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THE REPORT OF THE CANADA TRANSPORTATION ACT REVIEW

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THE REPORT OF THE CANADA TRANSPORTATION ACT REVIEW

INTRODUCTION

From July 2000 to July 2001, a panel of persons appointed by the federal government conducted a review of the *Canada Transportation Act* (CTA). The Review, carried out under the authority of section 53 of the Act, was presented to the Minister on 1 July 2001. The Minister tabled the report(1) in the House of Commons on 18 July, and public release followed soon after.

The subject of the Review, according to section 53, was to be the operation of the *Canada Transportation Act* and other Acts that pertain to the economic regulation of a mode, or modes, of transportation under the legislative authority of Parliament. The mandate, and a list of issues requiring special attention that was directed to the panel by the Minister of Transport, will be examined further below. First, both the legislation and the Review will be put in context.

BACKGROUND

The *Canada Transportation Act* is considered to be the "umbrella legislation" of Transport Canada.(2) Under the Constitution, the federal government has jurisdiction over rail, marine, air and (although it is not widely known) inter-provincial highway transport. The last item – inter-provincial highway transport – was delegated to the provinces in 1954(3) shortly after

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(1) Canada Transportation Act Review Panel, *Vision and Balance: Canada Transportation Act Review*, Ottawa: Public Works and Government Services Canada, 2001.

(2) Assistant Deputy Minister, Policy, Transport Canada, before the Standing Committee on Transport and Government Operations, 1 March 2001.

(3) Canada Transportation Act Review Panel (2001), p. 251.

the Winner Decision[4] made clear that it was a federal jurisdiction. Until 1967, each mode had operated under the authority of a separate act that regulated its activity, but at that time they were brought together under the *National Transportation Act*.

A. The *National Transportation Act*

The *National Transportation Act* (NTA) of 1967 was multi-modal in that it brought together the regulation of rail, marine, air and highway transport under one agency (the Canadian Transport Commission). Also, the NTA introduced a fair degree of commercial freedom and competition in the rail sector, which had previously been tightly regulated by government.

Significantly, the section which would have exercised federal jurisdiction in inter-provincial highway transport was never implemented because of provincial objections.[5] The deregulatory aspect of the NTA was that the government was no longer to be directly involved in the setting of freight rates: the railways were free to set their own rates, indeed they were exempted from the *Competition Act* so they could do so jointly. (This deregulatory measure was said to introduce inter-modal competition, i.e., with the highway mode.)

The late 1970s and 1980s saw the economic deregulation of transportation in the United States. (The essentials of economic deregulation are reviewed below.) Canada responded in the late 1980s with the *National Transportation Act*, *1987* (NTA '87) which contained numerous provisions to introduce competition among railways (intra-modal competition). These provisions are of direct relevance to the current review.

B. The *National Transportation Act, 1987*

The NTA '87 provided shippers with several tools to attain competitive rail service (e.g., extended interswitching, Competitive Line Rates, Final Offer Arbitration, dispute resolution). At the same time, however, it maintained close regulation of some aspects of railway operations, significantly restricting rail line abandonment. The regulatory authority remained with a re-organized Canadian Transport Commission, renamed the National

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(4) Richard J. Schultz, *Federalism, Bureaucracy and Public Policy: The Politics of Transport Regulation*, Montreal: McGill-Queen's University Press, 1980, pp. 14-15.

(5) *Ibid*.

Transportation Agency. The NTA '87 was given a year-long statutory review in 1993.(6) The NTA Review Commission made many recommendations to rebalance what some saw as a shipper bias in the NTA '87.(7)

These recommendations were reviewed by the Standing Committee on Transport(8) and together formed the basis of Bill C-101, which became law in June 1996 as the *Canada Transportation Act* (CTA).

C. The *Canada Transportation Act*

The major sections of the CTA focus on three areas: the operation of the again-renamed Canadian Transportation Agency; air transportation (which also has other significant legislation, notably the *Aeronautics Act*); and, most extensively, railways.

The rail section deals with:

- railway construction and operations;
- financial transactions of railway companies;
- rates, tariffs and services;
- transferring and discontinuing the operation of railway lines (formerly known as rail line abandonment);
- transportation of western grain;
- final offer arbitration;
- transportation of persons with disabilities; and
- other matters, such as accounting conventions.

