Legislative Summary **LS-504E**

BILL C-44: TRANSPORTATION AMENDMENT ACT

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LEGISLATIVE HISTORY OF BILL C-44

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-44: TRANSPORTATION AMENDMENT ACT[*]

BACKGROUND

On 24 March 2005, the Hon. Jean-C. Lapierre, Minister of Transport, introduced Bill C-44, the Transportation Amendment Act, in the House of Commons. The bill is similar in most aspects to its predecessor bill, C-26, the Transportation Amendment Act, which was introduced in the House of Commons on 23 February 2003 (2nd Session, 37th Parliament).(1) Bill C-26 was at the Committee stage when it died on the *Order Paper* with the prorogation of Parliament.

Nearly all of the provisions of Bill C-44 concern amendments to the *Canada Transportation Act* (CTA). "These amendments address key long-term transportation issues in Canada," said Mr. Lapierre. "They will improve the efficiency of the rail and air sectors, enhance competition, help protect the environment and provide a stable framework for investment."

A. Highlights

The highlights of the bill are that it:

- provides for a new, modernized and simplified National Transportation Policy Statement in the CTA, reaffirming established principles and embracing new ones, such as security and protection of the environment;
- provides for a reduction in the number of members of the Canadian Transportation Agency ("the Agency") from seven to five;

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) For an overview of key differences between the two bills, see David Johansen, *Notable Differences Between Bill C-44 and Its Predecessor, Bill C-26: Transportation Amendment Acts*, PRB 05-01E, Library of Parliament, Ottawa, April 2005.

- adds security programs to the list of purposes for which transportation data can be collected by the Minister of Transport, identifies transportation stakeholders and parties from whom data can be collected, and extends reporting and reviewing periods;

- extends the CTA provisions to review mergers and acquisitions, which currently apply only to the airline industry, to *all* federally regulated transportation undertakings of significant size;

- creates a mediation process for disputes concerning federal transportation matters within the jurisdiction of the CTA;

- amends the air transportation provisions in Part II of the CTA, notably in relation to: complaints processes; the advertising of prices for air fares; and the disclosure of terms and conditions of carriage;

- amends the railway transportation provisions in Part III of the CTA, including by: the creation of a mechanism for dealing with railway noise complaints; the modification of provisions relating to the setting of rates payable by shippers for transport of goods; and the modification of provisions dealing with the transfer and discontinuance of operation of railway lines;

- establishes a mechanism for resolving disputes between public passenger service providers and railway companies regarding the use of railway company equipment and facilities;

- adds a new Part V.1 to the CTA that establishes an approval mechanism for the construction or alteration of international bridges and tunnels and provides for the regulation of their operation, maintenance and security;

- transfers the legislative arrangements for railway police from the CTA to the *Railway Safety Act*; and

- provides a legislative framework to consolidate the current powers of VIA Rail Canada Inc. by enacting a specific Act governing the Crown corporation, including its mandate to provide passenger rail service in Canada.

DESCRIPTION AND ANALYSIS

A. Introduction

Bill C-44, known as the Transportation Amendment Act (clause 1), comprises four parts as follows:

- Part 1 – Amendments to the Canada Transportation Act (clauses 2-71)

- Part 2 – Amendments to the Railway Safety Act (clauses 72-73)

- Part 3 – Proposed VIA Rail Canada Act (clause 74)
- Part 4 – Consequential and Coordinating Amendments and Coming Into Force (clauses 75-88)

The description and analysis follow the numerical order of the clauses under each Part of the bill.

B. Part 1 of Bill C-44 – Amendments to the *Canada Transportation Act* (Clauses 2-71)

1. CTA Application and Part I – Administration (Clauses 2-15)

a. Conflicts between International Agreements and the *Competition Act* (Clause 2)

Clause 2 amends section 4 of the CTA to clarify that international agreements or conventions respecting air services to which Canada is a party prevail over inconsistent provisions of the *Competition Act*. Departmental officials point out that the current wording can lead to potential conflicts between provisions negotiated under those international agreements and the *Competition Act*.

b. National Transportation Policy (Clause 3)

Section 5 of the CTA contains a Declaration of National Transportation Policy based on a set of principles enunciated by Parliament. Clause 3 amends section 5 to update the National Transportation Policy Statement. The aim of the new statement, according to the department, is to outline policy principles in a simpler and clearer manner, in particular, by reaffirming established principles and embracing new ones, such as security and the protection of the environment.

c. Composition of Agency (Clauses 4-6)

Clauses 4 and 5 amend sections 7 and 8 to reduce the number of Agency members from seven to five, and clause 6 amends section 18(2) to require that all members (instead of just the chairperson, as is currently the situation) reside in the National Capital Region.

d. Applications for Relief (Clause 7)

Clause 7 amends section 27 concerning applications to the Agency for relief. It removes the current requirement that the Agency must be satisfied that the applicant would suffer "substantial commercial harm" if the relief applied for were not granted. According to the department, this has been seen as an unnecessary barrier to applicants seeking discretionary relief from the agency.

e. Enforcement of Agency Decision or Order (Clause 8)

Section 33 currently provides that a decision or order of the Agency may be made an order of any superior court and is enforceable in the same manner as such an order. Clause 8 amends section 33 to provide that a decision or order of the Agency may also be made an order of the Federal Court.

f. Mediation (Clause 9)

Clause 9 adds new section 36.1, concerning mediation. It provides the Agency with the power to mediate disputes concerning matters within its jurisdiction as an alternative to proceeding by way of formal adjudication. Departmental officials point out that mediation can help parties resolve their disputes in a more rapid, less litigious and less costly manner, and can narrow the gap between the partiers before the Agency exercises its adjudication role. As well, they note that, after a dispute, parties to a mediated agreement are generally more committed to its implementation and have a healthier relationship.

g. Transportation Information (Clauses 10-12)

According to departmental officials, the availability of transportation information is critical in enabling the government to properly exercise its oversight role of the transportation sector and to develop policies and programs. Information is also essential to other transportation stakeholders so that they may effectively carry out their duties and functions. A number of amendments to the provisions dealing with the reporting of transportation information are proposed to ensure that the Minister can collect and share the required information, and has the tools to ensure that the information is actually provided.

Clause 10 amends section 50(1) to specify that information required to be provided does *not* include personal information as defined in section 3 of the *Privacy Act*. It also adds security programs to the list of purposes for which the Minister of Transport may collect data. As well, it clarifies section 50 by adding section 50(1.1) to specify the stakeholders and parties from whom information can be obtained by the Minister. Proposed new section 50.1 (in clause 11) states that, if the persons referred to in section 50 have already provided transportation information to federal departments or agencies, the Minister may obtain copies from those departments or agencies, thereby avoiding duplication.

