Legislative Summary **LS-527E**

BILL C-11: TRANSPORTATION AMENDMENT ACT

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26 May 2006

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LEGISLATIVE HISTORY OF BILL C-11

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	4 May 2006	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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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TABLE OF CONTENTS

Page

Page

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BIBLIOTHÈQUE DU PARLEMENT

BILL C-11: TRANSPORTATION AMENDMENT ACT*

BACKGROUND

On 4 May 2006, the Hon. Lawrence Cannon, Minister of Transport, Infrastructure and Communities, introduced Bill C-11, an Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts, in the House of Commons. With several notable exceptions, the bill is similar in most aspects to its predecessor bill, C-44,(1) the Transportation Amendment Act, which was introduced in the House of Commons on 24 March 2005 (1st Session, 38th Parliament). That bill died on the *Order Paper* with the dissolution of Parliament, not having gone beyond first reading. According to departmental officials, the amendments to the *Canada Transportation Act* (CTA) contained in Bill C-11 focus on balancing the interests of communities, consumers, commuters and urban transit authorities with those of air and rail carriers.

Notable differences between Bill C-11 and its predecessor bill, C-44, include the following:

- Bill C-44 contained a number of amendments to provisions in Division IV, entitled *Rates, Tariffs and Services*, of Part III (pertaining to railway transportation) of the CTA. The proposed amendments related to the setting of rates payable by railway shippers for the transport of goods and are not included in Bill C-11.

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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) Bill C-44 was 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). That bill also died on the *Order Paper* with the prorogation of Parliament. For a legislative summary of Bill C-44, see David Johansen, *Bill C-44: Transportation Amendment Act*, LS-504E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 19 April 2005. For an overview of the key differences between Bill C-44 and its predecessor, Bill C-26, see David Johansen, *Transportation Amendment Acts*: *Notable Differences Between Bill C-44 and Its Predecessor, Bill C-26*, PRB 05-01E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, April 2005.

- Bill C-11 proposes to add a new provision in Part III of the CTA that permits the Minister to enter into an agreement with a provincial authority to authorize the latter to regulate a railway in the same manner and to the same extent as the Minister may regulate the construction, operation and safety of a federally regulated railway as well as the rates and conditions of service; this provision was not included in Bill C-44.

- Bill C-44 contained a number of amendments to certain provisions in Part IV of the CTA respecting final offer arbitration – a process that is generally available to a shipper who is dissatisfied with the rates or conditions of service proposed by a railway company; those amendments are not included in Bill C-11.

- Bill C-44 proposed to add a new Part V.1 to the CTA pertaining to international bridges and tunnels. Instead of being included as part of the broader package of amendments to the CTA in Bill C-11, the relevant provisions are now contained in a separate stand-alone bill, C-3, the International Bridges and Tunnels Act, which was introduced in Parliament on 24 April 2006.(2)

- Bill C-11 proposes to add number of detailed provisions respecting a review procedure for, and appeals of, administrative monetary penalties in Part VI of the CTA; these provisions were not included in Bill C-44.

- Bill C-44 proposed to introduce a new VIA Rail Canada Act that would have changed the governance of VIA Rail from the *Canada Business Corporations Act* to the proposed Act; the relevant provisions are not included in Bill C-11.

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;

- 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;

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(2) For a legislative summary of Bill C-3, see David Johansen, *Bill C-3: International Bridges and Tunnels Act*, LS-524E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 8 May 2006.

- 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; 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; and

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

DESCRIPTION AND ANALYSIS

A. Amendments to the *Canada Transportation Act* (Clauses 1-52)

1. CTA Application and Part I – Administration (Clauses 1-13)

a. Conflicts between International Agreements and the *Competition Act* (Clause 1)

Clause 1 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 2)

Section 5 of the CTA contains a Declaration of National Transportation Policy. Clause 2 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 3-5)

Clauses 3 and 4 amend sections 7 and 8 to reduce the number of Agency members from seven to five, and clause 5 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. Enforcement of Agency Decision or Order (Clause 6)

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 6 amends section 33 to provide that a decision or order of the Agency may also be made an order of the Federal Court.

e. Mediation (Clause 7)

Clause 7 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.

f. Transportation Information (Clauses 8-10)

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 8 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 9) 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 10 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.

g. Industry Review (Clause 11)

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 11 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.

h. Review of Act (Clause 12)

Clause 12 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.

i. Review of Mergers and Acquisitions (Clause 13)

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 15 and, instead, replaced in clause 13 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 offences and 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 14-27)

a. Interpretation and Application (Clause 14)

Clause 14 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 14 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 14 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 15)

Clause 15 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 13, 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 16)

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 16 adds the requirement that the licence must not have been suspended.

d. Licence for Domestic Service (Clauses 17-23)

Section 64 concerns the notice requirement regarding a licensee's proposal to discontinue or reduce domestic service. Clause 17 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 18 changes the 60-day period to 120 days.

Clause 19 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 19 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 19 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)) and section 66(7), which is related to section 66(6).