In the present day, rail transportation in Canada is used primarily for freight, and the products tend to be low-value, bulk commodities such as coal, ore, forest products and grain. Much of this transportation takes place in western Canada. In Eastern Canada, rail traffic tends to be more industrial products such as new automobiles, either moving in containers or on specialized rail-cars.

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(6) National Transportation Act Review, *Competition in Regulation: Policy and Legislation in Review*, Ottawa: Supply and Services Canada, 1993.

(7) *Ibid*.

(8) Standing Committee on Transport, *Report of the Recommendation of the National Transportation Act Review Commission*, June 1993.

The CTA can be considered umbrella legislation for all modes of transportation because it contains in section 5 an articulation of national transportation policy, modelled on the 1967 Act. The policy is comprehensive and, having stood the test of time, appears well founded. It contains a clear articulation of the economic principle upon which it is based, i.e., that carriers compete within and among modes, while having regard for safety, equity and regional concerns. A key point is that each carrier should bear a fair proportion of the real costs of facilities and services provided to that carrier at public expense.

The CTA was amended by two Bills, both of which received Royal Assent on 29 June 2001. Bill C-26 was entitled *An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence*. It allowed for the merger of Air Canada and Canadian Airlines. Bill C-34, *An Act to amend the Canada Transportation Act*, implemented changes to grain transportation that flowed from both the Grain Handling and Transportation Review (commonly known as the Estey Report)[(9)] and the report of the Grain Handling and Transportation Facilitator (commonly known as the Kroeger Report).[(10)]

Because of the recent attention paid to the pressing issues in air and grain transportation during the legislative process related to Bills C-26 and C-34, it was expected that the major focus of the CTA Review would be on rail issues, other than those dealing specifically with grain.

D. Economic Regulation

Economic regulation, as opposed to other forms of regulation such as safety, refers to government intervening in the marketplace to put restrictions on the commercial activity of firms for public policy reasons.

The usual forms of economic regulation deal with: restricting entry to, and exit from, the market; and placing restrictions on what services may be offered and what price can be charged for that service.

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(9) Hon. Willard Estey, *Grain Handling and Transportation Review, Final Report*, Ottawa: Transport Canada, Ottawa, 1998.

(10) Hon. Arthur Kroeger, *Consultations on the implementation of grain handling and transportation reform*, Ottawa: Grain Handling and Transportation Facilitator, 1999.

Economic deregulation, often just called deregulation, consists of lessening or eliminating various forms of economic regulation. Often, if economic and safety regulation have been linked together in the past, the introduction of deregulatory policies requires that safety regulations be reconsidered and recast, often to a higher standard.

The deregulation of transportation has been on the public agenda in western developed economies since 1978, when U.S. airlines were deregulated, and has been a central policy approach since the mid-1980s. Open competition and open entry work best where the cost of entry is low (low fixed cost), and this is often achieved where the infrastructure is provided by a third party, historically the government.

Cost structures can vary among different modes of transportation because of the nature of the mode and the government's historical role. The difference of cost structures is most extreme between those two freight modes that are in direct competition: rail and highway transport.

Rail is the rarity in that it provides its own infrastructure at great expense and then reserves it for its exclusive use. Highway transport both uses infrastructure provided by the public and shares it with private automobiles – which might almost be considered another mode of transportation. The cost of entry to the rail mode is prohibitively high; entry to the highway mode is relatively modest.

KEY ISSUES IN THE ECONOMIC DEREGULATION OF RAILWAY OPERATIONS

The rail mode is unique in that normally the operator owns, maintains (and pays taxes on) the infrastructure, over which he/she has exclusive use. This aspect of railway operations raises two difficult issues that have to be resolved to implement the two aspects of the national transportation policy (CTA, section 5): *intra*-modal (i.e., rail-rail) and *inter*-modal (i.e., rail-highway) competition. The policy, to be precise, declares as its objectives "a safe, economic, efficient and adequate network of viable and effective transportation services at the lowest total cost…"; further, the policy declares that those objectives are most likely to be achieved when "all carriers are able to compete, both within and among modes of transportation…."

