be a denial of natural justice in its grossest form.

The motion requesting access to the agreement was curtly denied for reasons that contrast sharply with those mentioned above in the CN/CP decision.

> Speaking generally, the Committee is reluctant to direct the details. . . (of). . .the agreement be revealed unless there is a good reason to do so. . . we consider that production of the agreement is not necessary in the public interest, and that the objectors have not established that it is essential to their case.[242]

Two recent decisions of the Railway Transport Committee are more encouraging as an indication of a trend to greater openness.[243] The first concerned the release to the public of railway accident reports compiled by Committee inspectors.

2. Railway Accident Reports

For almost seventy years, the Railway Transport Commissioners and its predecessor bodies had refused, with few exceptions to release the accident reports prepared by their inspectors. The reasons for this practice, first stated in 1908, were, first, that the reports were made exclusively to inform the regulatory authorities, second, that the reports should not be made available to parties comtemplating civil actions against the railways, and third, that railway officials would be deterred from giving information to the regulatory authorities if they thought it might be used against them in the courts. The practice was legally supported by a General Order of the Commission,[244] that declared all accident reports to be privileged and only to be made public by specific order.

Despite this discretion, reports were rarely released. Growing concern about this practice led[245], in 1971, to a general inquiry by the Railway Transport Committee into railway accidents, and the possible revision of the CTC's General Orders dealing with safety. During this inquiry's hearings, the Brotherhood of Locomotive Engineers and the Canadian Railway Labour Association launched a vigorous attack on the validity and desirability of the General Order that defined accident

reports as privileged. The Order was said to derive its authority from section 225 of the *Railway Act*. Subsections 225(1) and (2) establish duties in railway companies and employees to give notice and full particulars of accidents to the Commission. Subsection 225(3) gave the Commission the discretion to declare any of this information privileged.

In the decision following these hearings, the Chairman of the Railway Transport Committee, Commissioner Jones, concluded that the power of the Commission to declare material privileged extended only to the information required by subsections 225(1) and (2) of the *Railway Act*. In other words, the Commission has no power to declare that the report of any person appointed to inquire into a railway accident is privileged. Consequently, the Chairman recommended that the General Order should be rescinded and a new order be drafted, taking into account the views of the railways and unions.[246]

Of even greater significance than this piece of fairly straightforward statutory construction was the commissioner's willingness to state the broad policy grounds on which any claim to privilege should be evaluated:

> The real issue involves the extent to which the causes of railway accidents, and their investigation, should be open to public scrutiny. In my view, the public has a right to know what is going on in this important area. The families of those involved in train wrecks, and who may be killed or injured, do not, at present, have any way of knowing what happened, beyond what they may be told by the railway company, or, in some cases, where there is a public inquiry, what they learn from these proceedings. Nor do railway employees, or the Unions representing them, have the full benefit, in terms of their own work habits or practices, of knowing all the results of a vigorous and impartial investigation of train wrecks by the Commission. Furthermore, the public generally, particularly those who are users of the railways as passengers or shippers of freight, have a legitimate concern with the question whether the nation's railways are being operated safely. Finally, the managers of the railway companies do not now feel the additional spur that exposure of the causes of train wrecks to the cold light of day will bring to them, in their efforts to operate trains more safely.[247]

Against this background, the Commissioner then considered how far authorized privilege for information required for railway companies and employees under subsection 225(1) and (2) should go.

> It is in this area where the public interest can come into serious conflict with private legal rights, be they those of railway companies, or of individual employees, that may be involved in railway accidents. For example, following an investigation, the Commission has the power to order a railway company to suspend or dismiss an employee deemed to have been negligent or wilful. It is not difficult to see how the premature

disclosure of a statement given by a train service employee or a supervisor to his superior could prejudice his right to a fair hearing and determination by the Commission that he be suspended or dismissed.[248]

The Commissioner doubted that the CTC's discretion to disclose documents could be used to destroy a privilege accorded by a court of law; for example, to communications between lawyers and client involving pending litigation. But he saw no reason why disclosure would diminish "the candour and completeness of statements taken during accident investigations".[249]

3. The Rapeseed Case

The second major decision that considered openness arose during what has come to be known as the *Rapeseed* case, an "investigation" by the Committee into whether the public interest was prejudiced by certain freight rates. While there is a brief reference to the issue in the formal decision of the Railway Transport Committee, the ruling of most interest occurred during the hearings and hence can be found only in transcripts.

The issue arose when Manitoba's Minister for Economic Development testified that a number of rapeseed interests had refused to locate in his province because of the discriminatory rates charged by the railways. He was immediately challenged to identify these interests but refused to do so on the grounds that such disclosure would be harmful to provincial interests.

The hearings were held under section 23 of the *Railway Act* which referred to a "hearing" by the Committee, and as well described the proceedings as an "investigation".

Commissioner Jones, in ruling on whether disclosure should be required, set out the general considerations involved. Because of the intrinsic value and inaccessibility of this ruling, we quote him at length:

> It seems to us that two general principles arise and the first is that the Commission is not bound by the ordinary rules that govern the courts of law in the taking of evidence, because of the special nature of its function. And the second is that in any event, there are exceptions to the ordinary rule that the business of the courts should be carried on in public.

We conclude that the powers of the Commission under section 23 must be exercised in keeping with those two principles. As far as possible, the Commission should receive evidence at the hearing in the ordinary way, but if we were to exclude from consideration all information but that obtained in the ordinary way at a hearing, it seems to us that the natural meaning of the language of section 23 would have to be artificially strained to make the words "investigation" and "hearing" have the same meaning, and we don't think that they do.

Nor do we think that the words are interchangeable. A hearing must take place, but as part of an investigation which is to be such as in the opinion of the Commission is warranted, and in conducting an investigation, the Commission is to have regard to all considerations that to it appear relevant, including considerations of the public interest. . .

We have concluded that the Commission may receive any information it requires in the course of its investigation leading to its decision as to whether there is prejudice to the public interest by the reason of acts, omissions or the effect of rates of railways.

We have also concluded that while as much information as is possible should be obtained in open court in the interests of fairness and justice, those same interests require the Commission to use the other means of obtaining information that are at its disposal, whenever the circumstances make this necessary. For to do otherwise, would be to defeat the public interest. . .

Where information is relevant to a case under section 23 *and is essential for its determination* by the Commission, *but its disclosure at a public hearing may clearly cause actual and substantial damage to the party giving it, then the information*, we think, *must be given to the Commission in confidence*.

[Emphasis added...]

. . .What [the witness] will have to demonstrate to our satisfaction is that it will cause him actual and substantial harm. . .if he is required to disclose it.

The party asking the question will then be obliged to satisfy the Commission that the information he seeks is relevant to the issue, and essential to the determination of the application or the particular issue within the application. . .

The Commission will then call for the information in question, and make its decision as to whether it should be disclosed or not.

But before doing so, it will make another decision, which in our view is just as important, and in some situations perhaps more important, and that is whether the question asked and the answer sought are relevant and essential. It seems to us that we can't deal with this question of confidentiality in that kind of a vacuum, unless we look at the questions of relevance and essentiality.

Now there may be rate instances where the Commission faces this kind of a dilemma where evidence is essential and relevant, and where its disclosure would clearly cause actual and substantial harm, but the

Commission, for one reason or another, may not be of the opinion that it can be properly tested by its own resources, by its own staff. We may in such circumstances, and I understand there is at least one precedent for this. . .(exclude) all but counsel, for the purposes of the giving of the evidence and the cross-examination on it, on the usual understandings between counsel that there would be no disclosure.

This is not a procedure that we like. There is something repugnant to our system of law about *in camera* hearings. The parties in interest find themselves excluded, the press is excluded, and the whole concept of the conduct of these judicial proceedings is altered and varied in some fundamental way. But that is not to rule out the possibility. I think there may be situations where the information in question is just so damaging, but so vital, that we have no other option.

Now we think, in conclusion, that if we bear these three main steps in mind, relevance, essentiality and actual harm, while it may take time, perhaps more than some people would like, it's a fair and practical way of getting at this problem. And we would hope that as time goes on, and everyone gets used to working under these rules, that its scope will become a little more easy to appreciate, and let me say here and now, that this Committee, this panel, will not hestitate in any case to take whatever time is necessary to rule on any particular application on confidentiality.[250]

4. Railway Costs

Recent statutory reforms have also dealt with confidentiality. Under section 331 of the *Railway Act*, confidential information may be provided by the Commission when deemed necessary in the public interest. Provincial demands were made at the Western Economic Opportunities Conference, held in June 1973, for a clear statutory right to railway cost information. These demands were met in the addition of section 331.1 and 331.4 of Bill C-48 in 1975, which provide that the Minister of Transport may request this information on behalf of a provincial government, then transfer the information to the province provided it gives an understanding that the information will be kept confidential.[251] Where, however, such confidential information is relevant to any proceeding under the *National Transportation Act*, it may be published for the purpose of those proceedings. This now means that as far as provincial governments are concerned, the Railway Transport Committee cannot make individual decisions under section 331 of the *Railway Act*.[252] It is also another example of a beneficial trend towards greater disclosure of "confidential" information.

E. "PUBLIC INTEREST" INPUT

The Commission has been somewhat introverted in its regulatory activities. It has never actively sought to explain its role either to the wider public or to the industry it regulates.

The Commission's public posture has tended to be one of aloofness. This is in sharp contrast to the Canadian Radio-Television and Telecommunication Commission (CRTC), another federal regulatory agency with some similar problems but a very different heritage. Reflecting perhaps the industry it regulates and the personal style of its chairman, the CRTC has had a high public profile. Its first chairman participated in numerous media encounters where he has often been sharply criticized. He constantly sought to explain CRTC policies to industry and the general public as well as to encourage greater public understanding of the problems facing Canadian broadcasting. CRTC commissioners and the agency's senior staff regularly attend the annual conventions of broadcasters and cable operators where they patiently seek to explain their policies to their critics. At these sessions, they have naturally had to fend off what could become embarrassing questions about particular policies and even particular applications. The impressive element here is that they have not used the potential difficulty of having to refuse to discuss a pending matter as an excuse to avoid public scrutiny.

In the past, to some extent because of the CTC's aloofness, relations between industry and the Commission have deteriorated. In 1969, for example, the Air Transport Association (ATAC) passed a unanimous motion of non-confidence in the Air Transport Committee and demanded that formal rule-making procedures be adopted in order that their view might be heard.[253] By 1971, relations had worsened, as may be seen from what ATAC's chairman said in an interview at that time.

ATAC's chairman announced that the industry was "most concerned" that a recent change in the CTC's policy had forced the Commission to decline an invitation to send representatives to the Association's conference. The Commission's policy, as reported, considered it inappropriate for commissioners to express opinions on matters before them, or *likely to be*, since they were involved in making "decisions of a judicial character". "We really can't buy that" was the ATAC's response. In its chairman's opinion, the commissioners — who develop air transport policy — should meet the industry and "find out first-hand what is going on". The CTC's attitude was contrasted with the federal Department of Transport's approach of closer contact

with ATAC members on matters like safety and the licensing of aircraft pilots. "We are encouraged by their awareness of our problems."[254]

Relations since then have improved, but the Commission still appears to be unnecessarily distant in its relations with industry and the public. Its use of formal hearings has not, until very recently, recognized their potential for improving these relations. Public hearings need not be restricted to adjudicative proceedings, but can also serve as a forum for gathering information or eliciting opinion in areas where regulatory action might be necessary. The Commission's conservative view of formal hearings has been influenced, undoubtedly, by its statutory designation as "a court of record". This has not prevented it from holding a number of broader hearings, a salutary trend that indicates the Commission's responsiveness to the present regulatory environment, the need for improved communications with regulatees and the public, and the role in this of the public hearings.

The examples illustrate this trend. A recent general inquiry by the Air Transport Committee into the adequacy of Maritime air service concluded with the holding of public hearings at major centres throughout the Atlantic provinces. These were the first public hearings by the Committee that emphasized a general concern rather than specific licence applications. To promote an informal atmosphere more conducive to participation by the general public, witnesses were not required to give evidence under oath, and cross- examination was not allowed. A staff report, *The Adequacy of Unit Toll Commercial Air Services in the Atlantic Region of Canada*, was circulated to interested parties before the hearings. Public input proved valuable, particularly in helping to discover inconsistencies in staff studies.

A second example arose when the Telecommunication Committee considered Bell Canada's amended Application "B". Additional hearings were held in Toronto and Montreal to receive submissions from the general public. Although attendance was "disappointingly small", the Committee did point out that it benefited from the exercise.[255] Despite the limited public response, there were one hundred and eleven interventions filed with the Committee in Ottawa that represented a broad spectrum of public interests.

The Telecommunication Committee also scheduled public hearings on its proposals for a Rate Adjustment Formula Procedure, and invited submissions from carriers and interested parties. These three examples demonstrate the Commission's recognition of the usefulness of the public hearing in dealing with matters of general interest. As a method for eliciting industry and public response to proposed rules,

using the public hearing in this way is an innovative and important step. Not only does it ensure better and fairer rules and procedures, but also smoother implementation.

That the Commission has proceeded cautiously reflects its awareness of the problems associated with formal hearings and any expansion of their use. Put briefly, lengthier hearings mean less time for the implementation of more innovative approaches. Yet as the Commission endeavours to reduce the amount of time Commissioners spend in public hearings through careful application of section 19 (through the use of hearing officers and simplified procedures), more time can be devoted to using public hearings as a device for examining matters of general public interest (rule-making and policy formulation).

Closely related to the role of hearings is the issue of public interest and consumer representation before regulatory tribunals, and particularly, the Canadian Transport Commission. This has been dealt with extensively elsewhere but two recent matters illustrate how the issue has been approached by the CTC.[256] The Telecommunication Committee grappled with the rising interest of the public in rate applications by Bell Canada. This, to a considerable extent, led the Commission to hold a hearing in a closely related matter to public interest representation — whether intervenors should receive costs.

In 1974, the Telecommunication Committee was fated with one hundred and eleven intervenors in its consideration of a Bell rate application. Of these, only the Governments of Ontario and Quebec, the Consumers' Association of Canada, and one individual, Mr. Carlyle Gilmour of Chateaugay Heights, Quebec, participated for the duration of the proceedings. The major problem for the Committee was how to cope with the other intervenors and their very wide range of capabilities and interests.

The Committee concluded that "within the existing framework" the most constructive move would be to appoint an "independent Counsel" to assist intervenors with neither the funds nor the time to take part in lengthy hearings. The Committee reported encouraging discussions with the Department of Consumer and Corporate Affairs "but that Department was unable to assist us in this way". As for the provision of counsel by the Department of Justice under section 54 of the *National Transportation Act*, the conclusion was that ". . .the nature of this rate case does not lend itself to such Counsel being appointed".[257]

The Committee did not fully develop its ideas about the possible role of an independent counsel. It appears that his primary role was not envisaged as being at the hearing itself.

> The Committee believes that the appointment of such counsel could be of great benefit. It is our opinion that an expert independent legal advisor could, to a large extent, have provided his "clients" with the sort of interpretation and explanation of the case which several groups were seeking when they proposed that the Commission establish a Consumer Referral Agency. Many of the frustrations which individual intervenors experience might then be avoided.[258]

The other problems involved access to the transcripts and the location of hearings. Transcripts were made available on a daily basis in the public libraries and at the local offices of the Department of Consumer and Corporate Affairs in Ottawa, Toronto, Windsor, Montreal and Quebec City as well as at the Commission's court room prior to the commencement of each day's proceedings. As mentioned earlier two days of hearings were held outside Ottawa, in Toronto and Montreal.

Neither of these two experiments were reported to have been particularly successful. Very few people seemed to know about or take an interest in the transcripts, and the "out of town" hearings were not well attended. The Committee abandoned the proposed second day of hearings in Toronto for lack of participants although it did find some of the representations useful.[259]

Of particular interest to individuals and public interest groups is the possibility of being awarded costs when intervening in CTC proceedings. The Commission's approach to this issue initially seemed promising. At the request of the Consumer's Association of Canada the Commission held a two day public hearing early in April, 1975, on the general subject of the awarding of costs related to CTC proceedings. A policy hearing of this kind is unique in Canada and attracted considerable attention. Although the CTC eventually decided a year later on technical grounds that it could not and should not award costs to parties and intervenors, this hearing helped to focus attention on the role and needs of what has come to be known as public interest advocacy.[260] The hearing was one of a number of elements that has prompted the federal government to attempt to formulate a general policy regarding interventions in administrative proceedings.

CHAPTER VI

Review and Appeal of Commission Decisions

A. INTERNAL REVIEW

In a recent major decision, the Review Committee has set out in some detail the grounds on which review within the CTC of one of its modal Committee decisions may be obtained. Past attempts at definition had not been particularly successful and the Review Committee resolved to clarify matters in *COMSOL*.

The decision arose by way of an application to review a decision of the Commodity Pipeline Transport Committee allowing Canadian Pacific Railways (CPR) to acquire a controlling interest in a proposed slurry pipeline. For a number of years Shell Canada had been undertaking research into the feasibility of slurry pipelines, and for that purpose had set up a wholly owned subsidiary company, Commercial Solids Pipe Line Company Limited (COMSOL). One of the major concerns was to determine whether sulphur could be moved 600 to 800 miles from the gas fields of Alberta to the West Coast for shipment abroad. Sulphur is a by-product of natural gas production for which at the time there was a limited world demand. As a result, thousands of tons of this commodity were stockpiled in Alberta. Another factor affecting demand for sulphur (despite its relatively greater purity) was its high price, caused mostly by high transportation costs.

Shell was not encouraged with development prospects and sought to sell 80% of the capital stock in COMSOL to CPR. Shipment by rail

was considered to be the only feasible alternative means of transporting sulphur. The producers, fearing that this would lead to a diminution of competition, filed an objection to the acquisition under section 27 of the *National Transportation Act*. This section provides an opportunity for any person affected by an acquisition by an existing transportation undertaking of a business whose principle undertaking is transportation, to object to the acquisitions ". . .on the grounds that it will unduly restrict competition or otherwise be prejudicial to the public interest".

The result was a two-to-one decision refusing the objection, the Chairman of the Commodity Pipe Line Transport Committee dissenting. Before assessing the decision of the Review Committee that followed, an assessment of the differences between the majority and minority positions is useful.

The majority members asked whether intermodal acquisitions were contrary to the principles set down in section 3 of the *National Transportation Act*. They concluded that the statutory languages "able to compete" and "ability. . .to compete freely" did not prohibit intermodal acquisitions. To support this view, the majority pointed to Parliamentary recognition of intermodal ownership in section 23(3)(*b*) of the *National Transportation Act*.