Section 51(1) currently states that transportation information required to be provided to the Minister pursuant to the Act is generally confidential, subject to certain specified exceptions where disclosure is permitted. Clause 12 amends section 51 to provide that the Minister may share the transportation information with, among other specified parties, persons retained to advise the government, and providers of services in relation to transportation (including the Canadian Air Transport Security Authority, NAV CANADA, and pilotage authorities), where such information is necessary for them to carry out their duties and functions. As well, the confidentiality requirement does not apply in situations where the information is already in the public domain. The Minister may, with the approval of the Governor in Council, make regulations respecting the terms and conditions of the sharing of information. Persons who receive such information from the Minister must maintain its confidentiality.

h. Industry Review (Clause 13)

The CTA currently requires the Minister, *each* year before the end of May, to lay before Parliament a report on the state of transportation in Canada in respect of the preceding year. Clause 13 amends section 52 so as to require the Minister, every *three* years, to lay before the Senate and the House of Commons, within the year after the end of the three-year period, a report briefly reviewing the state of transportation in Canada. According to departmental officials, the longer reporting cycle allows collection and analysis of sufficient data for reporting significant changes occurring in the industry. The current reporting requirement in respect of the previous year causes a recurrent problem because of the insufficiency of available data.

i. Review of Act (Clause 14)

Clause 14 amends section 53 concerning statutory review so as to require the Minister, "no later than eight years after the day this subsection comes into force," to appoint one or more persons to carry out a review of the Act and any other Act of Parliament for which the Minister of Transport is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament. The person(s) conducting the review must assess whether the legislation provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5. The review must be completed within 18 months. The current section 53 stipulates that the review must be carried out "no later than four years after the day this Act comes into force" and specifies that the review must be completed within one year. A statutory review of the Act was therefore completed in 2001. The department recognizes that there is a continuing need for a statutory review but maintains that it may take longer than four years for the impact of changes in industry structure and performance to become noticeable.

j. Review of Mergers and Acquisitions (Clause 15)

Currently the CTA provisions to review mergers and acquisitions, set out in sections 56.1 to 56.7 (in Part II of the Act concerning air transportation), apply only to the airline industry. Those provisions are repealed by clause 17 and, instead, replaced in clause 15 by the addition of new sections 53.1 to 53.6, expanding the existing public interest review process for airline mergers and acquisitions to cover *any* federal transportation undertaking (for example, air, rail, marine, buses, trucks, airports, marine ports). This enables the Minister of Transport to review public interest issues arising from merger or acquisition proposals, as they relate to national transportation. The Commissioner of Competition will continue to examine competition issues.

Proposed section 53.1 provides that persons who are required to notify the Commissioner of Competition under section 114(1) of the *Competition Act* of proposed transactions involving transportation undertakings must, at the same time as the Commissioner is notified, notify the Minister of Transport. In the case of a proposed transaction that involves an air transportation undertaking, they are also required to notify the Agency. The notice must contain information regarding the public interest aspects of the transaction in addition to the

information required to be supplied to the Commissioner of Competition (pursuant to section 114(1) of the *Competition Act*). If the Minister is of the opinion that the proposed transaction does *not* raise issues with respect to the public interest as it relates to national transportation, the Minister must, within 42 days after the above notification, give notice of the opinion to that person. As well, if the Minister is of the opinion that the proposed transaction raises issues with respect to the public interest as it relates to national transportation, the Minister may, under section 49 of the CTA, direct the Agency to examine those issues, or, under section 7.1 of the *Department of Transport Act*, appoint and direct any person to examine those issues. The Agency or person must report to the Minister within 150 days or such longer period as is allowed by the Minister.

Proposed section 53.2 prohibits the completion of a proposed transaction without the approval of the Governor in Council. In the case of a transaction that involves an air transportation undertaking, there is the added requirement that it cannot be completed unless the Agency determines that the transaction would result in an undertaking that is Canadian (as defined in section 55(1)). The proposed section also requires the Commissioner of Competition to report to the Minister and the parties to the transaction on any concerns regarding potential prevention or lessening of competition that may occur as a result of the transaction. The report must be made within 150 days of notifying the Commissioner of the proposed transaction, or such longer period as the Minister may allow. The report must be made public immediately after receipt by the Minister.

Prior to the Minister making a recommendation to the Governor in Council for approval of the transaction, the Minister must consult with the Commissioner on any overlap between any concerns the Minister has in respect of the proposed transaction with regard to the public interest as it relates to national transportation and any competition concerns raised in the Commissioner's report. In addition, the Minister must request the parties to the transaction to address the respective concerns of the Minister and the Commissioner and to inform them of the measures they are prepared to undertake to address those concerns. Before making a recommendation to the Governor in Council for approval, the Minister must obtain the Commissioner's assessment of the adequacy of any undertakings proposed by the parties.

If the Governor in Council is satisfied that it is in the public interest to approve the proposed transaction, taking into account the revisions to the transaction and the measures the parties are willing to undertake, the Governor in Council may, on the recommendation of the

Minister, approve the transaction and specify any terms and conditions that the Governor in Council considers appropriate. On application by a person subject to those terms and conditions, the Governor in Council may, on the recommendation of the Minister, vary or rescind the terms and conditions. If the terms and conditions to be varied or rescinded affect competition, the Minister must consult with the Commissioner before making the recommendation. If the Minister directs the Agency to inquire into any matter or thing to assist the Minister in making a recommendation as per the above, the Agency must give notice of the inquiry to the Commissioner and allow the Commissioner to make representations to the Agency. Persons subject to terms and conditions must comply with them.

Proposed section 53.3 requires the Agency to determine whether a proposed air transportation merger would result in an undertaking that is Canadian (as defined in section 55(1)).

Proposed section 53.4 authorizes the Minister or the Commissioner of Competition to apply to a superior court to seek a remedy in the event of contravention of terms and conditions dealing with public interest or competition issues respectively. The Minister or the Commissioner must notify the other prior to making an application.

Proposed section 53.5 provides authority for the Governor in Council to make regulations specifying information required in a notice under proposed section 53.1 and exempting classes of transactions from the application of proposed sections 53.1 to 53.3.

Proposed section 53.6 sets out the penalties for not providing notice, for completing an undertaking without approval of the Governor in Council, and for not complying with the terms and conditions of the approval.

2. CTA Part II – Air Transportation (Clauses 16-30)

a. Interpretation and Application (Clause 16)

Clause 16 amends section 56 relating to the non-application of Part II of the Act. Anyone providing an air service must comply with the licensing requirements of Part II unless they are exempt under section 56 or are granted a formal exemption under section 80. Section 56(1) currently provides that Part II does not apply to aircraft that are used by the Canadian Armed Forces (CAF) or by any other armed forces cooperating with the CAF *and* that bear the insignia or markings of the CAF or those other armed forces. Clause 16 removes the

requirement that the aircraft bear the insignia or markings of the CAF or any other armed forces cooperating with the CAF. According to departmental sources, the CAF and other armed forces are already exempt from the requirements of Part II with respect to their own aircraft because their "services" are not publicly available. They point out that the reason for removing the requirement for the aircraft to bear insignia or markings of the CAF or cooperating armed forces in order to be exempt from the requirements of Part II is because the CAF and cooperating forces often lease aircraft or charter aircraft with crew for the purpose of transporting goods or personnel or for other reasons. These aircraft will not typically carry military markings, but the military function of the CAF is such that no external regulatory control over air operations undertaken on their behalf is desirable or practical.

Clause 16 also adds a new section, 56(3), to the Act to exempt from Part II air service provided at the request of a government in the context of an emergency situation having been declared by a federal, provincial or municipal government under federal or provincial law. Departmental sources point out that it is neither practical nor desirable in emergency situations to require those who wish to provide much-needed assistance, often small or corporate air operators, to either be licensed or apply for an exemption from the licensing requirement and await the decision.

In order to ensure that there is no abuse of the exemption for emergency service, another new section, 56(4), is added to provide the Minister with the power to, by order, prohibit air services from operating under the exemption under proposed section 56(3), or to require the discontinuance of that air service if, in the Minister's opinion, it is in the public interest to do so.