Clause 20 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 22 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 23 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 24)

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 24 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 25)

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 25 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 26-27)

Clause 26 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 27 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 27 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 28-47)

a. Definitions (Clause 28)

Clause 28 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 29)

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 29 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 30-33)

Clauses 30 to 33 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 30). 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 31). Proposed section 105.1 authorizes the Governor in Council to make regulations respecting the above matters (clause 32).

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 33). 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 34)

Clause 34 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. Transferring and Discontinuing the Operation of Railway Lines (Clauses 35-42)

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 35 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 36 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 37 and 38 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 39 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 40 amends section 146. Proposed section 146(1) provides 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, the railway company may discontinue operating the line on providing notice of the discontinuance to the Agency. Thereafter, 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 over the line. Similarly, under proposed section 146(2), if the railway line, or any interest of the railway company in it, is sold, leased or otherwise transferred by an agreement through the process set out in sections 143 to 145 or otherwise, the railway company that conveyed the line has no obligations under the Act in respect of the line as and from the date the transfer was completed and has no obligations with respect to any operations by any public passenger service provider over the line as and from that date. Section 146 previously referred only to VIA Rail Canada Inc. as opposed to any public passenger service provider.

Clause 42 adds proposed sections 146.2 to 146.5 to the Act.

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 146.4 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.

f. Maximum Grain Revenue Entitlement (Clause 43)

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 43 amends the paragraph to remove the reference to "incremental" and to add at the end of the paragraph the following: "and the costs incurred by the prescribed railway companies for the maintenance of cars that have been so obtained."

Clause 43 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.

g. Dispute Resolution (Public Passenger Service Providers and Railway Companies) (Clause 44)

Clause 44 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.

h. Agreements to Apply Transportation Law to Provincial Railways (Clause 46)

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 46 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.

i. Agreements with Provincial Authorities (Clause 47)

Clause 47 proposes to replace current section 158 with a provision that permits the Minister to enter into an agreement with a provincial authority to authorize the latter to regulate a railway in the same manner and to the same extent as the Minister may regulate the construction, operation and safety of a railway as well as the rates and conditions of service.

4. CTA Part IV – Final Offer Arbitration

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.

Unlike its predecessor, Bill C-44, Bill C-11 proposes no changes to the final offer arbitration provisions in Part IV of the CTA.

5. CTA Part V – Transportation of Persons with Disabilities

Bill C-11 proposes no changes to Part V of the CTA.

6. CTA Part VI – General (Clauses 48-52)

a. Administrative Monetary Penalties (Clauses 48-52)

Clauses 48 to 52 amend the provisions of the CTA pertaining to administrative monetary penalties.

Clause 48 adds proposed section 176.1 after the heading *Administrative Monetary Penalties* and before section 177. Proposed section 176.1 provides that for purposes of sections 180.1 to 180.7, "Tribunal" means the Transportation Appeal Tribunal of Canada established by section 2(1) of the *Transportation Appeal Tribunal of Canada Act*.

Clause 49 amends section 177 to become section 177(1) and adds a new section 177(2) 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. Proposed section 177(2) also permits the Minister to, by

regulation, prescribe the maximum amount payable for each violation, not exceeding $5,000 in the case of an individual and $25,000 in the case of a corporation. Clauses 50-52 amend sections 178-180 to reflect the above amendments to section 177.

Clause 52 also adds proposed sections 180.1 to 180.8 to the Act. These provisions were not included in Bill C-11's predecessor, Bill C-44.

A person who has been served with a notice of violation has the option of either paying the amount of the penalty specified in the notice or filing with the Tribunal a written request for a review of the facts of the alleged contravention or of the amount of the penalty (proposed section 180.1).

Payment by a person served with a notice of violation of the amount specified in the notice precludes further proceedings against that person in respect of the contravention of the designated provision (proposed section 180.2).

A person who is served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed must, on or before the date specified in the notice or within any further time that the Tribunal on application may allow, file a written request for a review with the Tribunal at the address set out in the notice (proposed section 180.3(1)). On receipt of that request, the Tribunal must appoint a time and place for the review and notify the Minister and the person who filed the request accordingly (proposed section 180.3(2)). The member of the Tribunal assigned to conduct the review must provide the Minister and the person who filed the request with an opportunity consistent with procedural fairness and natural justice to present evidence and make representations (proposed section 180.3(3)). The onus is on the Minister to establish that a person has contravened a designated provision (proposed section 180.3(4)). A person who is alleged to have contravened a designated provision is not required, and cannot be compelled, to give any evidence or testimony in the matter (proposed section 180.3(5)).

If a person fails to pay the amount of the penalty specified in a notice of violation within the time specified in the notice and does not file a request for a review, the person is deemed to have committed the contravention alleged in the notice. In that case, the Minister may obtain from the Tribunal a certificate indicating the amount of the penalty specified in the notice (proposed section 180.4).