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

and to the same wording in section 281(2) (*c*) of the *Railway Act*, as well as the wording of section 328(7) of the same Act:

> The Commission shall review and revise as necessary the uniform classification of accounts, at intervals not longer than every two years, to ensure that railway companies maintain separate accounting
>
> (*a*) of the assets and earnings of their rail and non-rail enterprises; and
> (*b*) of their operations by modes of transport.

From these provisions, the majority concluded that section 3 of the *National Transportation Act* referred to "modes that compete and modes in which common ownership of parts of those modes is a fact" and that common ownership, *per se*, did not violate the spirit and intent of section 3 unless it unduly restricted competition or otherwise was prejudicial to the public interest contrary to section 27 of the Act.

The minority was not concerned with the legality of intermodal acquisitions, *per se*. Instead it focused on the intended acquisition by

one mode of controlling interest of another proposed mode of transportation. Competition in transportation was recognized as the basic principle to be found in section 3 of the *National Transportation Act*, and safeguarded by section 27. The main issue for the minority was whether the particular acquisition at hand would unduly restrict competition or be prejudicial to the public interest. Given this perspective, it must be assumed that, in general, the minority considered intermodal acquisitions to be consistent with section 3 principles as long as they did not offend the safeguards in section 27.

In retrospect, all members of the Committee seemed to accept a similar interpretation of the interplay of sections 3 and 27 and the relation of these sections to intermodal acquisitions. What they differed on were the inferences to be drawn from the facts of the particular case. For the majority, the producers' advantage in negotiating freight rates because of their capacity to build their own pipeline, CNR's competitive presence and the existence of a remedy against unfair rates under section 23 of the Act meant that CPR's acquisition of the controlling interest in COMSOL was not unduly restrictive of competition or prejudicial to the public interest. The minority member came to the opposite conclusion when he found that the proposed pipeline had caused an actual reduction in rail rates. CPR's acquisition of a controlling interest in COMSOL in his view would mean the eradication of a competitive element. And this was found to be unduly restrictive of competition. In addition, the possibility of the pipeline replacing the railway as the only economically feasible means of transportation would cause certain producers, who could not connect to the pipeline, to be left without a means of transportation and this was considered by the minority member not to be in the public interest.

It is interesting to note that while the majority did not discuss this last point, the minority member did not consider the potential of a producer-owned pipeline for offsetting the damaging effects of CPR control of COMSOL or the competitive element to be found in the presence of CNR. There appears then, to have been a different selection of facts to support the opposing positions. Beyond this both positions failed to identify what would constitute an undue restriction in competition or a matter prejudicial to the public interest. The decision of the Commodity Pipeline Transport Committee whether CPR's acquisition of COMSOL would unduly restrict competition or otherwise be prejudicial to the public interest remained a value judgment placed upon the facts. That value judgment, in turn, can be seen as an outgrowth of the degree of commitment to competition by the decision-makers.

In its decision, the Review Committee recognized that the difference between the majority and minority position arose from differing inferences from the same facts, a difference of value judgment, and not a misinterpretation of the principles espoused in section 3 of the Act. The Committee, however, did not address itself to the total lack of guidelines for interpreting what competition is unduly restrictive or otherwise prejudicial to the public interest. The Committee simply referred to the word "unduly" as having a "connotation of high degree".

The Committee emphasized the "finality of quasi-judicial decisions". To ensure this finality it articulated very limited conditions for internal review by way of section 63 of the *National Transportation Act*. Review was regarded as a pragmatic means to correct an error or to meet changed circumstances, these two factors being the sole justifications for review in the Committee's view. Section 63 was very clearly held, then, not to impose a duty to review on demand. Nor did the existence of a dissenting opinion justify "automatic" review. Applicants for review had a burden placed upon them to demonstrate that

> new facts had arisen or that the decision contained an error in law or in fact or that a matter of principle that had been proposed before the original committee had not been considered, or that a new matter of principle arose as a result of the decision.[261]

In asserting this position, the Review Committee rejected arguments that review should also be allowed if a principle matter of substantial importance was at stake.[262]

The decision, however, failed to make clear the extent of the burden of the applicant seeking internal review. No mention was made of a *prima facie* case. Instead it would appear from a literal reading of the decision that an applicant must prove rather than merely allege the conditions essential for review.

The difficulty of this approach is made self evident if the condition "error in law" is used as an example. To say that the Review Committee will not review until it is satisfied that there is an error of law is tantamount to holding that nothing succeeds like success. It is one thing to say that no review will be granted unless the application for review raises a substantial question of law for the Committee to resolve; it is quite another to say that the applicant must actually show an error of law before his application for review will be considered on its merits. If the decision is taken literally it would mean that any successful application for review must lead to a reversal of the decision on review. The distinction between an application for review and

review itself would then be eliminated. Thus, the applicant for review based on an error of law could be placed in the invidious position of having to win his case on the merits before he even has a chance to appear before the Review Committee.

Admittedly the necessity to prove new facts, or an error in fact, or a matter of principle not considered, may not be seen to remove the distinction between deciding whether or not to review and actually reviewing a decision. It may be argued that once an applicant has *proved* one of the above the Committee could, in its review of a given decision, determine whether the new fact or erroneous fact or unconsidered principle warranted a variation or rescission of that decision.

However the failure of the Review Committee in the COMSOL decision to articulate clearly the case to be met to obtain review diminishes that decision's merit as a comprehensive statement of the review process under section 63 of the *National Transportation Act*.

In addition to this problem the question arises whether, in the pragmatic interest of finality, the Review Committee has fettered its discretion as given under section 63 of the *National Transportation Act*:

> The Commission may review, rescind, change, alter or vary any order or decision made by it, or may re-hear any application before deciding it.

It is interesting to take from the review decision a description of an argument submitted by Counsel for the Province of Saskatchewan and the Review Committee's response to it:

> Counsel for the Province of Saskatchewan submitted that the criteria for review. . .were not judicially instituted requirements. . .they were really no more than guidelines or parameters which were established by an existing Committee of Review or by Committees which were earlier set up to review or to consider reviews of decisions made by the Original Committees. Counsel submitted that despite the authorities that have been cited, there is no legislative restrictions with respect to the discretion which the Committee can exercise nor are there judicially established limits to this discretion. The authorities set out guidelines which could be utilized as a rule of thumb by the Committee to enable it to better organize its work but, under no circumstances, should they be considered to fetter the discretion of the Review Committee. . .
>
> This conception of the review process sees the Commission as a judicially deliberative body with a multi-tiered structure, up which an applicant must pass before he can be assured of a final decision. Instead of a process in which the modal committtee, in full possession of the facts of the case, renders the final decision subject to review in defined

> circumstances, which is what we think it is, this conception imparts no finality until the initial decision has been examined or re-examined in review, at the request of parties adversely affected. This is not how we see review in the scheme of the *National Transportation Act*.

By refusing review except in certain "defined circumstances" the Review Committee has opted for rigidity in order to ensure finality. However, as was argued by counsel for Saskatchewan, this rigidity in the face of the broad scope of section 63 of the Act is arguably a fettering of the discretion given the Review Committee by that section. A possible response to this argument is that the criteria for review espoused by the Review Committee are in themselves broad criteria — criteria under which any reasonable argument for review can be accommodated. However, it is not clear that the criteria used are broad. In respect of this, the criteria given for review cannot be taken or, at least, should not be taken at their face value. The Committee's obvious intention to confine review narrowly should be taken into consideration when interpreting the criteria used. The question is not whether any given argument for review can be tailored to these criteria rather the real test is whether the Review Committee will be responsive to that argument. On a careful reading of the COMSOL decision, it would appear that the future applicant for review could expect a narrow rather than broad use of the criteria provided, in keeping with the Committee's expressed desire for finality.

The alternative is not, of necessity, the automatic review procedure feared by the Committee. Instead, the Committee could put forward its criteria for review as guidelines. This would allow for a necessary structuring of the discretion given to the Committee. However, given a more responsive attitude than the narrow pro-finality stance adopted in the COMSOL decision, the parameters set would acquire a desirable degree of flexibility. As a result, an affected party would be given a real rather than illusory opportunity to argue, in a reasonably receptive forum, that his particular case warranted an extension of the parameters of the criteria for review. The result would not thus be automatic review on demand. The number of reviews could be controlled, but under flexible rather than rigid guidelines. In short, review would never be automatic but at the same time would not be automatically denied.

In addition, the argument could be made that in certain cases the quest for finality should give way to the need for clarification of Commission policy. The "defined circumstances" for review had, after all, been inherited from the body that had made the initial decision. A separate Review Committee was especially set up under the *National Transportation Act* composed of all the chairmen of all

the modal committees. This new Committee should broaden the scope of internal review in those "important" cases that cross modal committee boundaries and raise fundamental issues, thereby providing the opportunity to give a sense of direction and cohesion to the workings of the Commission.

One response to this argument and one made by the Review Committee in the COMSOL case, is that each individual committee is already structured on an intermodal basis since all commissioners are members of more than one modal committee. Therefore each committee would adopt an intermodal approach. This response may be questioned in light of a greater ability of the chairmen of the various modal committees as a group to articulate, in key cases, the intermodal perspective desired. Another response might point to the fact that many reviews are actually conducted by the same body that made the initial decision since the Review Committee regularly refers decisions considered reviewable back to the appropriate modal committee.

The last point, in turn, raises interesting questions as to the adequacy of a review made by the same body that made the initial decision. On the one hand the argument can be made that the original modal committee can best assimilate the new fact, or error of fact, by utilizing its expertise in the review of the decision. In other words *new* elements could be taken into consideration by the modal committee in review of their decision. This is particularly convincing if review is based on a new fact or error of fact decided upon by the Review Committee. But if the modal committee is to decide whether there has been an error of fact (or law), *quaere* that body's ability to do so impartially.

One difficulty encountered in grappling with these arguments is the confusion over the word "review" — a confusion that is tied into the problems dealt with earlier in defining conditions of reviewability and the onuses involved. It appears that the COMSOL decision envisages review only in light of some new element, be it a new fact or an error of law, etc. As mentioned above, it is not clear who decides whether the new element exists. If this function is left to the Review Committee and the significance of that new element is left for the particular modal committee involved to decide, then a "review" by the original decision-maker may be acceptable. "Review" in this case would be a "re-decision" based on additional elements. However, a distortion exists in describing this latter function as a review. The actual review has already taken place in determining whether or not a new element (new fact, error of fact or law, etc.) exists. The re-decision based on that new element is a *consequence*, not an

element, of the review made. Therefore, review by the original decision-maker, and the problem of impartiality it raises, only arises when the function of determining whether a new element exists is given by the Review Committee to the particular modal committee involved.

However, a more important matter to be considered is not that a particular modal committee may in practice be involved in actual review. Rather it is the realization that there is an area of review that should be reserved for the sole consideration of the Review Committee. Within this area fit those important or "key" cases raising fundamental issues and crossing modal boundaries. It can be argued that especially in these cases, conditions of reviewability should not be based only on the allegation or proof of new elements (new facts, error in law, principle raised but not considered, etc.). The importance of a principle, though considered, should be sufficient as a condition of review if the Review Committee is satisfied that the ambiguous or inconsistent application of that principle was involved. Such cases would provide examples where the interests of finality could be deferred in the interests of clarity and reconsideration of basic principles involved in the *National Transportation Act*.

A possible detrimental consequence of the *COMSOL* ruling would be a greater tendency to resort to the courts and the Minister for appeals. Neither of these avenues would provide as benign an influence on regulation as an internal review procedure. However the fear that internal review will be negated by the narrow constraints enunciated in the *COMSOL* ruling must be tempered in light of statistics made available in the Eighth Annual Report of the Canadian Transport Commission, 1974. Of 40 applications for review in 1974, 18 were denied and in 22 review was initiated.[262a] The significance of these figures very much depends on one's perspective. On the one hand it might be argued that review was granted in over one-half of the applications considered. On the other hand the figures could be used to show that review was denied almost fifty per cent of the time.

Besides discussing the merits of the COMSOL decision, *per se*, it is necessary to determine the decision's effectiveness in clarifying the status of review under section 63 of the *National Transportation Act* in light of previous and subsequent review decisions.

Some of the decisions prior to COMSOL demonstrate the understanding that before reviewing a given decision it is necessary to decide whether that decision is reviewable. For instance, in a decision rendered on December 14, 1973 it was determined that there was nothing to justify granting an application for review which sought a

reversal of the original decision. However, no comprehensive statement of the requisite conditions for review was given. The reasoning offered was simply that the application for review and the additional supporting material brought out "no facts" that would justify granting the review.[263]

Other pre-COMSOL decisions demonstrate a confusion in articulating the process of review anticipated under section 63. For example, one of the decisions given on December 14, 1973, stated that the Review Committee had reviewed the decision in question and had determined that the arguments submitted by the applicant for review were extrinsic to the reasons underlying that decision. As a result the application for review was dismissed.[264] This reads very much like: "On reviewing the Decision we have decided that there is no basis upon which to review the decision".[265]

The confusion might be seen as a failure to divide a given application under section 63 into its component parts: a preliminary application to have a decision reviewed and a secondary application, premised on the success of the first, to have an unfavourable decision rescinded, changed, altered or varied. This confusion is aggravated by the ambiguous wording of section 63 itself. Rather than stating that the Commission might review any order or decision, and on review, rescind, change, alter or vary that order or decision, the section combines review with rescission, change, alteration or variation. But, by creating a Review Committee, it would seem that the Commission recognized the necessity of performing the latter functions *after* a general review. Also, the division between review and subsequent rescission, change, alteration or variation is recognized in the method of recording the Review Committee's activities in the annual reports. The number of applications for review is listed. This number is subdivided into successful and non-successful applications. There is a further subdivision of the successful applications into decisions that were altered as a result of the review made.

The test of the COMSOL decision is whether it erased the confusion and ambiguities mentioned above. Therefore the real test lies in the clarity and conformity of subsequent review decisions.

Some of the post-COMSOL decisions articulate the two step procedure of determining reviewability prior to reviewing. For instance a decision on April 4, 1975, stated:

> The Committee has considered the application for review and the submissions in support thereof. The Committee is of the opinion that Order No. 1975-A-51 is reviewable, and having reviewed the said Order is of the view that it should be rescinded.[266]

Others, however, demonstrate similar confusions evidenced in pre-COMSOL decisions. For example, in a decision dated November 12, 1974, the Review Committee stated:

> The Review Committee has considered the submission made by the (the applicant) and is of the opinion that if the Air Transport Committee erred in the misapplying or ignoring to apply a stated policy then the matter would be considered reviewable. The Review Committee has reviewed the matter and has concluded that the Application for Review is without substance and the the Air Transport Committee did not fail to consider its own policy. . .
>
> The Application for Review. . .is hereby dismissed.[267]

It would have been clearer if the Committee had decided that a sufficient allegation of misapplication of a stated policy rendered the matter reviewable. Then, it could have stated that on review (a) the allegation could not be substantiated and therefore (b) no alteration, rescission or variation of the order of decision was required. Instead, the decision shows evidence of an actual review to determine whether a given policy was considered followed by a decision not to review.

It is interesting to note that post-COMSOL decisions also state differing considerations for review from those articulated in the COMSOL decision. For instance, the above mentioned decision classified failure to apply stated policy as a reviewable matter. A decision on February 19, 1975, refused to review a matter because there were no new facts before it *nor* any important principles at stake.[268] This implies that an important principle by itself would be sufficient grounds for a review — in direct contradiction to what the COMSOL review decision stated.[269] And, finally, special note should be taken of the latest recorded decision of the Review Committee, dated July 18, 1975. Direct reference to COMSOL was made with a restatement of the grounds governing review under section 63. However the grounds cited were extracted from the jurisprudence used in argument rather than from the final conclusions and decision of the Committee. Consequently one ground mentioned was: ". . .where some principle is at stake. . ."[270] This is strictly contrary to what the review committee in COMSOL decided.

It should be remembered that the Committee was careful to point out that the jurisprudence did not support review on that condition alone.[271] Also in their conclusions, the Committee stayed away from considering "where some principle is at stake" as a condition for review and preferred to restrict reviewability to circumstances where a principle raised had not been considered or a new principle had arisen as a result of the decision. Therefore, it would appear that this latest

decision has failed to accurately convey the conditions for review stated in the COMSOL decision, thereby adding to the demise of COMSOL as a comprehensive statement of the status of review under section 63 and the general confusion surrounding that section.

To ameliorate some of the confusion and ambiguities discussed above, the following changes are suggested. In recognition of their composite nature, applications under section 63 of the *National Transportation Act* should not be referred to as "applications for review". Instead it would be clearer to refer to them as "applications for review and rescission" (or alteration or variation as the case might be) or as "applications under section 63 of the *National Transportation Act*". Though it is strongly recommended that conditions of reviewability remain flexible, some clarification of the parameters being used by the Review Committee is required.[272] In addition, it is necessary to define the onus placed on an applicant to have a decision reviewed. It must be made clear whether the applicant is to allege new facts, error in facts or law, etc., or to prove them, or to allege some and prove others. (For example, it would be reasonable to have to prove a new fact and only have to allege an error in law). Decisions should take on a definite format of first determining whether or not the matter is reviewable (for example, whether an error has been sufficiently alleged or a new fact proved, depending on the onus involved). Then the Committee should determine on review whether, for example, there has been an error of law or fact (if proof of these elements is not a condition of reviewability) and then should determine whether rescission, variation or alteration of the given order or decision is warranted on the basis of the review made.

Until both the confusion over procedure and ambiguity over conditions for review are rectified, the exact state of review under section 63 of the *National Transportation Act* will remain unclear.

B. THE APPEAL SYSTEM

There are five routes that afford alternative methods of questioning Committee decisions or seeking CTC regulatory action. We have described these routes generally on the Commission's appeal system.

1. Prejudicing the Public Interest

The *National Transportation Act* allows situations that may be harmful to the public interest to be brought to the attention of the Commission.