In order to allow the Minister to apply a Ministerial order made pursuant to proposed section 56(4) without delay, proposed section 56(5) is being added to exempt the order from the examination, registration or publication normally required by the *Statutory Instruments Act*.

b. Moving of the Review of Mergers and Acquisitions of Airlines Provisions (Clause 17)

Clause 17 repeals current sections 56.1 to 56.7 of the Act concerning the public interest review process for mergers and acquisitions of airlines because, as previously noted, in clause 15, they are being replaced by proposed sections 53.1 to 53.6 which expand the process to cover *other* federal transportation undertakings as well.

c. Sale of Air Service (Clause 18)

Section 59 currently prohibits a person from selling or offering to sell in Canada an air service unless, where required under Part II, the person holds a licence under that Part in respect of the service. Clause 18 adds the requirement that the licence must not have been suspended.

d. Licence for Domestic Service (Clauses 19-26)

Section 62 currently allows the Minister, where he or she considers it advisable in the public interest that a domestic licence be issued to a person who is not a Canadian, to, *by order*, on such terms and conditions as may be specified in the order, issue a licence exempting the person from the requirement under section 61(a)(i) that he or she be a Canadian citizen for the duration of the order. Clause 19 amends section 62 to remove the requirement for the order, instead specifying that the Minister may, on any terms and conditions and for any period that the Minister may specify, exempt the person from the above requirement. This permits the exemption to be issued expeditiously where necessary, thereby avoiding the lengthier process of issuing the exemption by way of an order.

Clause 64 concerns the notice requirement regarding a licensee's proposal to discontinue or reduce domestic service. Clause 20 adds a new provision, proposed section 64(3.1), to provide that section 64 does not apply to a licensee that operates a domestic service that is seasonal in nature for eight months or less in a 12-month period. The rationale is that seasonal operators provide a unique service to a unique clientele, typically in remote areas, the withdrawal of which does not have the same impact on a community as does the withdrawal of other regular service.

Section 65 currently provides that where, on complaint in writing to the Agency by any person, the Agency finds that a licensee has failed to comply with section 64 and that it is practicable in the circumstances for the licensee to comply with an order under that section, the Agency may, by order, direct the licensee to reinstate the service referred to in that section for such a period, not exceeding 60 days after the date of the finding by the Agency, as the Agency deems appropriate, and at such a frequency as the Agency may specify. Clause 21 changes the 60-day period to 120 days.

Clause 22 amends section 66(3) so that, in making a finding under sections 66(1) or (2) (concerning unreasonable fares or rates or an inadequate range of fares or rates respectively), the Agency *may* (rather than "shall," as is currently the case) consider the factors enumerated in the section. Additional criteria are added; as well, the Agency is now given the power to take into consideration *any* information or factor that it considers relevant.

Clause 22 also adds a proposed new section 66(4.1) to provide that the Agency shall not make an order under sections 66(1) or (2) in respect of a licensee who is the only person providing a domestic service between two points if there is another domestic service that is not between the two points but is a reasonable alternative taking into consideration the factors mentioned in the provision. According to the department, this provision permits the focus of the Agency's investigation to be on markets instead of specific points of service, in order to ensure a proper determination of whether the carrier in question has a monopoly on service.

As well, clause 22 repeals section 66(6) (which previously provided the Agency with temporary authority to make a finding *on its own motion* under sections 66(1) or (2)).

Clause 23 amends section 67 concerning the publication of tariffs. Section 67(1)(a) is amended to require the holder of a domestic licence to *prominently* display at its business offices a sign indicating that its tariffs for domestic service, *including the terms and conditions of carriage*, are available for public inspection. The licensee is also required to permit such inspection. Section 67(1)(a.1) is added to require a domestic licensee to publish its terms and conditions of carriage on any Internet site that it uses for selling its domestic service. These amendments ensure that the terms and conditions of carriage, including valuable information for travellers, are available both at the licensee's business office and on the Internet.

Section 67.1 concerns actions the Agency may take in making a finding that the holder of a domestic licence, contrary to section 67(3), has applied a fare, rate, etc., not set out in its tariffs. Currently, the provision states that the Agency may make such a finding either on receiving a complaint in writing to the Agency by any person or on the Agency's own motion. Clause 24 amends the provision so as to no longer permit the Agency to make such a finding *on its own motion*.

Section 68 currently permits confidential contracts between the holder of a domestic licence (carrier) and another person regarding domestic air service. Departmental officials point out that if the confidential contract involves publicly available travel, the confidential contract can work to the disadvantage of the consumer. They give the example of a

tour operator who has entered into a confidential contract with an airline but who is then selling seats on that airline to individual passengers. Under these circumstances, the passengers may find that not only do the published rules not apply to them, but also, because the terms of the contract are confidential, they are unable to determine the terms governing their transportation. To remedy this problem, clause 26 amends section 68(1) so that the *terms and conditions of carriage* relating to the above contracts *cannot* be kept confidential. A new section, 68(1.1), is added to provide an exception to the above where an employer is a party to the contract and the contract relates to travel by its employees. In that case, the employer is aware of the terms and conditions of carriage and is responsible for deciding whether or not to provide the employees with that information.

e. Issuance of International Charter Permits (Clause 27)

An operator of a non-scheduled international service must have a licence under section 73 to operate the service, as well as a permit for each particular charter program that it operates. Clause 27 proposes to add a new section, 75.1, pertaining to the issuance of international charter permits. Proposed section 75.1 provides that the issuance, amendment or cancellation of a permit for the operation of an international charter to a licensee *shall* be done in accordance with regulations made pursuant to section 86(1)(e).

f. Air Travel Complaints (Clause 28)

The department points out that the position of the Air Travel Complaints Commissioner, as currently provided for in section 85.1, was established as a temporary measure in 2000, following the acquisition by Air Canada of Canadian Airlines, to address potential consumer abuses regarding the quality of service during the transition period. It notes that since then, the market has changed substantially. Air Canada is no longer the single dominant carrier and no longer the main target of complaints, reflecting the fact that there is competition on most major routes in Canada.

Therefore, clause 28 proposes to replace the current section 85.1 with a new provision that no longer provides for the designation of an Air Travel Complaints Commissioner and instead incorporates his or her functions into the everyday operations of the Agency. It also eliminates the previous semi-annual reporting requirement. The Agency will continue to be able to apply the existing informal process in addition to its well-established complaints resolution process in response to air travel complaints.

g. Regulations (Clauses 29-30)

Clause 29 amends section 86(1) concerning the Agency's regulation-making powers for purposes of managing the air service licensing regime. Among other things, a new subparagraph (h)(iv) is added enabling the Agency to make regulations requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier. Whereas the preceding subparagraph (h)(iii) currently refers only to a licensee, it is amended to refer to a licensee or carrier. The wording of paragraph (j) is clarified in the English version of the Act by replacing "persons in conjunction with whom air services are provided to the public" with "persons associated with the provision of air services to the public." That paragraph is also amended, for clarification purposes (in both languages), to include *travel wholesalers*, along with tour operators and charterers, as examples of such persons.

Clause 30 adds a new section, 86.1, to the Act, empowering the Agency, on the recommendation of the Minister, to make regulations respecting advertising in all media (including on the Internet) of prices for air services within, or originating in, Canada. The new section further provides that without limiting the generality of the above, regulations may be made that require a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service, and to indicate in the advertisement all fees, charges, and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser to determine the total amount to be paid for the service. As well, the provision states that the regulations may prescribe what constitutes "costs, fees, charges and taxes" for the above purposes.

Clause 30 adds another new section, 86.2, that stipulates that a regulation made under Part II (Air Transportation) of the CTA may be conditional or unconditional or qualified or unqualified and may be general or restricted to a specific area, person or thing or group or class of persons or things.

3. CTA Part III – Railway Transportation (Clauses 31-58)

a. Definitions (Clause 31)

Clause 31 amends section 87, which provides definitions for various terms used in Part III of the CTA. A definition for a "metropolitan area" is added; it is defined to mean any area that is classified by Statistics Canada in its most recent census of Canada as a census

metropolitan area. The definition permits the delineation of the geographic areas for which surplus railway lines, sidings and spurs must be offered to governments and urban transport authorities in accordance with sections 145 and 146.2 of the Act.

A definition of a "public passenger service provider" is added; it is defined to mean VIA Rail Canada Inc., a passenger rail service provider designated by the Minister, or an urban transit authority.