The two issues that need to be resolved are: (1) how to provide competitive rail alternatives where they do not exist; and (2) how to ensure fair competition between railways

(which operate on their own infrastructure) and highway transport (which operates on publicly provided infrastructure, i.e., public highways).

To these two issues, a third is added for Canadian railways: (3) how to ensure that Canadian rail regulation is both fair to Canadian carriers in an increasingly integrated North American market, and further that Canadian regulations are defensible under the terms of the North American Free Trade Agreement (NAFTA) that, to a degree, formalizes that economic integration.

A. Competitive Alternatives in the Rail Mode

The question is how to provide competitive rail alternatives. The answer is to provide one rail carrier with access to another rail carrier's rail line. Shippers consider this a key way in which to provide real competition and hence competitive prices; to railway companies, it is anathema and they refer to it as "forced access."

Because of the configuration of the rail lines, many rail shippers have direct access to two rail carriers, or indirect access by the use of interswitching. This means they have competitive service and hence competitive freight rates. Other rail shippers may only be served by one rail carrier, and are unable to get indirect access to another rail carrier because they are beyond the 30 km zone where interswitching applies.

These latter shippers – who feel they have no realistic competitive service – call themselves "captive shippers." As well as the lack of rail competition, they feel that the highway is not a realistic alternative as it is a very expensive mode for low-value, bulk commodities.

Railways, on the other hand, dispute whether captive shippers really exist. However, railways do defend their ability to have differential pricing (economically referred to as price discrimination). Under differential pricing, the railways charge one purchaser of rail services a higher price than that charged to another purchaser of identical services; the latter is charged less so they won't go to an alternative service.

That certainly implies that the purchaser who is willing to pay the higher price (albeit grudgingly) has much less choice and, if not "captive" by a rigid definition, can certainly be said to have no alternative service that is economically viable for them.

As noted, rail transportation is of special importance for bulk commodities, located predominantly in the West, which because of their low value are particularly sensitive to

price increases. One bulk commodity – wheat – has special issues, because of the role of the Canadian Wheat Board. These issues have been dealt with extensively by the recent Estey Report and the Kroeger Report.

The debate about how to achieve competitive rail alternatives underlay all the steps mentioned above: the development of the NTA '87 from 1984 to 1987; the NTA Review Commission in 1993; and the development of the CTA from 1993 to 1996. And this debate underlies the current review as articulated in submissions to the Review: rail shippers(11) believe there is not enough competition to ensure reasonable services and prices and therefore a range of tools are needed to ensure competition; the rail carriers(12) believe there is good, reasonably priced service in all but a few isolated cases and therefore there is only a need for a few additional competitive tools under very particular circumstances that must be conditions of their use.

These positions are clear, and clearly opposed, and it is very hard to come to a compromise position between them.

B. Competition Between Railways and Highway Transport

The question is how to ensure fair competition between railways, which operate on their own infrastructure, and highway transport, which operates on publicly provided infrastructure.

Rail carriers argue that highway carriers don't pay their way but are reluctant to say directly that highway carriers should pay their full costs because that is tantamount to saying highway carriers should significantly raise the prices they charge their customers – customers the railways share. Highway carriers say that they pay their way many times over through the amount of fuel tax they are required to pay to government. Government generally doesn't accept that position; it regards fuel tax as general revenue and does not believe that these monies should be dedicated to highway use.

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(11) Canadian Shippers' Summit, *Vision and Balance: Canada Transportation Act Review*, CD-ROM, submissions from The Canadian Shippers' Summit, Public Works and Government Services Canada, Ottawa, 2001.

(12) See CN, CP and The Railway Association of Canada in *Vision and Balance*, *ibid*.

C. Rail Regulation in the North American Context

For many years, the two major railways – CN and CP – have had operations in the United States. For the past ten years, they have each to a degree integrated their systems as one operating unit, from three perspectives: managerial, operational and commercial. On occasion they make the point that it is difficult, for example for statistical reasons, to separate their Canadian operations from their U.S. operations.