Where a person has reason to believe

(*a*) that any act or omission of a carrier or of any two or more carriers, or
(*b*) that the effect of any rate established by a carrier or carriers pursuant to this Act or the *Railway Act* after the 19th day of September 1967,

may prejudicially affect the public interest. . .such person may apply to the Commission for leave to appeal the act, omission or rate, and the Commission shall, if it is satisfied that a *prima facie* case has been made, make such investigation of the act, omission or rate and the effect thereof, as in its opinion is warranted.[273]

If a *prima facie* case is established, to the Commission's satisfaction, a public hearing is a mandatory feature of its subsequent investigation.[274] The burden of establishing a *prima facie* case has been adjudged to be quite light,[275] although by no means automatic.[276] The unique features of this method of "appeal" prompted a special "preliminary report" in 1973. This outlined a number of steps that could be used to simplify the operation of this procedure and reduce delay and costs to the parties involved.[277]

There are several practical difficulties in administering the section establishing the "appeal" procedure quoted above. Definition of the term "prejudicial to the public interest" is fraught with the same difficulties that exist in the "promotion v. regulation" conflict. And, if international tariffs are involved, co-operation with foreign governments outside the Commission's jurisdiction is required.

2. Appeal to the Minister

Applicants or intervenors may

. . .appeal to the Minister from a final decision of the Commission with respect to the application (for a licence or certificate) and the Minister shall thereupon certify his opinion to the Commission and the Commission shall comply therewith.[278]

Since review powers exist that also appear to cover this situation, the rationale for the provision is worth noting. The Commons debates on the *National Transportation Act* indicate that the section was

designed to allow appeals primarily by intervenors who felt they were being done out of their livelihood by new licence applications.[279] It is interesting to note that the intervenor's right of appeal does not extend to licence suspension, cancellation or amendment.[280]

Difficulties have arisen in the section's application. First of all, it seems to have been a very ineffective and inefficient method of conveying Ministerial policy statements to the Commission.[281] And second, extraneous political considerations have appeared to influence the outcome of the appeals.[282] This was not at all the apparent intent behind this section. For as was stated by the Minister of Transport, in debate on the legislation:

> It is not at all desirable to set up independent agencies to deal with these matters and then encourage appeals from them to politicians.[283]

3. Cabinet Intervention

A third method of "appeal" is also political in nature:

> The Governor-in-Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor-in-Council may make with respect thereto is binding upon the Commission and upon all parties.[284]

This broad discretionary provision had its origin in the *Railway Act* of 1903.[285] The power to act on its own initiative has only been exercised once by Cabinet.[286] The basis for that action appeared to be extraneous to the regulatory process existing at the time.[287] Once again, government actions appear to reflect a somewhat different perception of the regulatory process from that held by the Commission, as proposed reform of the *National Transportation Act* now demonstrates.[288]

4. Judicial Appeals

There are two routes of appeal to the judiciary provided for in the *National Transportation Act*. The Commission may of its own motion, or upon the application of any party, state a case for the opinion of the

Federal Court of Appeal upon any question that, in the opinion of the Commission is a question of law or jurisdiction.[289] Furthermore an appeal lies from the Commission to the Federal Court on a question of law or jurisdiction.[290]

C. JUDICIAL REVIEW

Despite the broad mandate in the *National Transportation Act* to provide for an economic, efficient and adequate transportation system by co-ordinating and harmonizing the operations of all carriers engaged in transport, the Commission's expansive jurisdictional powers have only occasionally come under the scrutiny of the courts. Judicial involvement can be categorized into constitutional, statutory interpretation and judicial review functions. Given the subject matter of the legislation and the myriad of Acts the Commission must administer, some judicial activity in the first two categories is understandable. Yet one would also expect that since the Commission is an administrative tribunal cloaked with extensive judicial or quasi-judicial functions, judicial review on procedural grounds by the courts would play an important role. Yet there has been very minimal involvement by the Courts in procedural matters. This suggests that many of the more interesting problem areas of the Commission must lie outside the ambit of traditional natural justice considerations.

Transportation matters lend themselves to constitutional conflict because of the high degree of federal and provincial interest in their regulation. However, with very definite federal jurisdiction over aeronautics, for example, questions arising as to whether an activity is or is not an extra-provincial undertaking are relatively easily answered. This results from the identifiable physical nature of transportation constitutional questions. As a result, constitutional problems have generally centered around deciding whether an undertaking is a part of, or necessarily incidental to, an extra-provincial undertaking, as in *C.P.R. v. Attorney General of British Columbia*[291] where a C.P. hotel was held not to be part of the railway undertaking. Thus in *Commission du Solaire Minimum v. Bell Telephone Co.*[292] and *Re Northern Electric Co.*[293] labour relations, with respect to Bell Canada and its wholly owned subsidiary, were held not to fall under provincial jurisdiction, being necessarily incidental to the telecommunications undertaking under federal jurisdiction.

The only other area of major constitutional interest in transportation matters arose as a result of the *Motor Vehicle Transport Act*[294] in which Parliament delegated the responsibility of regulating extra-provincial motor vehicle undertakings of provincially-constituted boards with provision to re-acquire regulatory control. The structure set up by the Act was a slight extension of the delegation concept approved in *P.E.I. Potato Marketing Board v. Willis*[295] referential adoption of existing provincial laws which previously affected solely intra-provincial motor vehicle undertakings. The approach was approved in *Coughlin v. Ontario Highway Transport Board*[296] although the Supreme Court of Canada in *Registrar of Motor Vehicles v. Canadian-American Transfer Ltd.*[297] limited the applicable provincial laws to those existing at the time the *Motor Vehicle Transport Act* came into effect. Subsequent cases have generally dealt with the extent of a provincial boards' jurisdiction over extra-provincial motor vehicle undertakings. See, for example, *Queen v. George Smith*,[298] *Re Day and Ross Ltd.* and *Jumbo Motor Express*,[299] *Regina v. Constable Transport*,[300] *Regina v. Beany*.[301] While this judicial involvement did not directly affect the Commission, it did validate the scheme which allows it to abstain from assuming jurisdiction until appropriate measures and consultations were undertaken. These cases also allow the Commission to propose the use of section 5 of the *Motor Vehicle Transport Act* (exemption of extra-provincial undertaking from Act) which acts as a very effective lever to ensure some federal input into the provincial regulation of motor vehicle operations.

The Commission functions under a wide cross-section of Acts, which contain, at times, very imprecise language. The most important input of the judiciary in interpreting this legislation has concerned the *Lord's Day Act*,[302] a federal statute prohibiting commercial activity on Sunday with exceptions for railway and vessel traffic, any work of necessity or mercy, and any work the Commission deems necessary with the object of preventing undue delay. With the decision in *R. v. Maislin Bros. Transport Ltd.*[303] that the exception to train and vessels does not apply to trucks and the narrow definition . *Motorways (Ontario) Ltd. v. Queen*,[304] the impact on the Commission is obvious. Applications under section 11(*x*) of the *Lord's Day Act* take on added importance for trucking companies. Indeed an application by *Reimer Express Lines*[305] for exemption was allowed by the Motor Vehicle Transport Committee on the liberal grounds that trucking competition with train and vessel transport is desirable. There was a strong dissent on more literal grounds that undue delay does not emcompass merely economic demand factors and that the overall object of the Act must be considered. The appeal was dismissed on the grounds that the Commission had taken into account all the relevant considerations in

determining whether there would be an "undue delay" and had not strayed from the object of the Act. The benefit of judicial interpretation here can be seen as an affirmation of the Commission's interpretation of its mandate under the legislative provisions involved.[306]

On the other hand in the recent "Freight Rates Case", the Commission has been reminded of the limits of its jurisdiction.[307]

Finally, there exists the traditional area of judicial involvement with administrative boards and tribunals. Scope of jurisdiction, the rules of natural justice, questions of law and errors of law form the basis for judicial review of administrative decision-making. Certainly, the Commission fits into the mould of an administrative tribunal having not only administrative responsibilities but also legislative and judicial functions. Its impact has not been confined to a narrow segment of society but has affected the rights of individuals engaged in transportation by air, rail, water, motor vehicle, commodity pipelines and telecommunications. Yet judicial review has not reflected this widespread regulatory activity. The following review of the judicial review case indicates the limited extent of judicial involvement in this area.

1. North Coast Air Services Trilogy

This series of cases dealt with the validity of a General Order made by the Air Transport Board in 1951 which provided that no commercial air carrier might carry traffic between points named in a licence of a Class 1 or Class 2 carrier. The Order was directed at Class 4 charter air service. This blanket order providing route protection was declared *ultra vires* in *R. v. North Coast Air Services Ltd.*[308] being justified neither under regulation-making authority nor under the authority to deal with an individual applicant's licence or specific individual's licence. Subsequently, in *North Coast Air Services Ltd. v. Canadian Transport Commission*,[309] the Supreme Court of Canada disallowed an attempt by the Air Transport Committee to adopt the invalid regulation. The Air Transport Committee then proposed to amend the 450 existing Class 4 charter licences individually pursuant to section 16(6) of the *Aeronautics Act*. After some discussion as to whether the Committee had fettered its discretion by implying that the merits of each case would not be considered, the Federal Court allowed the individual amendments in *in re North Coast Air Services Ltd.*[310]

2. *National Aviation Consultants v. Starline Aviation*[311]

This case dealt to some extent with the adequacy and fairness of the "file hearing". After dismissal of a licence application by the Air Transport Committee, the applicant sought review through the Review Committee alleging changed conditions. Written submissions were filed with the Review Committee by the applicant and intervenor and this information was exchanged between the parties. The Review Committee directed the Air Transport Committee to reconsider its decision. This was done with no further submissions. Although the Federal Court ruled that there was no lack of procedural fairness with the "file hearing" this was in large measure only because of a serious deficiency in the case before the court and also because of the intervenor's lack of request for a further hearing of any type.

3. *Canadian Pacific Railway Co. v. Province of Alberta et al*[312]

Under the *Railway Act*, an actual operating loss must be proved before any type of abandonment or discontinuance can be considered by the Commission. To facilitate this process the Commission issued a Costing Order in 1969 which prescribed all items and factors which are relevant in determining railway operating costs. An extensive series of public hearings and more than 18 months of work were involved. An appeal was taken to the Supreme Court of Canada ostensibly on a question of law. The case was summarily dismissed, indicating the court's unwillingness to classify very technical matters most suited to administrative adjudication as question of law.

This review of the few cases of judicial review involving the Commission reveals that much that is of significance from an administrative law point of view has yet to be tested in the courts. For example, questions concerning the use of staff studies and confidential sources of information, informal procedures and the file hearing system have not yet been raised directly on judicial review.

D. PARLIAMENTARY REVIEW

The primary contact between Parliament and the Canadian Transport Commission is through the House of Commons Standing

Committee on Transport and Communications. A reading of the proceedings of this Committee for the period of the existence of the Commission is a distinct disappointment.

The proceedings are almost invariably dominated by parochial concerns and what often seem to be ill-informed questions. The hearings have tended to lack focus as Members use their allotted time for personal "crusades". The questions posed by senior Members of the Committee reveal a consistent pattern of concern and enough of an understanding of transportation problems to be able to formulate penetrating questions and assess the answers they receive with some degree of sophistication.

The proceedings of the Committee exemplify the usual problems associated with any attempt by a lay body to undertake a meaningful review of the activities of an expert tribunal. Yet only on rare occasions has the Committee sought expert assistance. For instance, when considering the bill which was eventually to become the *National Transportation Act*, an economist was hired, but his contribution was too little, too late.[313]

Without adequate support staff employed on a sustained basis, the impact of the Committee will inevitably continue to be minimal. Only in minority government situations (such as that which prevailed in 1973 when the Committee voted 10-0 to call on the Commission to reverse a decision granting Bell Canada a rate increase,[314] a situation that may have influenced the Government to intervene) will the Committee be likely to have a discernable impact.

Rather than take the initiative, the Committee has preferred to confine its activities to questioning the Commission's President during the annual estimates hearings. Where it has taken the initiative, it has been singularly unsuccessful. For example, it conducted a series of "counter hearings" in Southwestern Ontario just after the Commission had authorized widespread railway discontinuances in that locality. The hearings were designed to demonstrate how cold, calculating and indifferent a bureaucracy could be. Yet few attended the public sessions and the evidence submitted was by and large a rehash of what had already been heard and considered by the Railway Committee. Nothing at all came of the hearings.

While much of the failure to maximize the potential value of these committee proceedings must be charged to the Committee itself, relations between the Commission and the Standing Committee started off on a very discordant note from which they have never really fully

recovered. When the CTC's first President, Mr. Pickersgill first appeared before the Committee in his new role (he previously had been Minister of Transport) he insisted that individual decisions of the Commission could not be questioned by the Committee. In view of the obvious importance of the issue in itself and because it gives as well a valuable insight into how Mr. Pickersgill envisaged his role as a regulator, an extensive extract from the Committee's proceedings of November 28, 1968 has been included below.

One of the first acts of the Commission after its creation was to authorize C.N.R. to discontinue its trans-Newfoundland passenger service. Members from Newfoundland were very upset at this development and sought to examine Mr. Pickersgill closely on this decision at the estimates hearings before the Standing Committee.

Mr. Pickersgill: This case was heard by the Railway Transport Committee, acting as a court of law under the statute. The Committee has made a decision. That decision is appealable and it would, I think, be the grossest impropriety of me or for anyone else in an official capacity to attempt to retry that case without the witnesses or anyone else being present. I think I would just have to plead, sir, that this is a question about a decision that has already been rendered in a lawful manner. It is a decision that Mr. Peddle does not like, but the decision has been rendered. It is appealable and. . .

Mr. Peddle: I am questioning figures which your Commission dealt with and used as a basis for a decision which you rendered, and surely it is quite in order for me to ask just what this meant. You are the Chairman of the Commission.

Mr. Pickersgill: I do not question, Mr. Peddle, your competence to ask the question. All I am questioning is my competence to answer it or the propriety of my answering it.

Mr. McGrath: But surely you are not suggesting that Parliament does not have a right to this information?

Mr. Pickersgill: I am not saying anything about that at all, Mr. McGrath. What I am saying is that the Canadian Transport Commission acted under the law as a court of law, and it rendered a verdict and Parliament said that people who were dissatisfied with that verdict had a right to appeal. They have a right to appeal and up to now no appeal has been made, and it would be a shocking impropriety, it seems to me, for me to try to substitute myself for the court of appeal set out by Parliament.

Mr. Peddle: Then you are suggesting, sir, that every question that we ask on this subject is out of order?

Mr. Pickersgill: No. I am not suggesting anything about the questions at all, Mr. Peddle.

Mr. Peddle: Mr. Pickersgill, did I understand — I am getting a little confused here. I asked a question on this item, "inside expenses", which constituted just about half of the alleged deficit. Did I understand that you will not comment on that?

Mr. Pickersgill: I do not think it would be proper for me to comment on that.

Mr. Peddle: Is there anyone who would comment on it. This is a serious situation. The question is did the commissioners just take this and look at it without knowing what it was or questioning it? I am asking about half the deficit which they were given permission to abandon on, on the basis of it — inside expenses, $429,765. Surely in this country of ours there must be somebody who can explain this, and if it is not the Chairman of the Canadian Transport Commission, who is it? Where do I go?

Mr. Pickersgill: Mr. Peddle, may I put the question to you this way. If a case had been heard and a decision rendered by one of the judges of the Supreme Court of Newfoundland, would you feel that a committee of the Legislature could summon him before them and ask him to explain how he had reached his decision when the law provides that if you do not like it, you can appeal to the other judges?

The law here provides than an appeal can be made from this decision to the Governor-in-Council and the decision has been made. It has been made by the Canadian Transport Commission. It is true, I did not sit on the case myself, but I am one of the members of that Commission and I am not, I think, doing anything except what is appropriate and right in the circumstances in saying that it is not my function and it would not be proper for me to attempt to explain to anybody how the other commissioners arrived at the conclusion they did. My point is very simple about that. There is a written decision and, as I understand it, when a court gives a written decision that constitutes the reasons for judgment.

Mr. McGrath: This is not a court it is a tribunal. It is not a court of law.

Mr. Pickersgill: It is a court of record, the law says so. And the law provides. . .

Mr. McGrath: Are you Mr. Justice Pickersgill? It is a poor analogy.

Mr. Pickersgill: It may be a poor analogy, but section 53 of the *Railway Act* provides a procedure for an appeal from a court.

Mr. McGrath: How can we have a judicial tribunal with a layman as its head? I think this is a red herring as somebody said, in order to prevent the Committee from properly examining this whole business.[315]

Another factor contributing to the relationships between Commission and Committee was the CTC's initial reluctance to bring staff members to Committee hearings. Since Committee members were most upset at the ease with which the Commission's Chairman could side-step their questions by the simple stratagem of pleading ignorance as to detail.[316]

CHAPTER VII

The Commission and Transportation Policy

A. INTRODUCTION: THE COMMISSION AS A "COURT OF RECORD"

The Commission has by and large taken a passive position as a regulator often preferring to wait until a matter became a problem, then reacting, rather than actively dealing with situations before difficulties arose. The tendency has been to wait until concrete cases demand immediate resolution. This is what may be described as the "Court of Record" syndrome. Indeed, the first President of the Commission grew less and less confident in the legitimacy and efficiency of active regulation as time went on. As he was to confide to the Standing Committee on Transport and Communications in 1972.

> I have been a regulator now for four and a half years and the longer I continue to be a regulator, the more I am in favour of having as few regulations as possible because, it seems to me that having people second-guessing somebody else in the business makes for inefficiency all around. You need regulations for safety, you need regulations to deal with monopolies, but beyond that, I would rather not have a lot of fellows who are not directly interested in the operation messing around with it.[317]

Despite the original emphasis on research, the CTC sounds unwilling to assert itself in the area of transportation policy, as the following exchange indicated.

> **Mr. Howe:** In your role as a Canadian Transport Commissioner, as the Chairman of that Commission, you have a lot more knowledge about most of these things than we have. In that area, I think probably it might be advisable for you to consider this. I know the government has to make their own policy.

Mr. Pickersgill: Mr. Howe, I really do not honestly think this is a proper function for me. I think it is a very proper function for members of Parliament, but I do not think it is a proper function for me.[318]

This unwillingness to make policy suggestions was even carried over into higher technical areas where the Commission, with its practical experience, was the only possible source of informed opinion for Parliament. Note, for example, the first President's response when his advice was sought as to the best method of implementing subsidies under the *Maritime Freight Rates Act*:

Mr. Pickersgill: We make every effort to make sure that no money is paid out that is not authorized by the law. We did not make the law and if the law in the opinion of anyone is in any way defective, we still have to carry it out, Mr. Thomas, as long as it is the law. I think you understand that.

Mr. Thomas: This is right.

Mr. Pickersgill: Happily for you, you have more chance of changing the law than I have.

Mr. Thomas: That is right but we have to have information first. This is why I am asking you if you are satisfied that these cases are being investigated thoroughly.