Finally, a definition of an "urban transit authority" is added; it is defined to mean an entity owned or controlled by the federal government or a provincial, municipal, or district government that provides commuter services in a metropolitan area. This definition permits the delineation of entities that are entitled to receive an offer to purchase surplus railway lines, sidings or spurs in metropolitan areas under the processes set out in Part III of the Act.

b. Railway Noise (Clause 32)

A large number of Canadian communities are home to railway operations, and disputes over railway noise can often arise between residents of those communities and railway companies. A December 2000 ruling by the Federal Court of Appeal held that the Agency had no jurisdiction to entertain complaints relating to matters such as noise emanating from the operations of a federally regulated railway. While citizens adversely affected by noise from railway operations can make a formal complaint to the railway company involved or bring a civil action in the courts, no federal regulatory body is currently mandated to regulate railway noise. Complaints are generally triggered by railway shunting operations. Clause 32 therefore proposes to add new sections, 95.1 to 95.4, to the CTA to provide the Agency with authority to address complaints relating to noise from the construction or operation of federally regulated railways.

Proposed section 95.1 provides that when constructing or operating a railway, a railway company must do so in a manner that does not produce unreasonable noise, taking into account the company's statutory obligations, its operational requirements, and the area where such activities take place.

Proposed section 95.2 states that the Agency may issue and publish guidelines, after consultation with interested parties, with respect to: the elements that it will take into consideration when determining whether a railway company is complying with section 95.1; and the collaborative resolution of noise complaints. The guidelines are not statutory instruments within the meaning of the *Statutory Instruments Act*. Such guidelines will inform both communities and railway companies of the factors to be considered in resolving noise complaints.

Proposed section 95.3 provides that the Agency, on receipt of a complaint, may order a railway company to undertake any changes in its railway construction or operation that the Agency considers reasonable in order to prevent unreasonable noise, taking into account the factors referred to in proposed section 95.1. If the Agency has published guidelines under section 95.2, it must first satisfy itself that the collaborative measures set out in the guidelines have been exhausted prior to conducting any investigation or hearing. This requirement is intended to encourage the resolution of disputes without regulatory intervention and to narrow to the extent possible the area of difference before the Agency is involved.

The noise provisions also apply, with any modifications that the circumstances require, to public passenger service providers, such as VIA Rail (proposed section 95.4).

c. Financial Transactions of Railway Companies (Clauses 33-36)

Clauses 33 to 36 generally replace much of sections 104 to 106 with modified provisions applicable to the financial transactions of railway companies. Proposed section 104 specifies the types of financial instruments to be deposited in the office of the Registrar General of Canada or in any other place that the Governor in Council, by order, specifies (clause 33). According to Transport Canada sources, the terminology is modernized to reflect current industry practices related to financial transactions and instruments pertaining to railway equipment. Proposed section 105 allows for the documents evidencing transactions such as mortgages, leases, etc., specified in the provision to be deposited in the office of the Registrar General of Canada or any other place that the Governor in Council, by order, specifies (clause 34). Proposed section 105.1 authorizes the Governor in Council to make regulations respecting the above matters (clause 35).

Departmental officials point out that sections 106(5) and (6) are being replaced by provisions adding a new condition under which an order of the Federal Court does not affect the rights of creditors to take possession of the rolling stock of a railway company (clause 36). They note that this amendment addresses a gap created by the interpretation of a U.S. court of a similar provision in the U.S. legislation.

d. Scheme of Arrangement (Clause 37)

Clause 37 amends section 108 regarding an application to the Federal Court by the directors of an insolvent railway company for confirmation of a scheme of arrangement between the company and its creditors. Sections 108(2) and (5) are repealed so that notice of the application for, and notice of confirmation and registration of, the scheme of arrangement need no longer be published in the *Canada Gazette*. Departmental officials note that this is consistent with the current practices for provincial and U.S. registries.

e. Rates, Tariffs and Services (Clauses 38-47)

Clause 38 amends section 111, which sets out certain definitions for purposes of Division IV entitled *Rates, Tariffs and Services* (comprising sections 111 to 139) of Part III of the CTA pertaining to railway transportation. The definition of a "competitive line rate" is repealed and replaced with a definition of a "competitive connection rate"; as well, the definition of a "connecting carrier" is replaced. A "competitive connection rate" is defined as a rate established by the Agency as a result of an application made under section 131 of the Act. A "connecting carrier" is defined to mean a railway company, other than a local carrier, that moves traffic to or from an interchange over a portion of a continuous route. The definition no longer contains the previous qualification which stated at the end of the definition: "in respect of which the railway company and the shipper agree on the movement of the traffic, including the applicable rate." The Act continues to maintain the current definition of an "interchange" to mean a place where the line of one railway company connects with the line of another railway company and where loaded or empty cars may be stored until delivered or received by the other railway company.

Clause 39 amends section 119 to require a railway company that proposes to change a tariff, other than by reduction of rates or charges, to publish a notice of the change at least 30 days before the effective date. During that same time frame, the railway company must send a copy of the notice to any shipper with whom it has a confidential contract that refers to the tariff. The section is also amended to reflect the taking effect of the changed tariff.

Section 128(1)(b) currently authorizes the Agency to make regulations regarding a *fixed* rate per car to be charged for interswitching traffic; clause 40 amends the provision to permit the Agency to prescribe the *maximum* rate per car instead of a fixed rate, thereby permitting the parties to agree to a lower rate.

Clause 42 amends section 129 so as to specify the circumstances when a shipper may make an application to the Agency for the determination of a competitive connection rate.

Clause 43 amends section 130 (concerning rates) so as to provide that the local carrier must provide the shipper with a rate for the movement of traffic from the point of origin to the point of destination and from a point of origin or destination to the nearest interchange with a connecting carrier (i.e., nearest point where the traffic could be transferred to a connecting carrier). The reason for this provision is to allow for an assessment to be made by the Agency under proposed section 131(2).

Clause 44 replaces current sections 131 to 133 of the Act with proposed sections 131 to 133.1. Proposed section 131 specifies that a shipper may apply to the Agency to establish any of the following matters in respect of which the shipper and local carrier cannot agree: the rate applicable between the point of origin or destination, as the case may be, and the nearest interchange with a connecting carrier; the designation of a continuous route; the designation of the nearest interchange; and the manner in which the local carrier is to fulfil its service obligations. Before an application can be considered by the Agency, it must first determine that: the shipper has no alternative, effective, adequate and competitive means of transporting the goods; and the rate established by the local carrier for the movement of traffic between the point of origin and the point of destination is above the 75th percentile of revenue per tonne-kilometre for movements by the local carrier of similar traffic under similar conditions. The Agency must establish the matter to which the application relates within 45 days after receiving the application. As well, the shipper is not permitted to apply for final offer arbitration for any competitive connection rate established by the Agency (while it is in effect) or being considered pursuant to the competitive connection rate provisions.

Proposed section 132 provides that the Agency may not establish a competitive connection rate for the movement of trailers on flat cars, containers on flat cars or less than carload traffic, unless they arrive at a port in Canada by water for movement by rail, or by rail for movement by water. This same prohibition currently applies to competitive line rates (current section 131(3) of the Act). As well, proposed section 133 provides that a competitive connection rate may not be established for the portion of a movement of traffic that exceeds 50% of the total number of kilometres over which the traffic is moved, or 1,200 kilometres, whichever is greater. This same prohibition currently applies to competitive line rates (current section 131(4)).

Proposed section 133.1 provides that a competitive connection rate must fall in the range of the 75th to the 90th percentile of revenue per tonne-kilometre for the movement by the local carrier of similar traffic under similar conditions. As well, a competitive connection rate must not be less than the variable costs of moving the traffic, as determined by the Agency. The latter provision currently applies in respect of competitive line rates (current section 133(4)).