Increasingly, the railways are arguing that it is necessary and desirable to be able to regard North America as one continental market throughout which the regulations should be harmonized.(13) For example, in the policy paper just cited in footnote 13, they refer to the "Continental Reality" but fail to define it further.(14)

The following statement is a reasonable argument: if operations are integrated, they need harmonized regulations to operate most efficiently. But it is less clear what harmonization of regulation means. It is not clear if it is being proposed that the Canadian, U.S. and Mexican governments work together to develop joint rail regulations, or indeed, if the governments are prepared to do that. Another possible interpretation is that Canada model its regulations on the U.S. regulations or simply adopt the U.S. regulations, but that has not been stated in those terms.

THE TASK OF THE CTA REVIEW

A. Mandate and Terms of Reference

The task of the CTA Review was a very substantial one to complete in just one year. The core mandate is expressed in Section 53 of the *Canada Transportation Act*, which states:

> [To] carry out a comprehensive review of the operation of this Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation and transportation activities under the legislative authority of Parliament.

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(13) Railway Association of Canada, *Developing a Continental Transportation Policy for Canada*, Ottawa: 31 March 2001.

(14) *Ibid*., p. 22.

The objective is to "assess whether the legislation referred to…provides Canadians with an efficient, effective, flexible and affordable transportation system" and to recommend amendments to the national transportation policy (set out in CTA section 5) and the legislation generally.

In addition, the Minister directed the panel specifically to give special attention to the following issues:

B. Competitive Rail Access Provisions

> The review panel shall consider proposals for enhancing competition in the railway sector, including enhanced running rights, regional railways and other access concepts. These concepts need to be assessed in the broader context of increasing North American integration and ensuring cost effective service for shippers over the long term. The review panel shall submit an interim report on access issues to the Minister of Transport by December 31, 2000.

C. Other Issues

> The following issues shall be considered in connection with any other matters dealt with by the review panel:
>
> a) the overall effectiveness of the current legislative and regulatory framework in sustaining the high levels of capital expenditures required to enhance productivity and promote innovation
>
> b) the extent to which the current framework supports the efforts of Canadian transportation players to adapt to the new e-business environment and to meet global logistics requirements
>
> c) the extent to which the current framework is appropriate for dealing with the public policy issues that may arise from newly emerging industry structures
>
> d) the extent to which the current framework provides the government with the necessary powers to support sustainable development objectives

e) the advisability of specific measures designed to preserve urban rail corridors for future mass transit use in the rail line abandonment process

f) whether the Canadian Transportation Agency should have the powers to set "maximum" as opposed to "actual" interswitching rates (This matter has been raised by the Standing Joint Committee for the Scrutiny of Regulations).

Considering both the legislative mandate and the further directives of the Minister, we can see that the Review's primary focus is the economic deregulation of the rail industry, and to a lesser degree the other modes. Secondly, the key aspect of rail deregulation is competitive access of one rail operator to the lines of another. Thirdly, the Review Panel was asked to consider how the current legislative and regulatory framework is appropriate for the following concerns (among others): the need for capital; new industry structures; the environment; and urban rail corridors.

Finally, we shall see that in the course of their inquiry, the Panel members saw the need to inquire into two other very large topics: the provision of roads and highways, and urban passenger transportation.

THE DECISIONS OF THE CTA REVIEW

The Panel's core mandate was a review of the economic regulation of transportation as contained in the CTA and other Acts. Implicit in this is the need to look at the key issues identified above: how to achieve competition in rail services; how to have rail-truck competition; and how this can be done in the trans-border and trans-jurisdictional North American context. Of these issues, competition in rail services is most central to the review of the CTA.

As if to highlight this last point, the Panel was directly charged to look at issues of competitive rail access as a means of achieving greater competition within the rail mode, and issue an interim report on the subject. Past history suggested it would be a contentious area that would present difficult decisions.

A. Interim Report, December 2000

The Interim report, as required by the Minister, tried to address what was called the "vexing" problem of rail access. This is a complex problem, and the main stakeholders – shippers and rail carriers – have strongly opposed views; as a result, the Review found it hard to arrive at conclusions in the time allotted. It reiterated the issues and suggested some criteria for deciding.

What is striking is that the views of the shippers and the carriers are diametrically opposed. Many rail shippers regard themselves as captive to rail transport and maintain that this situation results in "inappropriately high freight rates." They are particularly concerned about "differential pricing," also known as price discrimination. Railways, on the other hand, believe that shippers generally receive good service at reasonable rates, and that reasonable rates are ensured by a fair degree of competition.