Mr. Pickersgill: You would not like me to express an opinion about whether I think it is a good or a bad law.

Mr. Thomas: No, No.

Mr. Pickersgill: Because that, I think, would be impudence on my part. But I do not mind expressing the view that we do our utmost to see that no money is improperly paid within the terms of the law.[319]

Strangely, the first President when Minister of Transport had championed legislation designed to give wide policy initiatives to the regulatory Commission while, subsequently, as head of that same regulatory Commission he denied himself any major role in policy formulation. This attitude had meant that almost all initiative for change had to come from the Ministry of Transport and Department of Communications and the Commmission lost the leadership role assigned it in the *National Transportation Act* largely by default.

However, it was by no means entirely by default for in the early 1970's a major change occurred in the relationship between the new Ministry of Transport (which superseded the Department of Transport existing at the time of the enactment of the *National Transportation Act*) and the Commission. As John Langford has noted, this involved a major shift in attitudes.

There was clearly little conviction on the part of senior DOT officials that the department should have a strong policy role. The department was seen to be primarily concerned with operations, and the CTC, through its

regulatory and research roles, was viewed as the predominant policy maker within the national transportation framework.

> This image of the department's neutral policy role and limited objectives was not shared by the new Deputy Minister who took over in early 1969. With reference to a policy typology recently advanced by Professor Studnicki-Gizbert, the new attitude clearly was that the DOT should be formulating "active" and "exogenous" policy — policy "aimed at changing the transport industry's pattern and rate of development", as well as "achieving economic or other objectives outside the direct interests of the industry". According to this view, it was not possible to leave the policy-making role in the hands of the regulatory agency, the CTC. If the Minister of Transport was to exercise proper policy-making powers, the DOT would have to revise its objectives and the Minister's portfolio would have to be strengthened organizationally to bring together, in a balanced manner, regulatory, developmental and operational considerations.[320]

As a result there was a major shift of policy and development-research roles from the Commission to the Policy, Planning and Major Projects Branch of the newly created Ministry of Transport. As well, the Transportation Development Agency was established and designed to become the new focal point of research and development. Much more important than any structural alteration was the new conviction that the Ministry was to be responsible for the formulation of primary or general policy. This shift in the locus of policy-making has not, however, been accompanied by any statutory reform and this has created serious difficulties. Recent developments, and the introduction of legislation that would clearly shift virtually all policy- making power to the Ministry, attempts to remedy these difficulties, but in a draconian way.[321]

B. THE COMMISSION AND POLICY FORMULATION

It is sometimes said that in its day-to-day work the Commission does not make "policy". In fact, the Commission does formulate secondary or regulatory policy but what it does not do is articulate this policy openly. Even in those matters most conducive to case-by-case adjudication such as licensing, there exist, in practice, board policies that govern the manner in which individual applications are dealt. For example, it is the policy of the Air Transport Committee that in determining "public convenience and necessity" care will be taken to

ensure that existing carriers are not adversely affected by a new licensee, full time operations are preferred over part time operations and interveners must look after their own interests or risk the consequences. Moreover there are minimum debt/equity requirements established by the Committee, Class III applications for non-competitive route extensions using existing aircraft are granted virtually automatically and initial helicopter licences are tied to bases and the showing of need in one particular locality despite the migratory habits of the industry as a whole.

Not only is the formulation of this type of policy inevitable but it is also desirable. It is inevitable because any decision-maker, although rightly concerned to retain a reasonable degree of flexibility, does not wish to have to decide absolutely everything all over again with each application. It is desirable because this practice leads to some measure of consistency and predictability, particularly, of course, where people are aware of the policy.

The Commission has not, by and large, made as much use as it might of policy statements. These can greatly improve the quality of submissions and decision-making, generally. By frankly and openly giving interested parties as much information as possible about the Commission's thinking, no matter how tentative, issues tend to be brought more sharply into focus and confusion and cross purpose arguments can be avoided. This can be done very informally by way of information circulars, policy guidelines and the like. The information does not have to be definitive to be of great assistance to both the Commission and interested parties.

As an example of what might be done, a policy statement on "Class 4 Charter Air Service in Major Metropolitan Areas" could set out the concerns of the Air Transport Committee about over-capacity in certain markets, the need for distinct service to different sections of a given metropolitan area, the noise pollution and safety issues, the advantages of licensing full time over part time operators, and so on. Too much specificity would lead to accusations of fettering discretion (a matter dealt with later) although too high a degree of generalization would equally undermine the value of a policy statement. By drawing on its experience in specific licence applications, it should be possible for the Committee to formulate typical criteria employed in this type of licensing question.

In any one metropolitan area, it will be necessary to make individual decisions and these will vary according to the circumstances prevailing in the particular locality involved. Yet there must, of

necessity, be common features and common concerns to all such licensing decisions and these should be drawn together in policy statements of some sort. A draft policy statement could be released to the industry for its comments and should not be thought of as a regulation requiring precise language. This would defeat the purpose of the exercise. The danger is that if policy statements are not used, the Committee and the parties will spend altogether too much time "reinventing the wheel".

It may well be interjected at this stage that the Air Transport Committee did try at one time to do exactly what is being proposed here and it was soundly rebuked in the course of its efforts. Indeed, in 1968, the Committee was told by the Supreme Court of Canada that it did not have any legal authority for its "General Orders".[322] Subsequently, however, the Federal Court of Appeal did allow the imposition of route protection, which had previously been dealt with in the "General Orders", by way of a condition attached to all existing licences because the court considered that the Committee had exercised its discretion with respect to each licence.[323]

What is apparent from these cases is that the Committee is entitled to formulate policy statements provided it retains a residual willingness to recognize exceptions. The classic test adopted in Canada reads as follows:

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes. . .[324]

In other words, the Committee may structure its discretion by setting out the factors that it considers important, but it must not fetter its discretion by rigid rules. There can thus be no legal objection to policy statements which set out, in general terms, the criteria the Committee intends to employ in exercising its discretion, provided always that there is room for exceptions. In practice, in view of the Federal Court of Appeal's approval of exactly the same condition being imposed on each and every one of over four hundred charter carriers, it is apparent that the courts will accept an appearance of flexibility at face value and not go behind it.

A comparable regulatory tribunal to the Commission, the Canadian Radio-Television Commission, has made extensive use of policy statements.[325] In a recent decision of the Federal Court of Appeal, the use of a policy statement was specifically upheld because the court was satisfied that the Commission continued to exercise its discretion in each individual situation.[326] It is possible, nevertheless, by reading these policy statements to obtain a much greater understanding of the regulation of broadcasting than can anywhere be obtained for transportation regulation.

What a policy statement calls for essentially is a willingness to venture out and deal with problems before they arise as concrete cases demanding immediate solution. It requires foresight, an ability to generalize and the courage to risk being wrong. In return, policy statements and guidelines can lead to more effective and considerate regulation in that it gives parties some advance indication of what they should do by way of preparation.

In a relatively static area of regulation where the "rules of the game" are well known to all concerned from past practice and experience, policy statements might not be of much value. Where, however, there is new legislation, no established practice and a large number of new and inexperienced parties, the value of policy statements will be very high. Just such a situation faces the Railway Transport Committee with respect to railway relocation.

In 1974 the *Railway Relocation and Crossing Act* made it possible for municipalities and provinces to initiate action where railway relocation and rerouting can lead to urban improvement. Part I of the Act provides for financial assistance to municipalities or provinces of up to fifty per cent of the cost of preparing urban development and transportation plans grants of up to fifty per cent of the end costs of railway relocation, and the acquisition of vacated railway lands by the federal government, if necessary. Parts II and III provide for the expansion of the Railway Grade Crossing Fund and for additional financial assistance for large scale projects.

The Act requires the preparation of three major planning documents: an urban development plan, a transportation plan and a financial plan.

> The transportation plan covers all the transportation implications of the relocation or rerouting. It describes the overall transportation scheme which would result, including railway lines, streets, highways, bridges, bus routes, airports and wharves. It identifies specific projects, the implementation program and schedule, and the costs and financing.

> The financial plan summarizes the costs and financing from the transportation plan, cost sharing, the relocation grant requested and other financial information. In particular, it provides figures that would make it possible for the CTC to determine the net costs of railway relocation — the basis of the railway relocation grant.[327]

Compensation to the railway is to be on a "no loss/no gain" basis. The Railway Committee cannot accept a proposed financial plan unless it is satisfied that the financial plan will lead to this balance. This gives rise to some very difficult questions as to just what is to be included in determining the railway's costs and losses. For example, will the railway be compensated for their costs of compensating, relocating or providing other facilities for industries served at the old location? Will they be compensated for reductions in railway freight, passenger or other revenue as a result of the rerouting or relocation? Will the railway companies be compensated for expenditures called for by collective agreements in respect of employees affected by railway relocation? What appraisal principles should be used in arriving at the land values required under Part I? Most important, can hearings under Parts I, II and III be held simultaneously where an applicant's transportation and financial plans envisage assistance under all three parts of the Act?

The answer to these questions will apparently determine the feasibility and character of an application to the Railway Transport Committee. This is because they are preliminary questions that run to the basic issue of whether a municipality can afford to initiate a relocation and whether a province should support such a project. As well, the planning documents required under the Act are detailed and expensive although the ground rules for the drawing up of these plans are not adequately set out in the Act.

How then should the Committee deal with this situation? One way would be to leave everything to the first hearing and deal with the questions as they come up. Interested municipalities could simply be told to seek their own legal advice as to the meaning of the Act. The Committee, it could be said, is not in the business of giving free legal advice on hypothetical questions.

This negative approach should be rejected. If it is true that the Committee's staff have accurately identified a realistic set of preliminary questions, and if these go to the very basis on which relocation is to proceed, then the Committee should prepare guidelines or some other such document that sets out its preliminary opinion on these matters. The document should make it quite clear that it reflects only a tentative position adopted for the purposes of getting the hearings underway in an orderly manner. At the hearings, the parties

may still question these guidelines and the Committee should always concede that it is prepared to amend its initial stance in the light of arguments developed at the hearings. It is, however, unlikely that there will be many occasions for amendment if the staff has done a good job.

This approach has two great advantages. First, it lets the interested parties know the approximate financial commitment which would be expected of them should they wish to proceed with a relocation. Second, it will provide guidelines or ground rules for the hearings themselves. To tell a municipality to seek legal advice and to take its chances at a hearing is totally unresponsive to a legitimate request for clarification and will lead inevitably to wasteful and unproductive hearings. A distinction can, and should, be made between a situation such as this where general rulings are being sought as to the nature of an administrative scheme, and a request for a legal opinion on a specific issue and posed in an adversarial context.

C. THE COMMISSION AND THE MINISTRY OF TRANSPORT

Virtually no policy role was assigned to the Department of Transport in the *National Transportation Act*. As we have seen the Commission was given a very broad regulatory mandate in which it was expected that it would be the Commission would supplement and amplify the general policy set out in the Act. In practice this has not turned out to be the case. As was noted in the introductory chapter, the major thrust of current reform is designed to assert a much more positive policy role for the Ministry of Transport.

There has been much change in the relative positions of the Ministry and the Commission even in the absence of statutory reform. In part, this change has been brought about by the somewhat passive attitude displayed by the Commission and in part by a conscious decision by government to transfer effective general policy making capability from the Commission to the Ministry.

The divided authority between Ministry and Commission has created a great deal of frustrating misunderstanding as to their respective areas of responsibility. Witness the following recent exchange before the Standing Committee, indicative as it is of the extent of the gulf between them.

Mr. Marchand: We look a little bit ignorant when you put those questions and we cannot answer. There is a good reason for that and it is because the authority is with the CTC. They apply to the CTC and they give the answer and often they do not even inform us. So this is why. What is relevant to the Department, we know, but what belongs to the CTC. . .this is why Mr. Benson comes here representing the CTC, not with the Department here.

Mr. McCain: He did not supply us with information either the last time he was here.

Mr. Mazankowski: Are you going to scrap the CTC?

Mr. Marchand: The problem is that I want you to understand that. It is not because I am hiding or trying to hide anything. It is just because it is not within the jurisdiction we have. If we want to find out something from the CTC we have to do what you normally should do. We have to write to Mr. Benson and ask him what is going on.[328]

Another revealing exchange took place in April, 1974, when the Minister was questioned as to the extent of departmental input into a particular air route decision.

Mr. Stewart: Mr. Minister, have there been any consultations between yourself and the CTC on this application of Transair?

Mr. Marchand: No, there was no consultation with me. I do not know if there was inside the department, but not with me. I had discussions with Mr. Schreyer and Mr. Evans on this, but not with the CTC.

Mr. Stoner (Deputy Minister MOT): Normally when a case is before the CTC as a court of record, there really is not a discussion while the application is, if you will, *sub judice*.

Mr. Stewart (Marquette): Mr. Minister, do you not make recommendations to the CTC on areas of the country where there is no air service? Where there has been a formal application made, do you make recommendations to the CTC?

Mr. Marchand (Langelier): I usually do not. If there is an application to drop a service, there is an appeal to the Cabinet. Of course, I have to discuss that and we can reverse the decision of the CTC.

When they make a new application for a service that does not exist, the CTC — is it unusual for the CTC to consult us? They never consulted me, anyhow.

* * *

Mr. Stewart (Marquette): On a point of clarification, I maybe lost you somewhere on this point. Premier Schreyer and his minister, Mr. Evans, on their recent trip to Ottawa this month did not discuss the application of Transair to supply air service?

Mr. Marchand (Langelier): He mentioned to me that there was an application to the CTC. I do not say that they have not intervened with the CTC; this is something different. They knew quite well that it was useless to discuss that with me because I am not the one who grants the licences in this. I cannot say whether they have intervened with the CTC in

support or against; this I do not know. However, they mentioned at one moment that this application was filed with the CTC.

Mr. Stewart (Marquette): At present then, as Minister of Transport, what is your policy on an application of this type by Transair to supply this service to Western Manitoba and Central Saskatchewan?

Mr. Marchand (Langelier): This is the kind of policy that the CTC makes. We make the general policy. Oh yes; this is the way it is. I regret but I can state publicly that maybe it would be a good thing to say that, but I think the CTC would not like that because they would say it is a political intervention in a matter which is under the jurisdiction of the CTC. I have no personal opinion; I have an opinion only on the short haul that was discussed with me at a policy level because there the problem was not a problem of granting a licence but to know if we could have a service, say, of the kind we are experimenting with between Ottawa and Montreal and for Yorkton and Dauphin. This is an entirely different thing, so I do not have an opinion on this and I am not required to have it. Not only that but they would be reluctant if I expressed an opinion on this.[329]

These two exchanges reveal the sensitivity of relations between the Ministry and the Commission. There would appear to have been some improvement in these relations during 1975, but a destructive gulf would still seem to exist between them.

The disallowance in 1973 of the Bell rate increase and the series of ministerial reversals of decisions of the Air Transport Committee have severely undermined morale at the Commission. The frustration is not so much at the reversals themselves, but at the manner in which they occurred.

A 1974 decision of the Telecommunications Committee on a Bell Canada rate application observed with considerable insight that the frustration in the encounter between Bell and opponents of its rate application arose because they were on ". . .separate paths which would never bring them face to face".

> The overriding, indeed the only interest of the intervenors of whom we speak was the socio-economic significance not only of increases in rates, but of the telephone system as a whole. Bell Canada, on the other hand came before us to argue the need for specific amount of increased revenues. . .This group of intervenors tended to simply tune out what Bell was saying. On the other hand, there was virtually no direct response by Bell to the view of these intervenors, except by Bell's Counsel in argument.[330]

Much the same lack of communications exists between the Commission and the Ministry of Transport. The Commission sees its role as one calling for down-to-earth hard-headed economic analysis and objects to the Ministry's broader social and political concerns. The centre of gravity of concern in the Commission is with economics and

efficiency; in the Ministry the concern is with social impact and the political commitment to improve transportation. The Ministry is concerned with "promotion" (the "adequacy" of the system, to revert to the analysis used earlier), while the Commission is concerned with "regulation" (the "economics and efficiency" of the system).

It goes without saying that we recognize that any change in the legal mechanism that we might consider desirable cannot, of itself, solve this problem. However, it is clear to us that legal inadequacies have compounded the problem and the law has not provided a structure in which a start, at least, can be made to resolve this conflict. The best legal structure cannot, of course, guarantee good relations between the Commission and the department. Good relations could exist through unofficial channels despite a poor legal structure. Nevertheless, sound legal arrangements do make good relations more likely. We are, therefore, realistically modest as to how much law, as such, can accomplish.

The present legal framework contains no means by which the Government may transmit its policy on transportation to the Commission.[331] Thus even the well known "Regional Airlines Policy" is of doubtful legal significance because it is nowhere given any legal sanction.

Two decisions of the Air Transport Committee, the first in late 1974 and the second in early 1975, reveal two very different approaches as to how ministerial policy should be applied in practice. In the first, an application by Nordair to serve Sudbury and Thunder Bay, the Committee incorporated the policy statement into the requirements of public convenience and necessity.

> . . .the Committee is bound, in considering applications, to grant or deny them on the basis of whether the applicant has been able to prove that present and future public convenience and necessity requires the service. It, therefore, appears to the Committee that the test it must apply in connection with this application is whether the proposed service will provide the general public with the best possible service at the least possible cost while being operated by the applicant (a regional carrier) rather than by a mainline or trunk carrier, or a third level carrier.[332]

In the second, an application by Transair to serve Toronto, Brandon, Regina and Prince Albert, the Committee distinguished between the two separate tests to be applied.

> The Statement of Principles for Regional Air Carriers and subsequent policy statement do not relieve the Committee of the statutory requirements of the Aeronautics Act, namely that it must be satisfied in each case that the proposed service is required by the public convenience

and necessity. It is, therefore, incumbent on the Committee first to make a determination as to whether or not the service proposed meets the test of public convenience and necessity. If the findings were favourable, *then* the Committee would be required to make an assessment as to whether the granting of the application with or without conditions or modifications, would be consistent with government policy.[333]

Both these approaches raise potentially difficult legal issues. If the first test (that of incorporating the policy into the test of public convenience and necessity) is applied, it could be queried whether the Committee is exercising an independent judgment or being dictated to by the Minister. If the second test (separating public convenience and necessity and the policy) is adopted, how can a regional carrier which has satisfied the test of public convenience and necessity be denied a licence on the strength of government "policy" alone?