Clause 45 adds two new sections, 135.1 and 135.2, to the Act. Proposed section 135.1 provides that the information used by the Agency to make its determination of a competitive connection rate is confidential and may not be disclosed to the applicant. Departmental officials point out that the reason for confidentiality is that the information used by the Agency will include commercially sensitive information in respect of other traffic carried by the railway.

Proposed section 135.2 provides that if a competitive connection rate has been established for a movement of traffic of a shipper, no other competitive connection rate may be established for the same movement while the established rate is in effect. This provision thus ensures that once a competitive connection rate has been established for a specific movement, the applicant cannot again apply for such a remedy while the established rate is in effect.

Clause 46 amends sections 136(1) and (4) to reflect the change from "competitive line rate" to "competitive connection rate."

Clause 47 adds a new section, 136.1, providing authority for the Governor in Council to, by order, suspend the operation of the competitive connection rate provisions if the Governor in Council is of the opinion that the financial viability of a railway company has been seriously affected by their operation.

f. Transferring and Discontinuing the Operation of Railway Lines (Clauses 48-53)

Section 141(1) of the CTA currently requires a railway company to prepare and keep up to date a plan indicating for each of its railway lines whether it intends to continue to operate the line or whether, within the next three years, it intends to take steps to discontinue operating the line. Section 141(2) requires the railway company to make the plan available for public inspection in offices of the company that it designates for that purpose. Clause 48 proposes to add a new section, 141(2.1) requiring a railway company to notify, within 10 days of making a change to the plan, the Minister, the Agency, affected governments, and urban transit authorities. This ensures that interested parties have sufficient notice and opportunity to assess their interest in acquiring a line without lengthening the discontinuance process.

The Act sets out a number of steps with which a railway company must comply prior to discontinuing operating a railway line. Clause 49 amends section 143 of the Act to require that the advertisement offering the sale or transfer of a railway line for continued operation (one of the steps) must disclose any agreement between the railway company and a public passenger service provider (for example, VIA Rail Canada) respecting passenger service on the line. This ensures that a potential purchaser is aware of the existence of passenger service obligations on the line.

Clauses 50 and 51 repeal current section 144(2) and add, in place of it, a new section, 144.1. Proposed section 144.1 provides that when a public passenger service provider operates a passenger service under an agreement with a railway company on a railway line that is sold, leased or transferred, the purchaser assumes the rights and obligations of the transferring railway company in relation to the passenger service provider for the duration of the agreement. When a railway company's rights and obligations under an agreement with VIA Rail Canada are vested in another entity by virtue of the above provision, the portion of the railway line to which the agreement relates is declared to be a work for the general advantage of Canada. The declaration ceases to have effect if VIA Rail Canada ceases to operate a passenger rail service on the portion of the line to which the declaration relates or the operation of the railway line is discontinued.

The above measures ensure the continuity of existing public passenger service agreements when railway lines are sold or transferred. As well, the provision regarding VIA Rail Canada ensures that the Crown corporation will continue to have access to transferred railway lines over which its services are operated and will have access to the new recourse (dispute resolution) available to public passenger service providers under proposed sections 152.1 to 152.3.

Clause 52 amends section 145 so that a railway company offering to sell or transfer a railway line in the discontinuance process must offer it to the federal and provincial governments, urban transit authorities (as defined in the proposed definition in section 87), and municipal governments through whose territory the line passes. The amendment results in urban transit authorities being included in the sequence of mandatory offers of railway lines to public authorities in the circumstances set out in that section.

Clause 53 replaces current sections 146 and 146.1 with proposed sections 146 and 146.1 to 146.5. Proposed section 146 clarifies that once a railway company has complied with the process set out in sections 143 to 145 of the Act, but an agreement for the sale, lease or other transfer of the railway line is not entered into through that process, and once the railway company has provided notice of discontinuance through the Agency, it is relieved of any obligations under the Act with respect to the operation of a railway line and any operations by public passenger service providers. Also, when a railway line reverts to a railway company at the end of a lease or transfer agreement, the railway company must, within 60 days after the reversion, resume operations on the line or follow the process specified in sections 143 to 145.

Proposed section 146.1 ensures that when a grain-dependent branch line listed in Schedule I is leased and subsequently returned to a railway company, the railway company must follow the discontinuance process specified in sections 143 to 145, in order to provide interested parties with an opportunity to acquire the branch line before it is discontinued. If it is discontinued, the railway company must compensate the municipality or district in which it is located by making three annual payments to it in the amount of $10,000 for each mile of the line in the municipality or district.

Proposed section 146.2 requires railway companies to prepare and keep up to date a list of their "sidings and spurs" (line segments) in metropolitan areas that they plan to dismantle. A railway company must publish the list on its Internet site and notify specified parties of any change within 10 days. A railway company must not take any steps to dismantle a siding or spur until at least 12 months have elapsed since the siding or spur was added to the list. Prior to dismantling a siding or spur, a railway must offer them to governments and urban transit authorities for not more than their net salvage value. The process parallels the process in amended sections 145 and 146 whereby railway lines are offered to governments and urban transit authorities.

Proposed section 146.3 permits a person to whom a railway line is offered under section 145, or to whom a "siding or spur" is offered under section 146.2, to apply to the Agency for a determination of the net salvage value (NSV) at any time before the expiry of the period available to the person to accept the offer. The applicant must reimburse the Agency's costs associated with the application. Under the current provisions, a government must accept the railway company's offer to sell prior to the NSV being determined by the Agency. The ability to obtain a NSV determination prior to making an offer gives a government or urban transit authority advance knowledge of the NSV so as to facilitate decision-making regarding the potential purchase of the line, siding or spur.

Proposed section 164.4 states that proposed sections 146.2 and 146.3 referred to above apply, with such modifications that the circumstances requires, to railway rights of way, that are located in metropolitan areas and in respect of which the sidings and spurs have been dismantled, that a railway company plans to sell, lease or otherwise transfer. Similarly, proposed section 146.5 provides that the above proposed sections apply, with any modifications that the circumstances require, to passenger railway stations in Canada that a railway company plans to sell, lease or otherwise transfer or dismantle.

g. Maximum Grain Revenue Entitlement (Clause 54)

Section 151 concerns the calculation for a prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year. The formula makes reference to, among other things, the "volume-created composite price index." Among the rules listed in the provision that are applicable to the volume-related composite price index is the rule set out in paragraph 151(4)(c) that the Agency must make adjustments to the index to reflect the incremental costs incurred by the prescribed railway companies for the purpose of obtaining cars as a result of the sale, lease or other disposal or withdrawal from service of government hopper cars. Clause 54 amends the paragraph to remove the reference to "incremental" and to add at the end of the paragraph the following: "and to reflect the changes in the costs of maintaining cars that have been so obtained."

Clause 54 also adds a new section, 151(6), to provide that despite section 151(5) (concerning when the Agency must make the determination of a prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year), the Agency must make the adjustments referred to in subparagraph 151(4)(c) referred to above at any time that it considers appropriate and determine the date when the adjusted index takes effect.

h. List of Available Sidings (Clause 55)

Clause 55 introduces a proposed new section, 151.1, that requires railway companies to publish on their Internet sites, a list of rail sidings (in the Western Division) where railway cars can be loaded by grain producers. Railway companies must give 60 days' notice (in a newspaper of general circulation in the area where the siding is located) prior to removing such sidings from operation. This provision allows farmers time to make alternative arrangements or to work with the railway companies to keep their sidings in operation.

i. Dispute Resolution (Public Passenger Service Providers and Railway Companies) (Clause 56)

Clause 56 adds proposed new sections, 152.1 to 152.4, pertaining to public passenger service providers, to the Act. Proposed section 152.1 specifies that whenever a public passenger service provider and a railway company cannot agree on any rate, term or condition related to the operation of the passenger service on the railway's facilities, the public passenger service provider may, after reasonable efforts to resolve the matter have been made, apply to the Agency to decide the matter. The Agency may also be requested by either the public passenger service provider or the railway company to decide the matter where, after reasonable efforts to resolve the matter have been made, the public passenger service provider and the railway company cannot agree on the implementation of a matter previously decided by the Agency. This procedure replaces the existing final offer arbitration recourse for public passenger service providers currently set out in section 160.