This stark divergence of views is reminiscent of what was heard by the Grain Handling and Transportation Facilitator and to which he referred with dismay in the letter of conveyance of his report.(15) It also suggested that the issue of competitive rail access would be hard to resolve. The Panel noted that recommendations in the final report would be developed in the larger context of continental developments and wider developments in freight transportation in non-rail modes, presumably highway transport.

B. Issues Under Consideration, January 2001

Soon after the interim report, the Panel issued a document entitled *Issues Under Consideration*. In it, the Panel gave a status report after its first six months of consultation and research, noting that: the rail access question was indeed contentious; there were important issues relating to the adequacy of investment for both private and public infrastructure; and competition was needed in the air transport field. The other issues inherent in their mandate were also briefly touched on. Significantly, the Panel noted that, following their deliberations, they had identified the following as important issues: newly commercialized infrastructure providers (including airports, air navigation and ports); and roads and urban transit.

C. Final Report Recommendations

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(15) "The problem of reaching consensus was exacerbated by a degree of fear and mistrust on the part of each stakeholder group vis-à-vis the others that exceeded anything I have encountered elsewhere in the private sector." Letter from the Grain Handling and Transportation Facilitator to the Minister of Transport, September 29, 1999.

Recommendations on the deregulation of railway operations, which hinges on competitive rail access, are contained in chapter 5 of the Panel's final report. The reasoning in this chapter and its recommendations build on the background discussion of both the interim report of December 2000 and chapter 4 ("Competitive Rail Access: Issues Defined") of the final report.

These rail access issues constitute the core of the mandate of the Review and will be dealt with in detail.

Recommendations were made in other areas, including: the merger review process; the airline industry; marine transport; commercialized infrastructure; highways; ferries, intercity buses and passenger trains; urban transportation; persons with disabilities; the trucking industry; e-business; environment; and public policy and other legislative changes. These areas and relevant recommendations will be dealt with in less detail.

Finally, the important area with no recommendations is national transportation policy. The Panel suggested guidelines to modify the existing national transportation policy. These will be reviewed.

COMPETITIVE RAIL ACCESS AND SHIPPER PROTECTIONS (Recommendations 5.1 to 5.21)

The substance of the 21 recommendations related to railway access and shipper protection is reviewed below. The recommendations have been reordered and grouped where possible to highlight both the salient features of what are relatively complex operational and contractual relationships, and the legal issues involved.

A. Shipper Protection

Under the recommendations of the Panel, the following regime would prevail:

- A railway would publish in its tariff the level of service attached to the rates in the tariff. The Canadian Transportation Agency would have authority to determine whether that level of service had been met.
- Shippers would not need to apply to the Agency for "relief" to prove substantial commercial harm.

- Final Offer Arbitration would remain, and in an arbitration, an arbitrator would be required to consider whether a shipper had alternative, effective, adequate and competitive means of transport.
- The railways would be required to identify and publish a list of rail sidings in operation, and give 60 days notice to remove a siding from operation.
- Grain shippers would eventually lose special protection and be dealt with on a more commercial basis.

B. Competitive Rail Access

Under the Panel's recommendations, there would be three means of competitive access: interswitching; competitive connection rates; and running rights.

Interswitching:

- Interswitching limits would be retained. The Canadian Transportation Agency would determine the maximum rate, and the parties could enter into lower rates by commercial agreement if they wished. The Agency rates are to be commercially fair and reasonable to all parties.

Competitive Connection Rates:

- The current Competitive Line Rates would cease to exist and would be replaced by a provision for a competitive connection rate (CCR).
- Shippers would request a CCR from the Canadian Transportation Agency (in the past, shippers were not required to obtain an agreement with a connecting carrier). CCRs would be available only to shippers with no "alternative, effective, adequate and competitive" means of transporting the goods.
- The Agency would be responsible for determining that a CCR is required. Following a 30-day attempt by the shipper and the railway to negotiate a new rate, the Agency (if no new rate is arrived at by the parties) would establish a CCR. The CCR would be in effect for one year.
- A shipper could not: request final offer arbitration of any rate being reviewed or established under the CCR process; request final offer arbitration for the portion of the movement by the connecting carrier; or request a CCR for a rate established by final offer arbitration.