Since there is no recognized format for the conveyance of government policy, this can lead to considerable difficulties. For example, in the recent successful ministerial appeal by norOntair, the Air Transport Committee was told that it had failed to take into account certain statements made in the House and certain negotiations requested between Air Canada and the Government of Ontario.[334] But how was the Committee to know that these particular statements were to be treated as policy? Just where is the line to be drawn? Take, for example, the following attack on the 1973 Bell Canada rate decisions in the Parliamentary Standing Committee.

Mr. McGrath: Mr. Chairman, I would like to pursue this business of the public interest and public policy. Mr. Benson, how can you rationalize the decision you made as the former Minister of Finance from a statement made in the Budget by your successor in which he called upon business, labour and the professions to exercise price and income restraint? Surely you are not going to tell the Committee that you operate independent of government policy?

It would seem to me that faced with that policy statement from the Minister of Finance, the commission would certainly be under an obligation to say to Bell, "We cannot make a decision on your application" and tell them to go back home and wait for a while.

Mr. Benson: Here you are trying, it seems to me — I have learned never to give motives to people who say something — to draw me into an argument about the decision. I think the decision and the reasons for the decision are fully explained within the decision, and I refer hon. members to the decision and a careful perusal of the decision to see the reasoning behind the decision that was made.

Mr. McGrath: Notwithstanding the reasoning behind the decision, I come back to my question again. Does the commission have to be circumscribed by government policy? If so, it would seem to me in reading the speech of the Minister of Finance that government policy is

for all business and professions and labour across the country to show restraint in view of the inflationary situation in Canada. One would have expected that this very important commission, with its wide power delegated by Parliament, would set the example in following the directives of the Government of Canada.

Mr. Benson: Once again, all I can do is refer you to the decision which explains the reasons for the decision.[335]

One of the most unsatisfactory features of the present system is the attempt to impose policy *ex post facto* on a decision already made. This technique of changing the rules of the game after a decision has been rendered is very demoralizing to regulators who have conscientiously made a determination according to all the factors that apparently ought to be taken into account. They are then subsequently told that they should have taken something else into account. Not only does this technique frustrate hard working regulators and make them feel that they have wasted their time, but it also runs the risk of being successfully attacked in the courts on the "extraneous consideration doctrine". It is not at all clear that the Minister in an appeal under the *Aeronautics Act* of the Governor-in-Council under section 64 of the *National Transportation Act* can take into account factors extraneous to those contained in the empowering legislation under which the original decision was made.

Moreover, any attempt to use Ministerial appeals as a technique for transmittting policy, is inherently unsatisfactory. There are no means of ensuring that the resulting decision by the Minister will be treated seriously as a precedent. If departed from, it is simply a matter of chance as to whether the subsequent matter ever reaches the Minister again.

An excellent illustration of the difficulties inherent in any attempt to transmit policy by way of Ministerial appeals may be seen from the long-running and inconclusive battle about the liberalization of licensing policy on small charter operations.[336] In 1972, the Minister sought to lay down a principle for the guidance of the Air Transport Committee.

> On an application for a licence to operate a small piston engine aircraft in Class 4 charter service where the relative addition of the capacity proposed for the charter market concerned would be small and the financial risk to the applicant would be likewise small, it would seem reasonable to adopt a more liberal attitude to licensing a competitive service.[337]

Yet in November, 1974, the Minister had to reiterate this principle and admonish the Committee for not following it. In his wording ". . .I would expect the Committee in future similar cases to apply these

guidelines as features of air transportation policy".[338] In May, 1975 the Air Transport Committee split ranks in deciding on an application for a Class 4 charter licence for Vancouver. The minority pointed out that the refusal to grant a licence on the grounds that the area was already adequately served was in conflict with the principle the minister had sought to establish.[339]

Two recent examples changing the rules of the game after a CTC decision has been made were Cabinet disallowance of part of the 1973 Bell rate decision, and the norOntair Ministerial appeal.

> The Government is also influenced in this decision to disallow both stages of the service charge increases approved by the CTC for primary residential installations, by the possible adverse social impact of further substantial rate increases in this category now, especially in relation to low-income subscribers, who should have ready access to basic telephone service.[340]

If the government had wished the Committee to take such factors into account it could have instructed counsel to appear and raise these issues. Its concern could have been communicated earlier to the Committee at the hearing in order to ensure that it and the Committee's subsequent deliberation would consider social as well as economic factors.

Similarly in the norOntair appeal, the Air Transport Committee having relied on the statutory test of "public convenience and necessity" was told by the Minister on appeal that it had not taken into account ". . .the interest of the Government of Ontario in providing such communities with regular scheduled air service as a means of economic and social development".[341]

In 1975, there was a very good illustration of how policy should not be transmitted. When Air Canada filed fare increases with the Air Transport Committee on April 18, their proposed fare structure included very sharp increases for short haul routes.[342] There was an immediate critical response by the Minister of Transport who condemned the proposed increases as exaggerated.[343]

On May 13, 1975, before the Committee had started hearings on the application Air Canada filed a revised tariff which substantially reduced the increases on short haul routes.[344] Not only did this remarkable performance come close to making a mockery out of the legitimate responsibility of the Committee to determine the justness and reasonableness of the proposed fares, Air Canada's revision conflicted with a long-awaited government policy statement on transportation by the Government. That statement, released on June

16, selected the very issue of short haul/ long haul cross-subsidization in air as a prime example of a "significant inequity" in transportation. "Even within a single mode, such as air, there is inequitable treatment of users with long-haul subsidizing short-haul passengers."[345] Yet when Air Canada had tried to deal with this "inequity" by shifting to sharply increased fares in short-haul routes, the Minister's immediate political considerations had prevailed.

Clearly if the Minister of Transport or Cabinet is to be given the power to issue formal policy directives, this power must be exercised in a consistent and rational manner.[346] Moreover, the creating of such a power raises a very basic question — why have quasi-independent regulatory tribunals like the Canadian Transport Commission. There are three fundamental answers to this question. The first raises the need to relieve the Minister from the burden of making individual decisions on licensing and related matters. This is a practical, pragmatic answer and is recognized as a device to shield the Minister from the impossible task of having to justify each and every decision in the political arena.

The second answer, somewhat more lofty and idealistic, argues that better and fairer decisions are made if decision-makers are able to evaluate dispassionately competing claims for licences, subsidies and the like. The third answer underlies the first and second answers.

The regulatory tribunal serves as transmitter of general policy usually legislatively confirmed or structured with the responsible Minister and the Government retaining a continuing involvement with the overall policies applied by the regulatory tribunal. This answer — or fundamental aspect of our existing regulatory framework — was overlooked by the framers of national transportation policy, as set out in section 3 of the *National Transportation Act*, and the presumption underlying it that there would be no need to modify or supplement the policy from time to time.

The ideal relationship between the Commission and the Minister was recently well set out by the then Deputy Minister of Transport.

> The government has issued, from time to time, statements of policy, for example, respecting broad areas, international air service, regional air policy, and there was a question earlier about definition of a new policy for third carriers. It is within that policy framework, then, that the CTC deals with individual applications.[347]

How then is this ideal to be attained? The obvious immediate solution would seem to be that the Ministry should be empowered to

issue binding "direction" or "directives" to the Commission on matters of general policy. This power would be similar to the one granted to the Governor-in-Council under the *Broadcasting Act* to issue "directives" to the CRTC with respect to certain matters.[348] But a danger with this proposal is that the accumulated experience of the Commission will never be transposed into general rules, but will continue, as at present, merely to be applied on a case-by-case basis.

Let us consider a practical example. Over the last several years there has been substantial discussion of the need for a policy on so-called "third level" carriers similar in nature to the present "Regional Airlines Policy".[349] But who is going to formulate this policy? The Air Transport Committee has a good deal of practical experience with the actual workings of third level carriers and has already started to develop such a policy. However, the Committee's Chairman appears to have grave reservations as to the practicability at the present time of a general policy statement, in view of the extra-ordinarily wide discrepancies of geography and carrier capability.[350] Furthermore, there is no agreed upon definition of "third level" carrier (or "primary" carrier, as some prefer to be called). Nevertheless, it seems obvious that any policy, if it is going to be at all realistic, will have to draw heavily on the Committee's experience. It will also have to be motivated by a sense of urgency and a desire to break away from *ad hoc* case-by-case adjudication. To formulate the policy in the abstract and then to seek to force the Committee to implement it will not work because those with practical experience in enforcement and administration must have confidence in the practicability of the policy they are called on to implement.

It must be recognized that policy formulation should not be the exclusive preserve of the Ministry with the Commission confined exclusively to applying policy in specific situations. Indeed, not only is it desirable that there be an opportunity for the Commission to become involved in policy formulation, but legal techniques should be adopted to require them to do so.

We must also face the question of public and industry participation in policy making. It is submitted that the experience of the CRTC with "pre-regulation-making hearings" under section 16(2) of the *Broadcasting Act* has been sufficiently encouraging that it should serve as a model. The key here is that a *proposed* regulation or policy at a formative stage is thrown open for public and industry comment, criticism and debate.

There are five types of actors or sources of opinion in this process — the Ministry, Commission, the Provinces, the Public and the Industry. Reform should accordingly proceed with the following four principles in mind:

1. A forum must be created for input from five sources.
2. A rule-making procedure must be devised to accommodate the requisite input.
3. Unilateral directives from the Minister must be avoided, if possible.
4. Ultimately, Ministerial views must prevail and be subject to Parliamentary review.

The necessary structure would be along the following lines:

1. The Minister may inform the Commission of the need for formulation of policy or the Commission may act on its own initiative.
2. The Commission shall be given an opportunity to formulate the policy and for that purpose shall hold both formal and informal hearings with input from Commission staff, Ministry, industry, public and provinces.
3. Policy so formulated shall be transmitted to the Minister.
4. If policy as formulated is unacceptable to Minister, he may reject it and issue a policy directive binding on the Commission. He may also do so if the Commission fails to formulate policy when called on to do so.
5. Any policy directive issued by the Minister shall be published in the *Canada Gazette* and laid before Parliament.

The key to our proposal is to provide a forum, which presently does not exist, for the exchange of views between the Commission and the Ministry. We would like to see both formal and informal contact. This may mean that the differences between the Commission and Ministry will be brought out into the public and positions may tend to harden. This is a risk of which we are very well aware, but it is a risk which the present insulation renders acceptable.

Should these means be adopted so that general policy can be formulated in advance of consideration of particular matters, the need for appeals to the Minister or the Cabinet largely disappears.[351] The Review Committee, within the Commission, could provide the necessary check to ensure proper and consistent implementation of policy directives.[352] Further, since our proposal gives policy directives

a legal significance, any flagrant refusal to follow them could be corrected by the courts. To subject a regulatory tribunal to both broad directive powers and open-ended appeal runs counter to the reasons previously discussed for the creation of the regulatory body in the first place. Indeed, any tendency to resort frequently to ministerial appeals also conflicts with the basic rationale for setting up independent decision-makers.[353] This danger was recognized by the Government in debates that led to adoption of the *National Transportation Act*:

> . . .no one in his senses wants to turn any minister of the crown into a court of appeal. It is not at all desirable to set up independent agencies and then encourage appeals from them to politicians.[354]

CHAPTER VIII

Some Conclusions

The sheer size and range of the activities of the Canadian Transport Commission makes it an exceedingly difficult subject on which to generalize. In our view, much of the value of this study lies in the detail it contains. Yet it would be remiss not to include a few general comments in closing.

Like many other regulatory agencies, the Commission has tended to deal with its broad mandate in a piecemeal fashion. It has discharged its responsibilities almost exclusively on a case by case basis and has, as a result, often allowed itself to lose sight of broader concerns. This along with the allied question of the appropriate relationship between Commission and Ministry appear to be the central weaknesses in the present system.

There are, however, no easy ways to counter these weaknesses for the federal regulation of transport. But in the course of the study, a number of remedial suggestions have been made. For example, commissioners could be relieved of much of the present day-to-day decision-making and required to deal with the broader policy issues of transport regulation. At the same time it should be openly recognized that the Commission inevitably will and should make regulatory policy. Its role here should be enhanced through the use of tentative policy generalizations. The role of staff should be fully acknowledged and appropriate steps taken to ensure the fairness of non-adversary proceedings. A suitable forum, which draws on the experience of the

Commission, should be set up for the formulation of general transportation policy.

There are a number of encouraging signs to be seen at the Commission and it would be appropriate, in conclusion, to recall some of them. The issue of confidentiality is already receiving some of the attention it so urgently needs, the continued use of informal procedure holds out the promise of flexibility and some imaginative steps are being taken to make the formal hearing process more meaningful. All this augers well for the future.

ENDNOTES

1. This is taken from the title of Volume 1 of the Report. The full terms of reference are to be found in Appendix A of the Report and although somewhat longer, they are essentially along the same lines. The only reference to matters other than railway matters is in paragraph (e), which authorized the Commission to consider "related matters".

2. *Royal Commission on Transportation*, 1961, Vol. 1, 10. (Hereinafter cited as "MacPherson").

3. MacPherson, Vol. 1, 29. Emphasis in original.

4. *Id.*, at 30.

5. MacPherson, Vol. 2, at 182.

6. *Id.*, at 195.

7. *Id.*, at 180-181.

8. *Id.*, 161. In this regard the Commission would seem to have been quite prophetic for, as we shall see, the various modal committees of the Canadian Transport Commission still operate in relative isolation and "integration" has made slow and halting progress. The Commission made a realistic assessment of the responsibilities of the individual agencies and the resultant lack of time or energy to devote to "inter-modal" considerations. "It is enough to expect each agency to meet the pressing current regulatory responsibilities over the whole field of operations, standards, entry controls, rate regulation and the multifarious other problems of which only a specialized agency can even be made aware, without requiring them at the same time to be cognizant of the effects of their orders on every other segment of transportation."

9. "Nobody is concerned about Air Canada not making a profit," Mr. Korchinski was to point out. "Nobody is talking about that. What we are talking about is how to get the railways out of the red." Commons Debates, January 9, 1967, p. 11572. And see, Mr. Fawcett, *ibid.*, December 20, 1966, p. 11395. This concern at the short term immediacy of the Act was echoed by Mr. Dinsdale: "We had a transportation crisis on our hands, we had to grapple with the emergency bill and this present bill before the House has been presented as an integral part of the total solution. Because of the unseemly haste in the matter there has not even

been the opportunity to get a response from the press. . ." *Ibid.*, September 7, 1966, p. 8177. A major criticism was that there had been no opportunity for a re-evaluation of air transport policy. "I feel", Mr. Sherman observed, "that at this particular juncture of our history, at the very nub, at the very height as it were of the air age, it is almost inconceivable that a bill as far-reaching as this one should virtually ignore the field. . .of air transportation in particular in cities in Western Canada as my own, and as other prairie centres". *Ibid.*, January 26, 1967, p. 12321. And see, Mr. Nielson, *ibid.*, December 21, 1966, p. 11487, Mr. Horner, *ibid.*, January 8, 1967, p. 1579.

10. Commons Debates, September 1, 1966, p. 7995.

11. Commons Debates, September 1, 1966, p. 7991.

12. Commons Debates, January 27, 1967, p. 12342. There was some criticism from western Conservatives that the Act had not introduced enough competition. The following extract from a speech by Mr. J. H. Horner well summarizes their position. "The theme of the bill is competition. If one really believes that competition will be the answer to our transportation problems in Canada then one must inject competition into every mode of transportation. But has this bill really achieved this? Clause 1(a) says that there shall be no regulations which will in any way restrict competition among the different modes of transport. Is this really enough? Does this clause really say that there shall be competition between the various carriers in any mode of transportation? It does not." *Ibid.*, January 9, 1967, p. 11551. For an additional statement along similar lines see, *ibid.*, December 21, 1966, p. 11495.

13. Mr. Douglas, Commons Debates, September 2, 1966, p. 8043.

14. Mr. Barrett, *ibid.*, January 9, 1967, p. 11558.

15. Mr. Schoeyer, *ibid.*, December 20, 1966, p. 11380.

16. Mr. Pickersgill, *ibid.*, September 1, 1966, p. 7991.

17. Mr. Horner, *ibid.*, December 20, 1966, p. 11377.

18. For a useful discussion of the issue, see, "Quebec Threatens it will Resist Interference in Trucking Control," *Globe & Mail* (hereinafter G & M), April 11, 1969; "Provincial Road Control Favored", G & M, April 14, 1969; "Shippers Feel Traffic Bureaus Interfere in Rates", G & M, July 24, 1969; "Ottawa's Failure to Clarify Role leaves Trucking Firms Bewildered", G & M, November 26, 1969; "Federal Trucking Route May Open U.S. Routes", *Financial Post* (hereinafter F.P.), December 27, 1969; "Trucking Association President Disappointed at Ottawa's Inaction on a National Transportation Policy", G & M, July 1, 1971; "Truckers Want National Standards But Under Provincial Administration", F.P., July 27, 1971; "National Regulations would Help Truckers to Move into High Gear", F.P., August 21, 1971; "Ways Sought to Make Trucking Laws Uniform", G & M, November 23, 1971.

    Editor's Note: By an order-in-council made pursuant to s. 5 of the *Motor Vehicles Transport Act* (P.C. 1976-1832, 16 July 1976) the CTC was given regulatory authority over the Newfoundland Roadcruiser bus service operated by C.N.

19. *C.N.R. and the Attorney General for Newfoundland*, File No. 27563-488, July 3, 1968.

20. See, for example, an airing of this issue in Parliament, House of Commons, Standing Committee on Transport and Communications, 28th Parl., 1st Session, November 1968, pp. 2:3-6; 6:72-74. And see, *ibid.*, 28th Parl., 4th Session, 1972, pp. 4:6-8. See also Editor's Note, *supra*, Note 18.

21. Board of Commissioners of Public Utilities for Newfoundland, Annual Report 1968, pp. 95-103; *ibid.*, 1972, pp. 65-75.

22. *In the Matter of an Application by Reimer Express Limited*, Order No. mv-87-74, March 14, 1974, per Commissioner March at 47, [1974] CTC 96, at 148-49.

23. *Id.*, at 30, [1974] CTC at 128. As Commissioner Laval Fortier stated: "As far as I am concerned, there is much to be said in favour of permitting motor vehicle undertakings to do, on the Lord's Day, classes of work similar to rail and vessels. This would be convenient not only to the road carriers, but to the shippers and their customers and would also give effect to the intent of section 3 of the *National Transportation Act*. But this is not the purpose of paragraph (*x*). Only Parliament and the respective Legislatures of the provinces can grant such a permission".