Proposed section 152.2 provides that if, pursuant to an application under section 152.1, the Agency fixes the amount to be paid by the public passenger service provider for use of the railway company's facilities or services, the Agency must take into consideration, among other things, a number of factors specified in the provision.

Proposed section 152.3 provides that any decision of the Agency in respect of a matter disputed by the public passenger service provider and the railway company (and where an application has been made by a public passenger service provider pursuant to section 152.1) will be binding on the parties for a period of five years, or for any other period agreed to by the parties and specified in the decision.

In the interest of greater public transparency, proposed section 152.4 requires that future contracts between railway companies and public passenger service providers must be made available to a member of the public, upon request. This obligation also extends to current contracts except where the Agency has (in its discretion), on application by one of the parties to the contract, excluded an existing contract or a portion of it on the grounds that harm would likely result to the applicant if the contract, or the specified portion, were to be disclosed.

j. Agreements to Apply Transportation Law to Provincial Railways (Clause 57)

Section 157.1 currently allows the Minister to enter into an agreement with a provincial minister responsible for transportation matters providing for the administration, in relation to persons who operate provincially regulated railways, of any law respecting railway safety, accident investigation and railway crossings. Clause 57 amends that provision to also include reference to the administration of any law respecting railway noise or the economic regulation of railway companies to the extent that those matters are governed by the CTA. It also corrects an imprecision in the wording of the French version of this section.

k. Railway Police Constables (Clause 58)

Clause 58 repeals section 158 of the CTA, concerning the authority to appoint railway police constables, the reason being that clause 73 moves that authority to the *Railway Safety Act*.

4. CTA Part IV – Final Offer Arbitration (Clauses 59-62)

Final offer arbitration is a process generally available to a shipper who is dissatisfied with the rates or conditions of service proposed by a railway company. The final offer arbitration process requires an independent arbitrator to review the final offers made by the shipper and the railway company and to select one or the other.

a. Exemption from Final Offer Arbitration (Clause 59)

Clause 59 amends section 160 of the CTA to clarify that a public passenger service provider cannot make an application for final offer arbitration to resolve a dispute with a railway company. The reason is that a new dispute resolution mechanism is provided in proposed sections 152.1 to 152.4 to deal with disputes between a public passenger service provider and a railway company.

b. Submission for Final Offer Arbitration (Clause 60)

Clause 60 amends section 161(1) to clarify that final offer arbitration also applies to charges, rates, terms or conditions applicable to any *incidental services* in addition to those applicable to the movement of goods.

c. Arbitration Considerations (Clause 61)

Clause 61 amends section 164.1 so that the requirement in section 164(2) for the arbitrator to have regard to whether a shipper has alternative, effective, adequate and competitive means of transporting the goods applies equally where the dispute is for matters involving freight charges of not more than $750,000. The reason for this amendment is to address an anomaly in the current Act whereby the arbitrator must, in handling a dispute involving freight charges of more than $750,000, consider whether a shipper has alternative, effective, adequate and competitive means of transporting the goods; but the arbitrator has no similar obligation when dealing with disputes involving freight charges of $750,000 or less. The obligation will now apply to *all* disputes involving freight charges.

d. Joint Offer of Several Shippers (Clause 62)

Clause 62 adds proposed new sections, 169.1 to 169.3, to the Act. Proposed section 169.1 provides that two or more shippers may join in one proceeding and submit one offer for arbitration in respect of rates, charges, terms or conditions specified in a tariff when the matter submitted to the Agency for final offer arbitration is common to all the shippers. Time limits for submissions of final offers, and for the arbitrator to make a decision, etc., are set out in the provision. Departmental officials note that allowing multiple shippers to join in one proceeding enables a group of shippers with a common complaint to seek redress for matters that may be too small for one individual shipper, but which may have a significant cumulative impact on several shippers. They point out that this will help reduce the cost to shippers of filing individual offers for such matters as demurrage (late charges) and car cleaning, because of the high costs for a single shipper to seek relief on these small individual transactions.

e. Offers of Other Persons (Clause 62)

Proposed section 169.2 (clause 62) provides that sections 161 to 169 apply to any person (or group of persons seeking common relief) other than a shipper or a carrier, who is (or are) subject to charges or rates charged for the movement of goods or for incidental services, or to any term or condition associated with the movement of goods or incidental services. Time periods are set out. The above provision thus allows any person subject to a tariff, for example, a terminal operator, to apply for final offer arbitration.

f. Mediation (Clause 62)

Proposed section 169.3 (clause 62) provides that the parties to a final offer arbitration may, by agreement, refer to a mediator (which may be the Agency) a matter that has been submitted for a final offer arbitration. All matters relating to the mediation must be kept confidential unless the parties otherwise agree, and information provided by a party for the purpose of mediation cannot be used for any other purpose without the consent of that party. Unless the parties otherwise agree, the mediation must be completed within 30 days after the matter is referred for mediation. The mediation has the effect of staying the conduct of the final offer arbitration for the period of the mediation; and extending the time within which an arbitrator must make a decision in the matter of the final offer arbitration by the period of the mediation.

5. CTA Part V – Transportation of Persons with Disabilities

Bill C-44 proposes no changes to Part V of the CTA.

6. CTA (Proposed) Part V.1 – International Bridges and Tunnels (Clause 63)

Clause 63 proposes to add to the CTA a *new* Part, V.1, entitled *International Bridges and Tunnels*, comprising proposed sections 172.01 to 172.32.

a. Interpretation and Application (Proposed Sections 172.01-172.04)

Proposed section 172.01 defines the terms “alteration” and “international bridge or tunnel” for purposes of the proposed new Part V.1 of the CTA. An “alteration” is defined to include a conversion, an extension and a change of use of an international bridge or tunnel but does *not* include its operation and maintenance. An “international bridge or tunnel” is defined to mean a bridge or tunnel, or any part of it, that connects any place in Canada to any place outside Canada, and includes the approaches and facilities related to the bridge or tunnel.

Proposed section 172.02 provides that, in the event of an inconsistency between proposed Part V.1 of the CTA or the regulations made under it and any Act listed in Schedule III (setting out a list of bridges and tunnels Acts), Part V.1 and the regulations prevail to the extent of the inconsistency or conflict. It also provides authority for the Governor in Council, on the recommendation of the Minister, to make regulations amending Schedule III by adding, changing, or deleting the name of an Act. Nothing in Part V.1 or the regulations made under it

affects the application of any other federal statute, including those requiring authorizations in respect of an international bridge or tunnel. Hence, statutes such as the *Navigable Waters Protection Act*, the *Fisheries Act* and the *Canadian Environmental Assessment Act* that may, for example, affect the construction or alteration of an international bridge or tunnel, will continue to apply.

Proposed section 172.03 declares international bridges and tunnels to be works for the general advantage of Canada.

Proposed section 172.04 provides that, for greater certainty, Part V.1 applies in respect of any proposal for construction or alteration of an international bridge or tunnel that has been submitted to any department, agency or regulatory authority of the Government of Canada before the coming into force of Part V.1.

b. Construction and Alteration (Proposed Sections 172.05-172.11)

Proposed section 172.05 requires authorization from the Governor in Council in order to construct or alter an international bridge or tunnel.