- The competitive connection rate, as the interswitching rate, would have to be commercially fair and reasonable. However, it is further recommended that the rate fall "in the range of the 75th percentile to the 90th percentile of revenue per tonne-kilometre for movements of the same commodity over similar distances and under the same conditions and levels of service as the CCR portion, together with the interswitching rate for the first 30 kilometres."
- The Governor in Council could suspend the CCR provision if it is determined that railway viability is seriously affected by the operation of the CCR provision.

Running Rights:

Although noting that running rights were not originally intended for competitive access, the Panel suggested that maybe they should be and devoted many recommendations to how they might work. Under the Panel's recommendations:

- The proposed running rights would be applied for by another rail operator. The operator could seek traffic solicitation rights and would have to advise the infrastructure owner in advance. The guest operator would: be required to publish rates (with level of service) and give reasonable notice of withdrawal; have the ability to enter into confidential contracts; and have the authority to limit liability.
- The Canadian Transportation Agency would apply a public interest test, which addresses many considerations, including adequacy of existing service, the existence of competitive alternatives, and the financial impact on the host railway.
- The right to interswitching, competitive connection rates and final offer arbitration would be suspended.
- Compensation would be negotiated between the two railways involved; if they failed to reach an agreement, either could appeal to the Agency for a rate. Rates would be of two or three types: with traffic solicitation rights (incremental costs, plus a contribution to common costs); without traffic solicitation rights (incremental costs, plus possible premium based on willingness to pay); and passenger/commuter users (incremental costs, plus return on capital assets).
- Care would be taken by the Minister to ensure that the measures to implement the above recommendations comply with international and internal trade law.

C. Assessment

As mentioned above, the question of how to achieve conditions of open competition necessary for deregulation to work is particularly difficult in the rail mode. It is difficult because the carrier has ownership of and, in general, exclusive access to the infrastructure.

All of the many access provisions reviewed are means which attempt to achieve competitive-like conditions. To a degree, they are all artificial devices designed to mimic real competitive conditions. As such, they are sensitive, i.e., they can give an unfair advantage to one party if they are "out of balance." Further, where proxy market conditions cannot be created, some provisions give to the shipper direct protection against monopoly power by the railways.

If the tools are too strong, the railways are hamstrung and unfairly burdened; if they are too weak, the shippers have no real recourse and can suffer monopoly-like abuse by the carriers or feel that they are negotiating from a position of weakness.

It is obvious that the Panel has taken extreme care to balance the concerns of both sides and achieve a compromise. The recommendations reflect carrier concerns for the economic viability of the carrier industry (indeed, the Panel was directed to do so in the Minister's directive). At the same time, the Panel did hear the shippers' concerns. The Panel members acknowledged that, without adequate shipper protection, in certain situations railways could or would take advantage of their position of strength to derive greater revenue from their customers than they would be able to under conditions of real competition.

Interswitching, which is generally supported, remains fairly similar to what it was. The new competitive connection rates may work but appear tightly constrained as to how and when they can be put into effect. Running rights introduce a guest carrier as an important player between the shipper and carrier. If the essence of the need for competitive access provisions is that shippers and carriers cannot agree, it should be considered whether introducing a third party would simplify this.

These many recommendations in the area of competitive rail access and shipper protection may bring some improvements to the existing regime, but it is less certain that they will resolve the rail competition question. It may well be that in the current transportation context the problem is intractable, and any attempt to satisfy both sides is bound to leave both somewhat disappointed.

It is at least implied that viewing rail recommendations in a wider context of non-rail modes might point the way to solutions. Perhaps what is meant is that more equitable rail-highway competition could contribute to a viable rail industry that wouldn't feel the need to resist so strongly the competitive provisions for the rail mode.

THE MERGER REVIEW PROCESS (Recommendations 6.1 to 6.4)

The Panel recommended the establishment of a new process for reviewing proposed transportation mergers. The stated goal was to have a mechanism to examine issues of broad national or trans-national interest separately from competition issues.

Significantly, it would involve the Minister of Transport who would, if he/she thought there were public interest issues, appoint a public interest evaluator. The evaluator would evaluate the merger in the light of public interest issues identified by the Minister. This is proposed for all transportation modes under federal jurisdiction.