24. R.S.C. 1970, c. N-17.

25. H. L. Purdy, *Transportation Competition and Public Policy in Canada*, 1972, pp. 163-174. More recently an attempt has been made to so structure the subsidy as to encourage labour intensive undertakings in the Maritimes over the advice that it could not be done. "Freight Rate Expert Advises Against Changes", *Chronicle Herald* (hereinafter C.H.), April 3, 1974.

26. It has been held that section 23 does not apply to air rates. See, *In the Matter of Proposed Increases in Local Fares*, Air Transport Committee, Decision No. 3919, July 19, 1974 — [1974] CTC 281.

27. *In the Matter of the Saskatchewan Wheat Pool*, File No. 30637.2, June 27, 1973, [1973] CTC 249. And see, *In the Matter of Anglo-Canadian Pulp and Paper Mills*, File No. 24602.14.7 May 26, 1972 — [1972] CTC 214; *Ibid.*, November 2, 1972; *In the Matter of Prince Albert Pulp Co.*, File No. 26901.901.97.1, June 21, 1971 — [1970-71] CTC 173.

28. *In the Matter of the Application by the Saskatchewan Wheat Pool*, Order No. 13001, Nov. 2, 1971.

29. "Whatever the complexities of section 23 may be, in my opinion it is the duty of the Commission to ensure that the remedy it affords is made as simple and as expeditious as possible. This is particularly true of subsection (2), which in my opinion was intended to afford nothing less than a mechanism for decision as to those cases that may involve prejudice to the public interest and which on face of them ought to be investigated by the Commission." *Id.*, at 8.

30. It is probably for this reason that Vice President Roberge in the 1974 appeal of air fares by the Consumer's Association of Canada ruled not only that section 23 did not apply to air fares but that, even if it had, the C.A.C. had not discharged the "prima facie" onus. See above, note 26.

31. John C. McManus, *Federal Regulation of Transport in Canada*, p. 34.

32. *Ibid.*, p. 35.

33. See *infra*, at 119-120.

34. See, for example, "Air Canada Plans 30% Fare Cut on Long Runs," G & M, August 2, 1972; "C.P. Air Would Match Fare Cuts," C.H. Aug. 31, 1972; "Air Fare War and Ottawa's Caught in it," F. P. Sept. 2, 1972. In the applications by the Consumers' Association of Canada respecting passenger fare increases in 1974 and again in 1975, it was assumed throughout the hearing that consultation prior to rate filing was appropriate; that similarity of fares was not significant, and the Association's contention that rates were being set to satisfy the weakest and most inefficient operators, was not followed up with any apparent vigour.

35. Mr. Horner, Commons Debates, December 20, 1966, at 11377.

36. By Mr. Pickersgill, *id.*, January 8, 1967, at 11567.

37. MacPherson, Vol. 2, at 192.

38. Discussed at greater length, *infra* at 120.

39. There had been for a number of years clear indications that Ontario was not satisfied with the air services provided. See, for example, "Aviation Body is Considered by Ontario", G & M, February 18, 1969; "Broad Air-Route Changes may be made in Ontario", F. P. September 19, 1970; "Private Carriers want Subsidy to operate 'Highway in the Sky' ", *Financial Times* (hereinafter called F.T.), March 23, 1971; "Uncertainty remains over Proposed New Air Services", F. P., October 9, 1971; "Ontario Asks Public Review of Air Franchises", *London Free Press* (hereinafter called L. F. P.), December 3, 1971.

    For details on norOntair, see, Hon. W. G. Davis, Statement on the Introduction of the Government Air Service in Northern Ontario, Debates of the Legislative Assembly of Ontario, July 12, 1971, p. 3761; "Air Service Links in North to Start in Fall, Davis Says", *Toronto Star* (hereinafter called T. S.), July 13, 1971; "Ontario to Test Air Passenger Service in North", G & M, July 13, 1971; "White River Airline to Locate in Sudbury", G & M, September 1, 1971; "Ontario Plans Airline Start about October 15", G & M, September 28, 1971; "C.T.C. Approves norOntair Plan for New service", G & M, October 1, 1971.

40. *In the Matter of the Application by John C. Medcof, Chairman, Railroad Boosters*, File No. 49467.59, February 1, 1974 — [1974] CTC 27.

    For a valuable background to the Barrie decision, see, "Busloads of Support going to Railhearing", G & M, July 10, 1973; "Commuter Train could Destroy Barrie, Mayor Says", G & M, July 12, 1973; "Used own money to Publicize Trial Commuter Train", G & M, July 13, 1973; "Messiah for Rail Commuters", G & M, July 14, 1973; "C. N. Railway Station Coming Back to Life", G & M, March 28, 1974.

41. House of Commons, Standing Committee on Transport and Communications, Estimates 1974-75 Canadian Transport Commission, 29th Parl. 2nd Sess., March 28, 1974, pp. 1:20-21.

42. *Ibid.*, Estimates Department of Transport, 29th Parl. 2nd Sess., April 4, 1974, pp. 3:12.

43. Mr. Max Saltzman, Commons Debates, December 21, 1966, pp. 11482-3.

44. The *Globe & Mail* in a strident editorial entitled, "Botched Transportation" on March 31, 1974, summarized Canadian Transportation ills in the following manner. "It is not just Mr. Marchand's words which confirm the mess. It is events: wheat and lumber shipments far behind schedule, the Government forced by the railways to help rebuild old boxcars and probably buy new hopper cars for wheat, the railway's permitted concentration on shipments profitable to themselves while those profitable to Canada are downgraded, the Western Premier's complaint about freight rates, the inability of the C.T.C. — despite its great powers — to create order." For a frank response to Minister Marchand from F. S. Burbridge, President of C.P., see, "Transportation Systems Reach Capacity and Need Capital", *Financial Post*, March 30, 1974.

45. Commons Debates, March 7, 1974, p. 265. For a mild "I-told-you-so" N.D.P. speech by David Lewis, see *Ibid.*, March 21, 1974, pp. 732-5.

46. See, "290 Million Dollars in Aid for Transit Pledged by Trudeau, G & M June 17, 1974; "Cost to be Basis of Freight Rates under Liberal Plan"; G & M June 18, 1974; "Trudeau Promises Crown Corporation for C.N., C.P. Rail, Revitalized Passenger Service", G & M June 19, 1974, "Right Track, Wrong Train", G & M June 20, 1974.

47. See, for example, "Marchand to Engineer Transportation Master Plan", F.P. September 21, 1974.

48. "Railways given Another Chance on Passenger, Freight Car Plans," G & M September 27, 1974; "Transport Review will be Faint Echo of Election Promise," G & M October 1, 1974; "Federal Freight Policy Plans tied to Regional Economies", G & M January 17, 1975; "Integration of Land, Sea and Air Transportation is Proposed in Policy Paper to Cabinet," G & M April 10, 1975, "Ottawa Urged to Form Top-Level Agency. . .," G & M May 15, 1975, "Clear Transportation Definitions Needed", F.P. May 24, 1975.

49. "Transportation Policy A Framework for Transport in Canada Summary Report, June 1975." The policy statement was accompanied by two more detailed analyses of freight and passenger transportation, "An Interim Report on Inter-City Passenger Movement in Canada", and "An Interim Report on Freight Transportation in Canada". And see, Transport, Statement on Government Policy, Commons Debates, June 16, 1975; pp. 6781-6800. The reports were discussed in Committee, House of Commons, Standing Committee on Transport and Communications, 30th Parl., 1st Sess., 1974-5, June 26, July 2, 4, 8, 10, 17, 1975.

50. House of Commons, Standing Committee on Transportation and Communications, 30th Parl. 1st Sess., 1974-5, p. 21:6.

51. *National Transportation Act*, s. 6(3).

52. *Id.*, s. 6(4).

53. *Ibid.*, s. 7(1).

54. *Ibid.*, s. 7(6).

55. *Ibid.*, s. 7(4).

56. Our observations indicate that while legal skills are useful to Commissioners, given the nature of the CTC's work, administrative skills and the ability to delegate routine work were also useful (perhaps even more so) to effective regulation. Lawyers are notoriously poor delegators.

57. *National Transportation Act*, s. 12(1).

58. *Ibid.*, s. 10(1).

59. For a discussion of the problem of attracting and retaining qualified staff, see House of Commons, Standing Committee on Transport and Communications, 29th Parl., 2nd Sess., March 28, 1974, No. 1:18-19.

60. For a discussion on supposed bias in certain Commission staff see: House of Commons, Standing Committee on Transport and Communication, 28th Parl., 2nd. Sess., March 19, 1970, No. 18:84-5; 28th Parl., 4th Sess., March 28, 1972, No. 4:14, 16, 17; April 5, 1973, No. 2:27; 29th Parl., 1st Sess., April 10, 1973, No. 3:30; 29th Parl., 2nd Sess., March 28, 1974, No. 1:15,22.

61. With the coming into force of the *National Transportation Act*, R.S.C. 1970, c. N-17, s. 6(1).

62. Transport regulation in Canada was originally carried out by the Railway Committee of the Privy Council. This procedure gave way in 1904 to the Board of Railway Commissioners for Canada, renamed the Board of Transport Commissioners for Canada by the *Transport Act*, S.C. 1938, c. 53, with additional jurisdiction in certain areas of air and water transport.

63. The Air Transport Board was established by Parliament in 1944 to undertake the economic regulation of civil aviation.

64. The Canadian Maritime Commission was established by Parliament in 1947 to deal with the administration of shipping policy.

65. *National Transportation Act*, s. 4(*d*).

66. *Id.*, s. 4(*e*). The jurisdiction formula for pipeline and motor vehicle undertakings expressed as "connecting a province with any other or others of the provinces or extending beyond the limit of a province."

67. *Id.*, s. 24(1).

68. Pursuant to s. 24(1)(*f*), *id.* Telecommunications was formerly one of the responsibilities of the Railway Transport Committee under the *Railway Act*, R.S.C. 1970, c. R-2, s. 320-321. Although not technically a transportation mode, historically railway companies were the only persons engaged in telecommunication undertakings (telegraph). Hence, regulation of railways incorporated, somewhat involuntarily, telecommunication matters.

69. *National Transportation Act*, s. 24(3), ". . .in accordance with the rules and regulations of the Commission. . ."

70. *Id.*, s. 24(2).

71. As expressed by the then Transport Minister Pickersgill, Commons Debates, September 1, 1966, at 7991.

72. This view was expressed in several interviews undertaken during this study with Commissioners and staff.

73. *National Transportation Act*, s. 19(1).

74. *Infra* at pp. 87-88.

75. The Management Advisory Committee has as its chairman the President or "legal" Vice-President and includes the "research" Vice-President and all committee chairmen as members. The Director, Program Coordination and Corporate Planning, acts as secretary to the Committee. The purpose of the Committee is as follows:

> While not a Committee as prescribed in General Rule 200 of the Commission, this Committee is required to carry out the following functions:
>
> - review Commission program forecasts and activities,
> - advise the Commission and recommend transportation regulatory and economic policies,
> - recommend assignment of responsibility for the study and handling of inter-modal or multi-modal matters and problems,
> - advise on the coordination, harmonization and ratification of internal policies and procedures,
> - recommend modification, when appropriate, of committee and research program and project priorities and resource commitments and decide "make or buy" questions.
>
> The Director, Program Coordination and Corporate Planning, is the chairman of the Operations Committee whose membership is composed of all the executive directors in the Commission. The purpose of this Committee has been set out as follows:
>
> - to provide an initiating and first review level of new or proposed programs and internal and external regulatory policy recommendations,
> - to consider and recommend the assignment and responsibility and allocation of resources for studies of inter-modal and multi-modal questions and related organizational and procedural adjustments or additions,
> - to encourage and facilitate the exchange of information on Committee and research activities of mutual or joint interest or responsibility.

76. See MacPherson, Vol. 2 at 161.

77. See s. 7(4) of the Act.

78. Ss. 22(*b*) and (*d*) respectively.

79. Ss. 22(*a*), (*c*), (*e*), (*f*) and (*g*) respectively.

80. This "raid" on the Commission's staff resulted in some adverse comment. For Parliamentary concern over the Ministry's action, see House of Commons, Standing Committee on Transport and Communications, 28th Parl., 4th Sess., April 25, 1972, 6:26-7. And see below, pp. 108-109.

81. *National Transportation Act*, s. 21.

81a. References to the "legislative" or rule-making function of committees refer to the fact that C.T.C. committees perform an "initiating" or informal function in this regard. Final legislative authority resides with the Commission itself by virtue of Rule 260(2).

82. *Id.*, s. 4(*a*).

83. *Railway Act*, R.S.C. 1970, c. R-2.

84. *National Transportation Act*, s. 45(1)(*a*)(*b*).

85. *Id.*, s. 45(2).

86. *Id.*, s. 46(1).

87. *Railway Act*, ss. 107-120.

88. *Id.*, s. 123.

89. *Id.*, s. 126(7). In accordance with this construction authority, the Committee is responsible for administering funds from the Railway Grade Crossing Fund under s. 202.

90. *Id.*, s. 106. However under s. 259, the procedure outlined in the *Railway Act* for granting approval must be complied with. As regards branch line operations, the Committee must first determine if the operation has incurred an "actual loss" as defined in s. 252. If so, the Committee then determines "whether the branch line is uneconomic and likely to continue to be uneconomic", s. 254. This finding, according to Committee decisions, involves rationalization considerations. The Committee has further discretion in deciding whether an uneconomic branch line should be abandoned. Relevant public interest matters, such as those listed in s. 254(3), must be considered. This same procedure is applicable to passenger train service discontinuance per s. 260.

91. *Railway Act*, s. 262(1).

92. *Id.*, s. 262(3).

93. The section has been used only once, and then upon application by a group of private individuals. See, *Barrie-Toronto Commuter Rail Service*, Railway Transport Committee, File No. 49467.59, February 1, March 25, 1974 — [1974] CTC 27.

94. *Railway Act*, s. 276.

95. *Id.*, s. 264, s. 270.

96. *National Transportation Act*, s. 23. There also exists a narrow route of appeal for unjust or unreasonable passenger rail rates under s. 280(4) of the *Railway Act*. However, the section applies only to rail service between areas of which the principal points are not connected by an adequate highway system or rail service accommodating, principally, commuters.

97. *Railway Act*, s. 225(1).

98. *Id.*, s. 226.

99. Because of the increase in the number of railway accidents, the Committee decided to conduct a special inquiry into three specific accidents. The terms of reference were then expanded to deal generally with railway safety. After public hearings in 1971 a special task force was created to investigate improved safety measures for dangerous commodity rail movement. Also planning was completed in 1972 for the establishment of an Advisory Committee on Railway Safety. The Committee has completed three major reports in this area. The *Initial Report of the Railway Safety Committee* was handed down in April, 1972 and was followed by *Second Report of the Railway Safety Inquiry* in July, 1972 and *Third Report of the Railway Safety Inquiry* in December, 1973.

100. *Railway Act*, s. 227.

101. *Id.*, s. 330.

102. R.S.C. 1970, c. M-3.

103. *National Transportation Act*, s. 4(*b*).

104. *Aeronautics Act*, R.S.C. 1970, c. A-3.

105. *Id.*, s. 9.

106. *Id.*, s. 10 (1)(*a*)(*b*), (2) — judicial; s. 14 — legislative.

107. *Id.*, s. 17(1).

108. *Id.*, s. 16.

109. *Id.*, s. 16(3). For a criticism of the failure of the Committee to articulate the criteria it actually uses, see *infra* at 62-64, 110-111.

110. See, for example, *Airtransit Canada (STOL)*, Decision No. 3851, April 11, 1974.

111. Air Carrier Regulations, s. 9.

112. *Id.*, s. 44(5).

113. *Id.*, s. 47.

114. *Id.*, ss. 45(1) and (2). For an application of s. 45 see *Consumers' Association of Canada and Air Fare Increases*, Decision No. 3919, July 19, 1974 — [1974] CTC 281. With the ruling that s. 23 of the *National Transportation Act* did not apply to air fares, this remains the only method of challenging air tariffs. While the Committee held a public hearing in this particular case, it remains to be seen if this precedent will continue as there exists no legal right to either make application under s. 45 or intervene under the General Rules of the Commission. (General Order 1967-1).

115. The Regulations establish licence classifications for air carriers, rules for licensing procedure, charter licensing rules and requirements for filing financial information with the Committee.

116. S. 16(5) of the *Aeronautics Act provides*: . . .no air carrier shall operate a commercial air service unless he holds a valid and subsisting certificate issued to him by the Minister certifying that the holder is adequately equipped and able to conduct a safe operation as an air carrier.

116a. While the Commission has no direct control over the equipment "acquired" by an air carrier it may effectively regulate what equipment is "used" by virtue of its authority to restrict the issuance of licences to certain types of aircraft, as *per* the Air Carrier Regulations.

117. See *Nordair and Austin Airways Ltd.*, Decision No. 2606, September 13, 1968; *Transair and Air Canada*, File No. 2-T115-22A, April 13, 1972. Officials of Transair stated ". . .the purchase of two pure jet aircraft couldn't be justified without the Toronto run". *Winnipeg Free Press*, December 5, 1969.

Lack of direct control over aircraft purchases has partly contributed to a difficult situation in which the regionals have purchased large jet aircraft primarily for overseas charter work thereby perhaps cutting into a market which should be Air Canada's. See, "Statement Hints at Curtailing Regional Airlines Charters", G & M July 11, 1975.

118. *National Transportation Act*, s. 4(*c*), "transport by water to which the *Transport Act* applies and all other transport by water to which the legislative authority of the Parliament of Canada extends."

119. R.S.C. 1970, c. T-14, s. 2. Proclamations have been made with respect to the Great Lakes, Mackenzie River and Yukon River.

120. Certain geographical exceptions to this licensing requirement exist. *Transport Act*, s. 12.

121. *Transport Act*, s. 5. Public necessity and convenience includes, *inter alia*, existing competition factors and quality and permanence of the service.

122. S. 17 of the *Transport Act* enumerates the five classes of tariffs that a licensee is authorized to issue — 2 standard tariffs (freight and passenger), two special tariffs (freight and passenger) and competitive freight tariffs. Only standard tariffs require prior approval. Committee approval is required by s. 18(2).

123. *Id.*, s. 23.

124. *Id.*, s. 30.

125. *National Transportation Act*, s. 22(3)(*b*). Part V of the *Transport Act* dealing with harbour tolls and providing for investigations into their reasonableness at the request of the Minister of Transport which appeared in the 1952 Revised Statutes was neither repealed nor consolidated when the 1970 Revised Statutes was issued. It would seem that these sections of the Act are still law and could be invoked if necessary.