Proposed section 172.06 requires a proponent for the construction or alteration of an international bridge or tunnel to submit an application to the Minister for approval by the Governor in Council. The applicant must provide the Minister with any documentation or information that is required under guidelines issued by the Minister, or any further document or information that is required by the Minister after receipt of the application. The guidelines are not statutory instruments within the meaning of the *Statutory Instruments Act*.

Proposed section 172.07 authorizes the Governor in Council, on the recommendation of the Minister, to approve such projects under such terms and conditions as the Governor in Council considers appropriate. The Governor in Council may vary or rescind those terms and conditions. Every person who is subject to terms and conditions is under an obligation to comply with them.

Proposed section 172.08 allows the Minister to, among other things, order the removal or alteration of a bridge or tunnel that was constructed or altered without the approval of the Governor in Council.

Proposed section 172.09 sets out the offences and punishment for contravention of the above provisions. As well, where a person is convicted on indictment of an offence under proposed section 172.09, the court may, in addition, order that the international bridge or tunnel, or anything used in its construction or alteration, be forfeited to the federal Crown (proposed section 172.1).

Proposed section 172.11 provides for the possibility of expropriation where a person requires an interest in land for the purposes of the construction or alteration of an international bridge or tunnel and has unsuccessfully attempted to purchase the interest.

c. Regulations (Proposed Sections 172.12-172.14)

Proposed sections 172.12 to 172.14 authorize the Governor in Council, on the recommendation of the Minister, to make regulations concerning, respectively, the *maintenance and repair*, the *operation and use*, and the *security and safety*, of international bridges and tunnels. In each case, the relevant section specifies a list of possible matters in respect of which regulations may be made, without limiting the generality of the regulation-making power.

d. Emergency Directions (Proposed Sections 172.15-172.2)

Proposed section 172.15 provides authorization for emergency directions in cases of an immediate threat to the security or safety of an international bridge or tunnel. If the Minister feels that there is an immediate threat to the security or safety of such a bridge or tunnel, the Minister may direct any person to do, or to refrain from doing, anything that in the opinion of the Minister it is necessary to do or refrain from doing in order to respond to the threat, including directions respecting the evacuation of the international bridge or tunnel and the diversion of traffic or persons.

According to proposed section 172.16, the Minister may authorize any officer of the Department of Transport to make, subject to any restrictions or conditions that the Minister may specify, any direction that the Minister may make under section 172.15 whenever the officer is of the opinion that there is a threat referred to in that section.

An emergency direction comes into force immediately when it is made but ceases to have force 30 days after it is made, unless the Minister or officer who made it repeals it before the expiry of the 30 days (proposed section 172.17). An emergency direction may provide that it applies in lieu of or in addition to any security regulation made under proposed section 172.14 (proposed section 172.18(1)). In the event of an inconsistency or conflict between a regulation and an emergency direction, the emergency direction prevails to the extent of the inconsistency or conflict (proposed section 172.18(2)).

Emergency directions made under the above provisions are not statutory instruments within the meaning of the *Statutory Instruments Act* (proposed section 172.19).

Proposed section 172.2 sets out the offences for contravening a security regulation made under proposed section 172.14 or an emergency direction made under proposed section 172.15 or pursuant to proposed section 172.16.

e. Incorporation by Letters Patent (Proposed Sections 172.21-172.28)

Proposed section 172.21 authorizes the Governor in Council, on the recommendation of the Minister, to issue letters patent of incorporation for the establishment of a corporation for the purpose of constructing or operating an international bridge or tunnel. The provision specifies matters that may be included in the letters patent. The provision also provides for supplementary letters patent (to amend the letters patent), and for the possible revocation of letters patent or supplementary letters patent. Letters patent and supplementary letters patent are not considered to be statutory instruments within the meaning of the *Statutory Instruments Act*, but must be published in the *Canada Gazette* and are valid with respect to third parties as of the date of publication.

Other relevant provisions concerning corporations include those respecting: the Governor in Council's regulation-making powers concerning them (proposed section 172.23); their capacity and powers (proposed section 172.24); their authority to charge tolls, fees or other charges for the use of an international bridge or tunnel (proposed section 172.25); the power of their directors to manage their activities and affairs (proposed section 172.26); duty of care of their officers and directors (proposed section 172.27); and the power of their directors to make by-laws regulating the affairs of the corporation (proposed section 172.28).

f. Shares of a Corporation (Proposed Section 172.29)

Proposed section 172.29 provides that for the purposes of section 90 (transactions requiring parliamentary authorization) in Part V (entitled *Crown Corporations*) of the *Financial Administration Act*, the federal Crown, or a "parent Crown corporation" within the meaning of section 83 of that Act, is authorized to acquire, hold, dispose of and otherwise deal with shares of a corporation that owns or operates an international bridge or tunnel.

g. Enforcement Powers (Proposed Sections 172.3-172.32)

Proposed section 172.3 sets out enforcement powers for the purposes of proposed Part V.1, for example: the power of the Minister (or a person designated by the Minister) to enter a place for the purposes of making inspections, investigations or audits relating to the enforcement of proposed Part V.1 of the CTA; the power to remove things for examination and to seize things for evidence; the authority of a justice of the peace to issue warrants; the use of force in executing warrants; etc.

The owner or person who is in possession or control of a place that is inspected, investigated or audited under proposed section 172.3, and every person found in the place, must provide the Minister (or a person designated by the Minister) with: all reasonable assistance to enable him or her to carry out the inspection, investigation or audit and exercise any power conferred on him or her by the above provision; and any information relevant to the administration of proposed Part V.1 of the CTA or the regulations, notices, orders or emergency directions made under that Part that he or she may reasonably require (proposed section 172.31).

Proposed section 172.32 provides that if, on the Minister's application, it appears to a court of competent jurisdiction that a person has done, is about to do, or is likely to do, any act or thing constituting or directed toward the commission of an offence under proposed Part V.1, the court may issue an injunction ordering the person named in the application: to refrain from doing any act or thing that, in the opinion of the court, may constitute or be directed toward the commission of an offence under proposed Part V.1; or to do any act or thing that, in the opinion of the court, may prevent the commission of an offence under proposed Part V.1.

No injunction may be issued unless 48 hours' notice is given to the party or parties named in the application or the urgency of the situation is such that service of notice would not be in the public interest (proposed section 172.32).

7. CTA Part VI – General (Clauses 64-68)

Clauses 64 to 68 amend the provisions of the CTA pertaining to administrative monetary penalties.

Clause 64 amends section 177 so as to permit the Minister to, by regulation, designate any provision of section 51 (confidentiality of transportation information supplied to the Minister pursuant to the Act), or of a regulation made under section 50 (requirement of named parties to supply transportation information to the Minister) or 51, as provisions that may

be enforced by way of administrative monetary penalties. Clauses 65-67 amend sections 178-180 to reflect the above amendment to section 177. Clause 68 adds proposed section 180.1 to allow the Minister to delegate the enforcement of the above provisions to the Agency. Departmental officials point out that enforcement of the above is considered more efficient than by way of summary conviction, although proceeding by way of the latter is still possible under sections 173 to 176.

Clause 70 adds a new Schedule III to the Act listing bridges and tunnels Acts for purposes of proposed Part V.1.

8. CTA Part VII – Repeals, Transitional Provisions, etc. (Clause 71)

Clause 71 provides for a number of transitional provisions.

Despite sections 4 to 6 of the CTA (which, as amended, reduce the number of CTA members from seven to five), the members of the CTA, including its Chairperson and the Vice-Chairperson, who hold office on the coming into force of those sections continue to hold office according to the conditions of their appointments until the expiry of their respective terms (clause 71(1)).

Despite section 4 of the CTA, the Governor in Council may not appoint or reappoint members of the Agency under sections 7(2)(a) or 8(2) respectively of the CTA until the number of members of the Agency, other than the Chairperson and the Vice-Chairperson, is less than three (clause 71(2)).