If, at the conclusion of the review, the Tribunal member who conducts the review determines that the person has not contravened the designated provision that he or she is alleged

to have contravened, the Tribunal member must without delay inform both the person and the Minister of the determination. In that case, subject to proposed section 180.6, no further proceedings under the bill can be taken against the person in respect of the alleged contravention (proposed section 180.5(a)).

Alternatively, if, at the conclusion of the review, the Tribunal member determines that the person has contravened the designated provision that he or she is alleged to have contravened, the Tribunal member must without delay inform the person and the Minister of the determination and, subject to regulations made under clause 43(3), of the amount determined by the Tribunal member to be payable by the person in respect of the contravention. In that case, if the amount is not paid to the Tribunal within the time allowed by the Tribunal member, the latter must issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person (proposed section 180.5(b)).

The Minister or a person affected by a determination by a Tribunal member under proposed section 180.5 may, within 30 days after the determination, appeal it to the Tribunal (proposed section 180.6(1)). A party that does not appear at a review is not entitled to appeal a determination, unless they establish that there was sufficient evidence to justify their absence (proposed section 180.6(2)). The appeal panel of the Tribunal assigned to hear the appeal may either dismiss it or allow it and, in the case of the latter, may substitute its decision for the determination appealed against (proposed section 180.6(3)). If the appeal panel finds that a person has contravened the designated provision, the panel must without delay inform the person of its finding and, subject to regulations made under section 177, of the amount determined by the panel to be paid by the person in respect of the contravention. If the amount is not paid to the Tribunal within the time allowed by the Tribunal, the Tribunal must issue to the Minister a certificate in the form that may be established by the Governor in Council setting out the amount required to be paid by the person (proposed section 180.6(4)).

If any of the various time limits (i.e., for the payment of an amount determined in a notice, for the request for a review, or for an appeal) have expired or an appeal has been disposed of, then, on production in any superior court, a certificate under proposed section 180.4, 180.5(b) or 180.6(4) shall be registered in the court (proposed section 180.7(1)). Once registered, a certificate has the same force and effect, and proceedings may be taken in respect of it, as if it were a judgment in that court obtained by the federal Crown against the person named in the certificate for a debt of the amount set out in the certificate (proposed section 180.7(1)).

Proposed section 180.7(2) allows for reasonable costs and charges related to the registration of the certificate to be recovered in the same manner as if they had been certified and the certificate had been registered under proposed section 180.7(1). Amounts received by the Minister or the Tribunal under clause 54 are deemed to be public monies within the meaning of the *Financial Administration Act* (proposed section 180.7(3)).

In the case of a violation referred to in section 177(1), every reference to the "Minister" in proposed sections 180.3 to 180.7 is to be read as a reference to the Agency or a person designated by the Agency (proposed section 180.8(1)). In the case of a violation referred to in section 177(2), the Minister may delegate to the Agency any power, duty or function conferred on the Minister under Part VI of the CTA (proposed section 180.8(2)).

B. Amendments to the *Railway Safety Act* (Clauses 53-54)

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. Clause 53 amends the provision to make reference to the Federal Court as well as a superior court.

Clause 54 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 54 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.

C. Transitional Provisions (Clauses 55-58)

Clauses 55-58 provide for a number of transitional provisions.

D. Consequential and Coordinating Amendments and Coming Into Force (Clauses 59-64)

Clauses 59-63 make a number of consequential and coordinating amendments to other Acts, and clause 64 provides 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-11 are the culmination of extensive discussions and consultations aimed at updating the legislative framework governing significant components of Canada's national transportation system. Transport Canada held wide-ranging consultations with other federal departments, provincial and territorial governments, concerned agencies and stakeholders.

In an article that appeared in the *Ottawa Citizen* on 5 May 2006,(3) a former Air Travel Complaints Commissioner, Bruce Hood, was quoted as expressing his concern that the proposed elimination of that position would make it increasingly difficult for Canadians to resolve problems with airlines. His concern is that complaints would get lost in the Canadian Transportation Agency, into whose operations the previous function of the Commissioner would be incorporated. The last Commissioner completed her term in September 2004 and no replacement was named.

In the same article, a Canadian Transportation Agency spokesperson, Jadrino Huot, stated that permanently dismantling the Office of the Commissioner, who acted as an advocate for airline passengers to the federal government and the media, could put limits on the Agency's ability to fight for change in the airline industry. "Definitely with a commissioner there was a higher profile for the program, with the reports and public interventions," he said. "The commissioner, in his or her role, was in more direct contact with the airline industry, as well as through his or her position was able to identify some trends or to make specific recommendations about some system issues or systemic problems that were observed." He went on to express the view that the proposed changes will effectively reduce the Agency's role to dealing with airline complaints on a case-by-case basis instead of being able to tackle larger, ongoing problems with airline service or quality.

(3) Carly Weeks, "Air complaints head could be gone for good: Tories' proposal of dismantling office has former commissioner 'concerned,'" *Ottawa Citizen*, 5 May 2006, p. A3.