126. R.S.C. 1970, c. 39 (1st Supp.).

127. *Id.*, s. 5.

128. S.C. 1970-71-72, c. 52.

129. *Id.*, s. 23(2).

130. *Id.*, s. 23(5). See also, *St. Lawrence Seaway Authority Act*, R.S.C. 1970, S-1, s. 16(4).

131. R.S.C. 1970, c. F-8.

132. *Supra*, note 125, ss. 23, 27.

133. For a detailed description see the following staff paper: *The Functions of the Shipping Services Section of the Water Transport Committee*, May 30, 1974.

134. *National Transportation Act*, s. 22(1)(*f*).

135. *Id.*, s. 4(*e*).

136. Despite the passage of the *National Transportation Act* in 1967, Part III was not proclaimed until May 15, 1970 by the Governor-in-Council.

137. See s. 42 of the *National Transportation Act* for the Commission's legislative functions. It provides for the making of regulations relating to classification of licences, the availability of financial information, safety and the prevention of injury in motor vehicle operations. This latter area of jurisdiction parallels the Railway Committee's responsibilities but not those of the Air Transport Committee.

138. *Supra*, note 134, s. 39(1).

139. *Id.*, s. 38(5).

140. *Id.*, s. 38(2).

141. *Id.*, s. 40(1).

142. *Id.*, s. 40(3).

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

144. *Id.*, s. 3(1), (2).

145. *Id.*, s. 4.

146. *Id.*, s. 5. Initially in 1967, the trucking and bus industry was very responsive to the idea of being placed under direct federal control, not only because of lack of uniformity in provincial regulations but, most importantly, because the *National Transportation Act* articulated an apparent policy of free inter-modal competition. More recently their attitude may best be described as ambivalent in part because of fears of more stringent rate regulation should the CTC take over regulatory authority from the provinces.

147. *National Transportation Act*, s. 36.

147a. Editor's Note: See, for example, Editor's Note, *supra*, note 18.

148. For a recent statement from the trucking industry, see, "Truckers Spurn Permanent Aid Despite Losses Caused by Freeze", G & M, August 8, 1975.

148a. R.S.C. 1970, c. A-18.

149. R.S.C. 1970, c. L-13.

150. *Id.*, s. 11(*x*).

151. *National Transportation Act*, s. 4(*d*).

152. *Id.*, s. 2.

153. Part II was brought into effect February 1, 1972, by cabinet proclamation.

154. Under s. 29 and 30 of the *National Transportation Act*, only a company authorized by an Act of Parliament has authority to construct or operate a commodity pipeline.

155. *Id.*, s. 31(1).

156. *Id.*, s. 32(1).

157. *Id.*, s. 32(1)(*a*), (*b*).

158. *Id.*, s. 33(1).

159. *Id.*, s. 33(3).

160. *Id.*, s. 34(5) establish The Committee's regulation-making power but does so by reference to the National Energy Board's regulation-making power under s. 88 of its Act.

161. The rationale for this change was set out in the Government Green Paper: *Proposals for a Communications Policy for Canada: A Position Paper of the Government of Canada*, March, 1973. "The regulatory link between transportation and communications is no longer of special importance, and the two fields have been separated in the executive arrangements of the federal Government. The nature of the regulation in the two areas. . .is different in kind. There is a need for a move away from ad hoc regulatory procedures. . .It is evident that many existing and foreseeable regulatory problems would be eased by the establishment of a single federal regulatory agency to cover the whole field of telecommunications. Such a body exercising authority over both the Canadian broadcasting system and the operations of federally-regulated telecommunications carriers would be in a position to take account of the increasing interaction between broadcasting and other forms of telecommunications."

162. *Railway Act*, s. 320-21.

163. By an amendment to s. 320(2) of the *Railway Act*, R.S.C. 1970 1st Supp. c.35.

164. The Committee also engaged in a major exercise — the Telecommunications Cost Inquiry — which is now being continued by the Canadian Radio-Television and Telecommunications Commission.

165. *Id.*, s. 320(3).

166. *Id.*, s. 321(1).

167. *Id.*, s. 321(2).

168. *Id.*, s. 321(4).

169. *National Transportation Act*, s. 63.

170. *General Rules under the National Transportation Act*, General Order 1967-1 Rule 770(c).

171. *Id.*, s. 24(4).

172. Because Rule 770(c) does not provide express authorization to do so, *supra* note 170.

173. Under s. 63, *National Transportation Act*.

174. *National Transportation Act*, s. 22(1)(*i*).

175. *The Second Annual Report of the Canadian Transport Commission, 1968*, at 7. This advisory capacity has been extended to include international maritime affairs with particular reference to container traffic development. Editor's Note: This Committee spends almost equal time advising on international water transport matters.

176. In the words of Quebecair President Lionel Chevrier, as quoted in a *Globe & Mail* article "Regional Airlines Not Satisfied with Routes", August 8, 1974.

177. S. 27(1) of the *National Transportation Act*.

178. *General Rules*, Rule 275.

179. See *Canadian Pacific Acquisition of COMSOL*, Commodity Pipeline Transport Committee, File No. P-507.2, September 20, 1973 — [1973] CTC 368. The Railway Committee was perhaps better equipped to make this decision.

180. However, in the "Hefler Case", (In the Matter of an Objection Filed by the Atlantic Provinces Trucking Association. . .Decision No. MY-27-19, August 27, 1973 — [1973] CTC 355) the Motor Vehicle Transport Committee indicated that it might be willing to "pierce the corporate veil".

181. *Railway Act*, s. 91.

182. *Air Carrier Regulations*, s. 19-20 and s. 27 of the *National Transportation Act*. Whether these broader provisions apply to the acquisition of Pacific Western Airlines by the Alberta Government remains to be seen. The key issue is whether a province is a "person" for the purpose of the Regulations. Editor's Note: See now *Re Pacific Western Airlines Ltd.*, (1977) 14 N.R. 21 (S.C.C.). And see, 1976-77 (Can.) c. 26. *An Act to Amend the Aeronautic Act and the National Transportation Act* (first reading, April 14, 1977).

183. *Application by St. Andrew Airways Ltd.*, Decision No. 3731, October 1, 1973, at 6 — [1973] CTC 439 at 447.

184. *In the Matter of the Operation of a Commercial Air Service by St. Andrews Airways Ltd.*, Order No. 1974-A-154, March 12, 1974.

185. *Aeronautics Act*, 16(8).

186. *In the Matter of the Operation of a Commercial Air Service by St. Andrews Airways Ltd.*, Order No. 1974-A-263, April 1, 1974.

187. For a valuable discussion of this subject, see, Harvey J. Goldschmid, "An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies", *Recommendations and Reports of the Administrative Conference of the United States*, Vol. 2, 896.

187a. Editor's Note: Since before 1974, the C.T.C. has had a full-time lawyer in its Ottawa office where he has been engaged solely in prosecutions under the *Aeronautics Act*.

188. Based on interviews during the course of this study.

189. For a detailed assessment of the "file hearing" technique devised to deal with this flood of licence applications, see *infra*, at 55-70.

190. A matter of continuing importance in inflationary times. See, for example, "Users Ask Change in Marine Pilotage Operation", *Globe & Mail*, June 12, 1975.

191. The Committee prepared a comprehensive inventory of 2448 extra-provincial motor vehicle undertakings in 1971 and is continuing to compile as comprehensive a statistical picture of the Canadian trucking industry as possible.

192. In 1974, 53 applications for temporary exemption were approved.

193. For a detailed discussion of review, see *infra* 87-96.

194. *National Transportation Act*, s. 19(1)(*b*).

195. *Id.* s. 81(1). For a recent illustration of the use which may be made of section 81, see, *In the Matter of an Application dated November 14, 1973, of Canadian National Railway Company for Approval of a Revised Schedule of Local Telephone Exchange Service Rates for British Columbia, Yukon Territory and Northwest Territories*, Telecommunication Committee, Order No. T-702, August 20, 1975.

196. *Bell Canada Amended Application B*, File No. C.955.182.1, August 15, 1974 — [1974] CTC 412.

197. Under s. 23 of the *National Transportation Act*.

198. See testimony by CTC President Benson, House of Commons' Standing Committee on Transport and Communications, 29th Parl., 2nd Sess., March 28, 1974, No. 1:26.

199. Telecommunication Committee, Order No. T-474, August 15, 1974.

200. *In the Matter of Section 23 of the National Transportation Act. . .*, File No. 24602.14.7, November 2, 1972 at 3 — [1972] CTC 268, at 270.

201. *Ibid.*

202. Letter dated September 21, 1972 containing a copy of the Minutes of the Meeting held in Montreal on September 14, 1972. See also what was included in the record, *supra* note 200 at 199.

203. See, for example, the "At-and-East Export Grain Rates" Case (*In the Matter of the Application of the Canadian National Millers Association*), Railway Transport Committee File 17112.49 March 28, 1966, [1966-67] CTC 195, and the "Gypsum Rock Rate Case" (*In the Matter of the Application of Atlantic Gypsum Limited*) Railway Transport Committee File No. 49378, February 28, 1974 — [1974] CTC 81.

204. The News Association involved were Canadian Press, France Press, Reuters, Associated Press and A.P. Sports Edition, United Press International and Agence France-Presse.

205. Eighth Annual Report of the Canadian Transport Commission 1974, at 11-12, 17.

206. Street, Justice in the Welfare State, 2nd Edit., 1975, p. 23. Although made with reference to social security appeals the anology is valid here in view of the number of applications which have to be dealt with each year.

207. H.W.R. Wade, *Administrative Law*, 3rd Edit., 1971, p. 171.

208. The description of the file hearing process does not purport to be a complete description of the Committee's administrative procedures. For this see *"Administrative Procedures of Air Transport Committee, Canadian Transport Commission", January, 1973.*

209. *"Guide for the Preparation and Filing by Canadian Applicants of Applications to Operate Commercial Air Services"*, Form A 1001-6/73. S.O.R./72-145, May 5, 1972.

210. Applicants are cautioned about their responsibility to "make a full presentation and to provide additional relevant information. . ." as thought necessary and requested by the Committee. See Part I, s. 1 (*d*), *id.*

211. Part II, section 6, "Evidence of Financial Position", *id.*

212. Part III, *id.* An example of the detail required are the following questions asked of Class 4 charter applicants.

(b) What is the total number of revenue block hours (ramp to ramp) per year which you expect to be flown by each type of aircraft in the proposed service in each of the first two years after commencement of service? Illustrate how you arrived at this estimate. If this is not the total number of revenue hours per year which are expected to be flown by these aircraft state what other revenue flying hours are expected to be flown by them, and on what services.

(c) What is the nature and volume of traffic or service you expect to provide? State whether any firms or individuals have indicated their intention of using the proposed service and the extent to which they expect to do so. On what types of work and in what geographical areas? Provide evidence indicating quantitatively how many revenue flying hours per year they expect to utilize the proposed service.

(d) Have the firms or individuals mentioned in (c) above used any air service in the past? If so, submit any data available which shows its past volume.

(e) If the proposed service will be competitive with other services indicate what business you expect will be gained by diversion from such carriers.

213. See the "Guide", *supra* note (209); Part III section 7 (Operating Property and Equipment to be used. . .); Section 9 (Operating Estimates, some six pages of required details), Sections 8 and 10 (Tolls and Tariffs).

214. Based on interviews conducted during the study. and see, for example, House of Commons, Standing Committee on Transport and Communications, 29th Parl., 2nd Sess., 1974, pp. 1:16-17.

215. In "Annex to Administrative Procedures Issued January, 1973".

216. For two recent examples of this phraseology see, *Application by Air-Dale Limited*, Decision No. 4094, May 2, 1975; *Application by Robert Golder*, Decision No. 4102, May 22, 1975.

217. For a useful discussion of the effect of a failure to give reasons see, *Current Issues in Administrative Law*, Dalhousie Continuing Legal Education Series No. 7 at 120-4, 126-7.

218. As it did in *In the Matter of an Application by the Province of Saskatchewan*, March 19, 1974.

219. Emphasis added — Decision by the Hon. Jean Marchand, *In the Matter of Decision No. 3414*, August 21, 1973, [1973] CTC 350, at 354.

220. As stated by H. N. Janisch in introduction to, A. H. Janisch, *Publication of Administrative Board Decisions in Canada*, (1972) p. v.

221. The former are described by Davis as "Adjudicative facts"; the latter as "legislative facts".

222. *Administrative Procedures of Air Transport Committee*, *supra* note 208.

223. *In the Matter of an Application by Canadian Helicopters Ltd.*, March 19, 1974.

224. *Application by Gordon Homewood Skelton*, Decision No. 4098, May 20, 1975.

225. *Globe and Mail*, March 17, 1970.

226. House of Commons, Standing Committee on Transport and Communications, 28th Parl., 2nd Sess., 1969-70, at 18:7-14.

227. *Brant Street - CNR Grade Separation*, File No. 1916, Vol. 3.

228. Commons Debates, September 1, 1966, at 7994. For an analysis of the use of staff studies in the Air Transport Committee's file hearing process, see *infra* at 64-68.

229. *In the Matter of Air Transport Committee Investigation of Proposed Increase in Local Fares*, Decision No. 3919, July 19, 1974, *Transcript*, July 17, 1974, at 175-77.

230. Letter from M. J. O'Grady, National President, Consumers' Association of Canada to Honourable Jean Marchand, Minister of Transport, dated August 9, 1974, released, August 14, 1974. And see, "Public Denied Chance to Fight Airline Fare Boosts, Group says", *Globe and Mail*, August 14, 1974.

231. *In the Matter of CPR's Passenger Train Service* Montreal-Ottawa via Lachute, P.Q., File No. 25938, 1965. The Railway Transport Board was the predecessor to the Railway Transport Committee of the Canadian Transport Commission.

232. *In the Matter of the Application by Metro Toronto (Jane Street)*, File No. 16288, January 30, 1970 — [1970-71] CTC 23.

233. See, for examples *In the Matter of the Application by the Town of Mississauga*, File No. 26727.1632, November 28, 1972 — [1972] CTC 294.

234. *Re Magnasonic Canada Ltd. and the Anti-Dumping Tribunal* (1973), 30 DLR (3d) 118, [1972] F.C. 1239.

235. *Id.*, at 125 — [1972] F.C. at 1247.

236. *Id.*, at 126 — [1972] F.C. at 1247.

237. *In the Matter of Certain Claims of Canadian Pacific Limited*, File No. 49305.1, June 27, 1974 — [1974] CTC 209, at 214.

238. Commons Debates, January 20, 1967, p. 12056. For a detailed discussion of the use of confidential statistics by the Air Transport Committee in its file hearing procedure, see above pp. 65-68.

239. *In the Matter of the Special Communications Tariff*, File No. 10041.187, June 20, 1973, at p. 6.

240. *Id.*, at 7. The intervenor's victory, it should be noted was shortlived. CN/CP filed a new tariff and it was adopted by the Telecommunication Committee. Resort was had to section 331 of the *Railway Act* which provides for the receipt of information on a confidential basis. This effectively deprived the intervenors of an opportunity to contest the tariff. *In the Matter of Filing of Special Communications Tariff*, Order No. T-385, February 25, 1974.

241. *In the Matter of Northern Transportation Ltd.*, File No. W-110.15.9, August 10, 1973, at 7 — [1973] CTC 341, at 347.

242. *Id.* CTC, at 384. Another encouraging sign was the earlier insistency by the Railway Transport Committee that in abandonment and discontinuance applications, the public be fully informed on the cost figures. This was justified on strictly functional lines: "The effect of an abandonment or a discontinuance in one community or region may well be widely different from its effect in another. In every one of these cases the decision of the Committee is based on a cost determination which must then be applied to the needs and requirements of the locale in which it is to take effect. It is important that the Committee have the full benefit of the local or regional point of view on any such issue that is before it for decision. . ." In the Matter of "The Canadian", File No. 49466.8.2, June 18, 1970, at p. 3, [1970-71] CTC 45, at 47. And see a recent decision on the western provinces right of access to cost information, *In the Matter of the Request by the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba*, Order No. R-18472, April 5, 1974.

243. *In the Matter of the Public Disclosure of Railway Accident Investigation Reports*, File No. 49581, May 10, 1973, at 6, [1973] CTC 163.

244. General Order O-1, s. 6: Every accident report, or information respecting the same, furnished the Commission by any railway company pursuant to the provisions of the *Railway Act* and of this Order, and the report of any person appointed by the Commission to enquire into and report upon any accident or casualty occurring on any such railway is declared to be privileged and shall only be made public or given out by Order of the Commission.

245. See, for example, House of Commons, Standing Committee on Transport and Communications, 1st Sess., 29th Parl., 1973, at 3:13.

246. *Supra* note 243 at 39 — [1973] CTC at 199.

247. *Id.*, at 46 — [1973] CTC at 197.

248. *Id.*, at 47-8, — [1973] CTC at 198.

249. *Id.*, at 49 — [1973] CTC at 199.

250. *In the Matter of the Saskatchewan Wheat Pool*, File No. 30637.2 June 27, 1973, *Transcript*, May 10, 1972, pp. 1692-1697 — [1972] CTC 164, at 174-77.

251. S.C. 1974-75-76, c. 41, s. 2.

252. For the debate on this measure see, Commons Debates, February 18, 1975, pp. 3337-45; Standing Committee on Transport and Communications, 30th Parl., 1st Sess., March 3, 4, 1975; Commons Debate, March 21, 1975, pp. 4375-81.

253. "Canadian Air Industry Cites Inflation Squeeze", *Globe & Mail*, November 4, 1969; "Air Officials Fear Government Policy Moves", *Winnipeg Free Press*, November 4, 1969.

254. "Continued Growth is Predicted for Canadian Air Carriers", *Globe & Mail*, December 8, 1971.

255. *Bell Canada, Amended Application B*, August 15, 1974, at p. 6.

256. See, for example, Michael J. Trebilcock, *The Case for A Consumer Advocate*; J. David Fine, *Consumer Interest Presentation in the Federal Telecommunications Regulatory Process*; Warren Black, *Structure Procedure and Powers of the Canadian Transport Commission*; John C. McManus, *Federal Regulation of Transport in Canada*.

257. Section 54 provides in part: "The Commission may, in any application, proceeding or matter of special importance pending before it, if in the opinion of the Commission the public interest so requires, apply to the Minister of Justice to instruct counsel. . ."