Despite section 4 of the CTA and clause 71(2) above, the Governor in Council may appoint or reappoint members of the Agency to be designated as the Chairperson and Vice-Chairperson of the Agency under section 7(3) of the CTA (clause 71(3)).

C. Part 2 of Bill C-44 – Amendments to the *Railway Safety Act* (Clauses 72-73)

Section 34 of the *Railway Safety Act* currently provides that an order or emergency directive made by the Minister may be made an order of the court of any superior court, and must be enforced in the same manner as an order of the court. Cause 72 amends the provision to make reference to the Federal Court as well as a superior court.

Clause 73 proposes to add to the *Railway Safety Act* a new Part IV.1 entitled *Police Constables*, comprising proposed sections 44 and 44.1. The provisions concerning the appointment of railway police constables currently contained in section 158 of Part III of the

CTA are moved to proposed section 44 of the *Railway Safety Act*. Departmental officials point out that the reason for moving the provisions is because they fit more appropriately under the railway safety legislation, which governs safety and security of railway operations.

Clause 73 also adds a totally new provision, proposed section 44.1, requiring each federally regulated railway company to establish procedures for dealing with complaints against railway police constables; designate one or more persons to be responsible for implementing the procedures; and designate one or more persons to receive and deal with the complaints. As well, the railway company must file with the Minister a copy of its procedures in that regard and implement any recommendations made by the Minister, including recommendations concerning how these procedures are to be made public. This provision ensures that there is an independent review mechanism to review complaints regarding railway police constables.

D. Part 3 of Bill C-44 – Proposed New VIA Rail Canada Act (Clause 74)

When VIA Rail Canada Inc. was established in 1977, through incorporation under the *Canada Business Corporations Act*, separate legislation was not developed for it. Clause 74 proposes to enact specific legislation, the proposed VIA Rail Canada Act (hereinafter referred to as the VRCA), comprising 20 sections. In essence, the proposed VRCA changes the governance of VIA Rail Canada from the *Canada Business Corporations Act* to the proposed Act. It does not change the Corporation's corporate status, its operations or its status as a Crown corporation.

1. Title and Interpretation (Proposed Sections 1-2)

Section 1 of the proposed Act entitles it the VIA Rail Canada Act. The following references to sections are to sections of the proposed VRCA.

Section 2 sets out the definitions for purposes of the proposed VRCA. "Board" is defined to mean the board of directors of the Corporation established by section 12. "Corporation" is defined to mean VIA Rail Canada, resulting from the continuance of VIA Rail Canada Inc. under section 3.

2. Continuance (Proposed Sections 3-6)

Section 3 provides for the continuance of VIA Rail Canada Inc. (incorporated on 12 January 1977 under the *Canada Business Corporations Act*) under the proposed VRCA under the name VIA Rail Canada.

Section 4 provides that the proposed Act is deemed to be the charter of the Corporation for purposes of Part X (pertaining to Crown corporations) of the *Financial Administration Act*. Section 5 states that on the coming into force of section 3 of the proposed VRCA, the *Canada Business Corporations Act* ceases to apply to the Corporation; in other words, the Corporation is then governed by the proposed VRCA.

Section 6 states that the shares of VIA Rail Canada are cancelled without any repayment of capital in respect of them; as well, the capital constitutes a capital surplus of the Corporation. Departmental officials point out that shares are not necessary because VIA Rail Canada is a sole shareholder corporation.

3. Responsible Minister (Proposed Section 7)

Section 7 states that the Minister of Transport is the appropriate Minister in relation to the Corporation for purposes of Part X of the *Financial Administration Act*.

4. Mandate, Capacity and Powers (Proposed Sections 8-10)

Section 8 provides that the mandate of VIA Rail Canada is to manage and provide a safe and efficient rail passenger service in Canada. It also allows for the Corporation's use of excess equipment, facilities, and resources for commercial purposes ancillary to its mandate with a view to reducing the need for payments to the Corporation out of the Consolidated Revenue Fund. Section 9 provides that the Corporation has the capacity and, subject to the proposed VRCA, the rights, powers and privileges of a natural person. It also states that the Corporation may borrow money, subject to Part X of the *Financial Administration Act*. The Corporation is not an agent of the federal Crown (section 10).

5. Head Office and Board of Directors (Proposed Sections 11-12)

The Corporation's headquarters are in Montréal, unless otherwise specified by the Governor in Council (section 11). Section 12 establishes a board of directors comprising up to 15 directors, including the chair and the chief executive officer. The chair and the chief executive officer are appointed by the Governor in Council, while the other directors are appointed by the Minister, with the approval of the Governor in Council. Departmental officials point out that the above is consistent with the size of the current board of directors, and that the process for appointments is consistent with the *Financial Administration Act*.

6. Chair (Proposed Section 13)

Section 13 requires the chair to preside at meetings of the board and to carry out other duties set out in the corporate by-laws. In the event of the absence or incapacity of, or vacancy in the office of, the chair, the board may designate another director to serve as the chair for up to 90 days or, with the approval of the Governor in Council, for a longer period.

7. Chief Executive Officer (Proposed Section 14)

Section 14 specifies that the chief executive officer is responsible for the direction and management of the business and day-to-day operations of the Corporation and must perform any duties assigned by the corporate by-laws. In the absence of the chief executive officer, the board may appoint an officer or employee of the Corporation to perform the duties of the chief executive officer for up to 90 days or, with the approval of the Governor in Council, for a longer period.

8. Transitional Provisions (Proposed Sections 15-20)

Sections 15 to 20 are transitional provisions that allow for the Corporation to continue operating as is. Members of the board of directors, the chair and chief executive officer continue to hold office until the expiry of their terms. The property, rights and obligations, legal actions or claims, and by-laws of VIA Rail Canada Inc. are continued under VIA Rail Canada.

E. Part 4 of Bill C-44 – Consequential and Coordinating Amendments and Coming Into Force (Clauses 75-88)

The clauses in Part 4 of the bill make a number of consequential and coordinating amendments to other Acts and provide for the coming into force of provisions of the bill.

COMMENTARY

Departmental officials point out that a thorough statutory review of the *Canada Transportation Act* was completed in 2001, and the proposed amendments in Bill C-44 are the culmination of extensive discussions and consultations aimed at updating the legislative framework governing significant components of Canada's national transportation system.

To date, it would appear that there have been few comments regarding the bill in the press. A couple of articles have quoted Mr. Ian May, the Chair of the Western Canadian Shippers' Coalition. For example, an article in the *National Post*(2) states that one amendment maintains existing provisions regarding access to railway track, which, if enacted, would mean that railways will maintain control over who has access to their networks. The article states that the move has angered some shipping groups, especially in western Canada. According to Mr. May, railways enjoy a monopoly in many parts of Canada, giving them the ability to charge whatever rates they want. He maintains that the best way to level the playing field is to force CN and CP Rail to open their networks to other railways that can offer better rates and service.

The same article notes that in recent years, the federal government has been caught in a tug of war between shippers pushing for open access on one hand and the railways demanding their networks not be expropriated on the other. CN Rail has come out against any laws that might compel it to open its network to other railways. "Forced access is unacceptable," said Mark Hallman, a spokesperson for the company. "It's inappropriate to have bureaucrats in Ottawa setting criteria [for who can use our tracks]." Similarly, the article states that CP Rail, which last fall announced that it was considering an investment of up to $500 million to increase the capacity of its network in western Canada, has warned that it will not embark on the project unless it gets a commitment from the federal government that it will not give in to shippers' groups by bringing in new rules that would force the railways to open up their tracks to competition.

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(2) John Greenwood, "CP Rail to examine Transportation Act amendments: Railway says it will not spend planned $500-million if tracks are to be shared," *National Post*, 29 March 2005, p. FP4.