258. *In the Matter of the Amended Application "B" of Bell Canada*, File No. C955.182.1. Editor's Note: Because the C.T.C.'s decision in this matter was released after Professor Janisch's study was completed, an extensive summary of the arguments made at the hearing included in his study as submitted to the Commission has been deleted. For a consideration of some of the arguments concerning costs to intervenants, and of the decision, see Trebilcock (1977), 1 Can. Bus. L.J.

259. *Id.*, at 7-9.

260. See Canadian Transport Commission, File No. 257-3; The Commission's attitude toward costs has in the past been somewhat unimaginative. It had been said that it would be a dangerous precedent to award costs which could be used by an established company to scare off intervenors. Thus it was said that the possibility of costs would discourage people from speaking out at railway discontinuance hearings. *CPR Discontinuance Toronto-Havelock, CNR Discontinuance Toronto-Markham*, File No. 49466.24, May 31, 1971. The Air Transport Committee, however, has declared itself willing to penalize an unprepared applicant with costs. *Re Northern Helicopter Ltd.*, Decision No. 2762, 1969.

261. The denial of these grounds were based on a rather weak observation that these factors were not found in isolation in the past as supporting the necessity for a review: "We are left to decide whether or not to grant a review on the basis that the case is an important one and that it involves

an important matter of principle which contributes also to the importance of the case.

As to the importance of the matter and of the principle which may be involved, we have no difficulty in agreeing with the Applicants and the Intervenors in support. Our difficulty lies with the granting of a review based on no other criteria, even if in exercising our discretion we are not legally constrained by the jurisprudence which has so far guided the Commission. Going back to the cases where reference is made to an important principle being involved or the matter being an important one, *these factors are not found in isolation as supporting the necessity or desirability of a review.*" (Emphasis added) Review Committee, July 24, 1974, File No. P507.2, p. 22 — [1974] CTC 300, at 322-23.

262. *Id.*

262a. Editor's Note: Seventy-seven applications for review were considered by the Review Committee during 1976, including 12 applications received in 1975.

In 41 of the above cases, the original decision was reviewed, while in 35 cases the Committee found that no grounds for review existed. One application was withdrawn.

Of the 41 cases reviewed, 22 resulted in modifications to the original decisions. Fourteen decisions were reaffirmed, while five cases referred to the modal committee to conduct the review had not been decided by year-end.

Eighteen judgments on appeals were received from the Minister of Transport during 1976. In two instances modifications to the original decisions were directed. In four instances a review of the original decisions was directed; the reviews resulted in one modification to the original decision, one decision was reaffirmed, while two cases had not been decided by year-end. Twelve appeals to the Minister were dismissed.

At the end of the year 10 applications for review had been received but not yet considered by the Review Committee as the pleadings had not been completed.

263. *"In the Matter of an Application by Sydney Verne Huntley. . ."* File No. 2-H264-1, December 14, 1973.

264. *"In the Matter of an Application by Labrador Airways Ltd. . ."*, File No. 2-N141-12A, December 14, 1973.

265. See also a decision made on May 31, 1974, (File Nos. 2-E153-3, 2-E153-4) *"In the Matter of an Application by Elk Valley Air Services Limited. . ."* where the Review Committee concluded:

> ...The Air Transport Committee did not err in finding that the present and future public convenience and necessity did not require the granting of the Elk Valley Air Services Limited's application...
>
> The application for review...is therefore dismissed.

The premise seems to be a conclusion based on a review made. Therefore the concluding statement is rendered self contradictory.

266. *"In the Matter of an Application for Review by Hiks and Lawrence Limited. . ."*, File No. 2-H42-4A, April 4, 1975.

267. *"In the Matter of an Application for Review by Okanagan Helicopters Ltd. . ."*, File No. 2-T168-2A, November 12, 1974.

268. *"In the Matter of an Application for Review by Wardair Canada Limited. . ."*, File No. 202983, February 19, 1975.

269. The Committee went on to decide that the Air Transport Committee had not erred in its appreciation of the facts or the law; a finding that suggests that they did review the decision.

270. *"In the Matter of an Application for Review. . .by Eastern Flying Services Limited"*, File No. 2-E83-2A, July 18, 1975.

271. *Ibid.*

272. This comment is made in light of the failure of post-COMSOL decisions to clearly articulate the conditions for review set down in the COMSOL decision.

273. *National Transportation Act*, s. 23(2).

274. *Id.*, s. 23(4). Only four cases have come before the Commission under this section: *Saskatchewan Wheat Pool.* Railway Transport Committee, File No. 30367.2, November 2, 1971, June 27, 1973 — [1973] CTC 249; *Anglo-Canadian Pulp and Paper Mills and CP Ltd.*, Railway Transport Committee, File No. 24602.14.7, May 26 — [1972] CTC 214, November 2, 1972, [1972] CTC 268, (decision pending); *Prince Albert Pulp Co. and CP Ltd.*, Railway Transport Committee, File No. 26901.97.1, February 10, 1972 (hearings postponed); [1972] CTC 10; *Consumers Association of Canada and Air Fare Increases*, Air Transport Committee, Decision No. 3919, July 19, 1974 — [1974] CTC 281 (not applicable to air fares).

275. *Supra* note 274 *Saskatchewan Wheat Pool*, November 2, 1971.

276. *Supra* note 274 *Consumers Association of Canada* case: had s. 23 been applicable to air fares, the evidence adduced by the applicant was not sufficient to establish a *prima facie* case.

277. See above pp. 49-50.

278. *National Transportation Act*, s. 25(1), our addition in parenthesis.

279. Commons Debate, January 10, 1967, p. 11642.

280. *National Transportation Act*, s. 25(2).

281. See p. 109 below on formulation and implementation of policy.

282. See, *norOntair*, March 25, 1974 and *Danish Air Charter*, June, 1974.

283. Commons Debate, January 10, 1967 p. 11642.

284. *National Transportation Act*, s. 64(1).

285. See, *Railway Act*, S.C. 1903, c. 58, s. 44(2). This very broad appeal provision would appear to reflect a conscious departure from the American model of fully independent regulatory commissions out of respect for a parliamentary system of government. See, S. J. McLean, *Reports upon Railway Commissions*, Sessional Paper No. 20(a), 1902.

286. See, *Government Review of Bell Canada Decision*, June 27, 1973.

287. The Committee had proceeded according to the conventional rate base/rate of return approach while the government in its review emphasize new factors such as "social impact studies".

288. Editor's Note: see now Bill C-33, 1977.

289. Section 55(1).

290. Section 64(2).

291. (1950) 1 D.L.R. 721 (Jud. Comm. of P.C.).

292. (1966) S.C.R. 767.

293. (1972) 25 D.L.R. (3d) 368 (Que. C.A.); but cf. *Reg. v. Ontario Labour Relations Board*, ex p. Dunn (1963), 39 D.L.R. (2d) 346.

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

295. (1952) 2 S.C.R. 392.

296. (1968) S.C.R. 569.

297. (1972) 26 D.L.R. (3d) 112, [1972] S.C.R. 811.

298. [1972] S.C.R. 359.

299. (1972), 27 D.L.R. (3d) 115 (N.B. Sup. Ct. A.D.).

300. (1967), 60 D.L.R. (2d) 577 (Elgin Co. Ct.).

301. (1967), 62 D.L.R. (2d) 20 (Carleton Mag. Ct.).

302. R.S.C. 1970, c.L-13.

303. (1968), 5 D.L.R. (3d) 646; [1968] Que. Q.B. 891.

304. (1973) 36 D.L.R. (3d) 1 [1974] S.C.R. 635.

305. *In the Matter of an Application under paragraph (x) of Section II of the Lord's Day Act by Reimer Express Lines Ltd.*, Order No. MV-87-74, March 14, 1974 — [1974] CTC 96.

306. *A.G. Quebec and Minister of Transportation for Ontario v. Reimer Express Lines Ltd. and the Canadian Transport Commission*, Federal Court of Appeal, December 12, 1974 — [1974] 2 F.C. 164.

307. *Canadian Pacific Ltd. v. Government of Alberta et al.*, [1976] 1 S.C.R. 815.

308. (1968) 65 D.L.R. (2d) 334 (B.C.C.A.).

309. (1968) S.C.R. 941.

310. (1972) F.C. 390.

311. (1973) F.C. 571.

312. Unreported judgment of the Supreme Court of Canada, October 8, 1970, [1971] S.C.R. v.

313. House of Commons, Standing Committee on Transport and Communications, 27th Parl., 1st Sess., 1966. Respecting Bill C-231, An Act to Define and Implement a National Transportation Policy, pp. 23:1673-5; 24:1697; 34:2299. An unsuccessful plea was made for expert assistance at the time when Bell Canada sought amendment to its Act of Incorporation, *ibid*, Respecting Bill C-104, An Act Respecting the Bell Telephone Company of Canada, 27th Parl., 2nd Sess., 1967, pp. 4-115-6. During debate on the *National Transportation Act*, Mr. Hamilton proposed that the Standing Committee be given a permanent staff of experts. "This amendment would not interfere with the efficiency of the Board", he suggested, "but it would give some form of democratic control". Commons Debates, December 21, 1966, p. 11481.

314. *Id.*, 29th Parl., 1st Sess., 1973, p. 2:30.

315. House of Commons, Standing Committee on Transport and Communications, Revised Main Estimates (1968-69) of the Canadian Transport Commission, 28th Parl., 1st Sess., November 28, 1968, pp. 95-6, 98.

316. *Id.*, 28th Parl., 1st Sess., 1968, pp.93-4.

317. Mr. Pickersgill, House of Commons, Standing Committee on Transport and Communications, 28th Parl., 4th Sess., 1972, p. 7:14.

318. *Id.*, 28th Parl., 2nd Sess., 1968-69, p. 18:82.

319. *Ibid.*, 28th Parl., 4th Sess., 1972, p. 6:17.

320. John W. Langford, "The Making of Transport Policies — A Case Study: The Ministry of Transport as a Policy Making Institution", *Issues in Canadian Transport Policy*, at p. 410.

321. Editor's Note: For an assessment of developments subsequent to this study by its author, see H. N. Janisch, "The Role of the Independent Regulatory Agency in Canada", a paper presented to the Administrative Law Subsection of the Canadian Association of Law Teachers, Fredericton, N.B., May 30, 1977.

322. *North Coast Air Service Limited v. Canadian Transport Commission*, (1968) S.C.R. 940.

323. *In re North Coast Air Service Limited*, [1972] F.C. 390.

324. *The King v. Port of London Authority*, [1919] 1 K.B. 176 at 184.

325. See, for example, "Licensing Policy in Relation to Common Carrier", C.R.T.C. Public Announcement, December 3, 1969; "Canadian Broadcasting 'A Single System': Policy Statement on Cable Television", C.R.T.C. Public Announcement, July 16, 1971; "Broadcast Advertising to Children and Children's Programming", C.R.T.C. Public Announcement, October 16, 1973, August 21, 1974; "F.M. Radio in Canada: A Policy to Ensure a Varied and Comprehensive Radio Service", C.R.T.C. Public Announcement, January 20, 1975.

    An instructive use of policy guidelines may be found in the "exposure draft" technique employed by the Department of Consumer and Corporate Affairs to explain how a new act will be enforced. See, for example, Information Statement No. 9, General Guidelines and

Procedures Relating to Applications for Exemption from Insider Reporting Requirements, Canadian Corporations Act Bulletin, Vol. 4 No. 12, December 1974.

326. *In the Matter of an Appeal and a Section 28 Application by Capital Cities Communications Inc.*, [1975] F.C. 18.

327. "Opening the Way to Urban Improvements. . .The Railway Relocation and Rerouting Program", Information Canada, Ottawa, 1974.

328. House of Commons, Standing Committee on Transport and Communications, 29th Parl., 2nd Sess., 1974, p. 4:28.

329. *Id.*, 29th Parl. 2nd Sess., 1974, pp. 4:37-9.

330. *In the Matter of Amended Application "B" of Bell Canada*, File No. C.955.182.1, August 15, 1974, at 9 — [1974] CTC 412, at 422.

331. Aside that is from section 258 of the *Railway Act* which has been used to issue an Order-in-Council preventing Prairie branch line abandonments until 1975.

332. *Application by Nordair Ltd.*, Decision No. 4029, December 31, 1974, at 8 — [1974] CTC 674, at 684.

333. Application by Transair Limited, Decision No. 4060, February 27, 1975, at 8 — [1975] CTC 208, at 216.

Emphasis added. Mr. Benson has stated on several occasions that he considers the Commission bound by the Regional Airline Policy and the government policy allocating passenger shares to Air Canada and CP Air. See, for instance, House of Commons, Standing Committee on Transport and Communications, 29th Parl. 1st Sess., 1973, p. 2:12; *ibid.*, 27th Parl. 2nd Sess., 1974, p.1:11.

334. *norOntair Appeal*, February 19, 1974.

335. House of Commons, Standing Committee on Transport and Communications, 29th Parl., 1st Sess., 1973, p.2:16.

336. See, for example, the following ministerial decisions: *Chartier Air Service*, May 17, 1968; *Niagara Helicopters*, October 6, 1968; *Haida Northwestern Helicopters*, February 23, 1970. The Committee would finally seem to have "got the message". See, *Ex parte Helisolair Ltd.*, Decision No. 2580, June 24, 1968; *Inter Air Travel Ltd.*, Decision No. 2568, October 24, 1968; and more recently *Trans West Helicopters Ltd.*, File No. 2-T168-2A, May 17, 1974. See, *Great Lakes Helicopters Ltd.*, File No. 2-G241-1A, April 5, 1974.

337. *Appeal by George A. Kent*, September 19, 1972 — [1972] CTC 265.

338. *Appeal by Westminster Air Limited*, November 12, 1974 at p.3 — [1974] CTC 636, at 639.

339. *Application by Gordon Homewood Skelton*, Decision No. 4098, May 20, 1975.

340. Government of Canada, Review of the Canadian Transport Commission Decision of March 30, 1973, on Bell Canada's Application "A", June 27, 1973.

341. *norOntair Appeal*, February 19, 1974, at p. 7. Ontario's entry into the airline business has very recently been completely overshadowed by Alberta's acquisition of Pacific Western Airlines for $36.7 million. See "Mystery Buyer Takes over PWA", *Globe & Mail*, August 2, 1974; "Jet Air want Inquiry", "CTC Studies Takeover", August 7, 1974; "PWA Sale is Possible by Alberta", *Globe & Mail*, August 9, 1974; "Flak Just Starting to Fly over Alberta's PWA Deal", *Financial Post*, August 10, 1974.

342. "Airlines Seek Increases in Domestic Fares", *Globe & Mail*, April 19, 1975.

343. "Reassess Plans Airlines Told", C.H., April 19, 1975.

344. "Air Canada Reduces Request for Increases on Short Haul Routes", *Globe & Mail*, May 13, 1975.

345. See *Transportation Policy: A Framework for Transport in Canada, Summary Report*, (1975) at p. 31.

346. It is interesting to note a similar issue in Ontario. There Ontario Hydro adjusted its rate requests in light of "directives" contained in the 1975 "mini-budget". Intervenors before the Ontario Energy Board, which must decide on the reasonableness of the rates and make a recommendation to the government, are of the view that possible behind the scenes contacts between the government and the board completely undermines the efficiency of the hearing process. "Hydro won't Reveal Dealings with Government", *Globe & Mail*, August 22, 1975.

    Another example of an informal directive of questionable legal significance may be seen in Mr. Pelletier's "comments" on a study by his Department of the equipment buying practices of B.C. Tel. "The Canadian Transport Commission is being urged to ensure that British Columbia Telephone Company makes equipment purchase decisions free from the influence of its U.S. parent." *Globe & Mail*, July 11, 1975.

347. House of Commons, Standing Committee on Transport and Communications, 29th Parl., 2nd Sess., 1974, p. 4:38.

348. *Broadcasting Act*, R.S.C. 1970, c. B-11, s.27.

349. During the Hearing, the applicant and several intervenors stated that there was an immediate requirement for the Minister of Transport to proclaim a Third Level Carrier Policy which would designate the carrier and establish their position vis a vis the regional air carriers. This problem is not new and the need for such a policy has been stated often since 1967. The Air Transport Association of Canada has discussed the problem within its membership, but has not undertaken any formal study. The Canadian Transport Commission has, since June 1971, been engaged in a study of Third Level Carriers in Canada and a preliminary report on this subject prepared by a Consultant hired by the Commission and entitled, "Third Level Air Carrier Operations — A Review of Issues" has now been circulated to the industry for comments, *Pacific Western Airlines Ltd.*, Decision No. 3811, February 15, 1974 — [1974] CTC 53, at 57. And see, "Small Carriers Want More Flying Room", F.T., April 2, 1973; "Airlines Report Urgent Defining Public Need", *Globe and Mail*, December 5, 1973; "Carriers Agree on Updating but

Oppose Major Policy Change", *Globe and Mail*, July 3, 1974. For a very useful discussion by Mr. Pickersgill of the issues involved see, House of Commons, Standing Committee on Transport and Communications, 28th Parl., 2nd Sess., 1969-70, pp. 18:24-5.

350. As expressed in an interview with the authors.

351. One particularly difficult problem which could arise is where a specific case comes up which is not covered by a policy directive. An excellent current illustration is the Alberta government's purchase of PWA. Because there was no pre-existing policy statement, the Minister of Transport was confined to *ex post facto* fulminations in the press. "Marchand's Concern is Increasing over Provincial Airlines?", *Globe & Mail*, June 20, 1975.

    Let us suppose that it had been possible to legally adopt a policy statement. Could this have been done without it appearing to deal within an individual application? A useful suggestion is to be found in the "Edwards Report", *British Air Transport in the Seventies*, Report of the Committee of Inquiry into Civil Air Transport, May, 1969, CMnd. 4018, at p.159. It is to the effect that where a policy issue comes up unexpectedly by way of an individual application, the government should be able ". . .to issue a direction to the licensing authority suspending action on its decision for a specific (but not unduly long) period on grounds of major public interest. During that period it would consider whether a modification of policy were essential and if so would promulgate it by a change in the statutory instrument setting out the civil aviation policy".

352. For example in, *In the Matter of an Application for Review by Okanagan Helicopter Ltd...*, November 12, 1974, the "misapplying or ignoring to apply a stated policy" was considered a grounds for review.

353. During the entire life of the Air Transport Board (1944-1967) there was only one appeal to Cabinet. See, Curie, *Canadian Transportation Economics*, at p. 402. Compare this with the 69 appeals to the Minister of Transport decided by him between February 19, 1968, and May 1, 1975.

354. Commons Debates, January 10, 1967, p. 11642.

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