The Competition Bureau and the public interest evaluator would be encouraged to work closely with other countries when considering trans-national mergers.

These recommendations do address the issue of the continuing vacuum that was created when the authority to review mergers was taken from the Canadian Transportation Agency in 1996. However, it does beg the question why the authority is simply not restored to the Agency. It would seem that more than 100 years of regulating railways by the Agency, and its predecessors, has given it some expertise and institutional memory in the area, which could be useful.

This Agency's experience also seems valuable in light of the recommendation for multi-modality. The Agency has a history of regulating several modes and was specifically organized that way at the time of the 1967 Act. It would also seem likely that many of the trans-national links recommended have already been in place for many years.

THE AIRLINE INDUSTRY (Recommendations 7.1 to 7.7)

The Panel reconsidered the situation in the airline industry in Canada, which had recently been examined at the time of Bill C-26. The situation will also be reviewed in two years time.

As well, the Panel considered changes that would stimulate the airline industry through greater competition and made several recommendations to improve the competitive environment. Some of these recommendations were of a technical and detailed nature (one even touching specifically on Air Canada's Aeroplan).

The Panel made the following recommendations:

- raise the limit on the voting shares of Canadian airlines that can be held by foreigners to 49%;
- give carriers recourse to the Canadian Transportation Agency for disputes over access to airport facilities; and
- remove the Agency's powers to review passenger and cargo fares on monopoly routes upon complaint.

However, the most spectacular recommendation (based on a view that the government should actively pursue Canada's interest in a more liberal international environment for air services) was the following:

> That the government enter into negotiations with the United States and Mexico to create a North American Common Aviation Area in which carriers from Canada, the U.S. and Mexico would compete freely…

This is not a technical issue. This is a political decision for the federal government to make if it wishes to. In the past, the government has not wished to follow this course, and in press reports following the release of the current report, the Minister has reiterated that position.(16)

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(16) Alan Toulin, "Extend NAFTA to the skies, panel says: Federal Group urges free-for-all among continent's airlines," *National Post*, 19 July 2001, p. A1.

MARINE TRANSPORT (Recommendations 8.1 to 8.5)

The Panel makes a number of recommendations on deregulation, commercialization and divestiture for the marine mode.

These recommendations touch on: cost recovery of marine services; eventual elimination of the liner-conference exemptions from competition law; eventual elimination of the restrictions on entry to domestic shipping in the *Coasting Trade Act*; and the elimination of the 25% duty on vessels built or purchased outside Canada.

GOVERNANCE OF THE NEWLY COMMERCIALIZED INFRASTRUCTURE PROVIDERS (Recommendations 9.1 to 9.15)

This chapter deals with three areas of infrastructure, formerly owned and operated by the federal government, that have been commercialized in recent years: airports, air navigation, and ports. At present, there is no legislation governing airports, but the points made by Panel members appear to reflect current government thinking that will guide airport legislation currently being developed. Recommendations are only made in the areas of airports and ports.

A. Airports

In the area of airports, the Panel made the following action recommendations (in addition to reiterating the need for legislation): establish principles to govern the setting of airport fees; remove the airports' tax exemption that dates from the era of their federal status; and create restrictions on for-profit airport subsidiaries. (An example of a for-profit subsidiary might be an airport management consulting service that did work for other airports.)

In addition, the Panel recommended some support for smaller airports and touched on the contentious Airport Emergency Intervention Service regulations.

Perhaps counter to the independent, private nature of commercialized airports, the Panel also recommended that commercialized airports adhere to guidelines developed by Transport Canada in regard to their performance reporting.

B. Ports

In the ports area, which is governed by the *Canada Marine Act*, the Panel raised the following points: the Crown does not need to be involved in liability; the borrowing limits of ports should be removed; and the Minister should have less power to appoint Directors.

As was the case with airports, the Panel also recommends: restrictions on port subsidiaries; the need for ports to develop performance measurement systems; and a review of the Act in 2002.

PAYING FOR THE ROADS (Recommendation 10.1)

The Panel identified the importance of roads and highways at the mid-point of their inquiry and raised it in their *Issues Under Consideration* paper.

The final report gave an overview of: the road and highway system in the country; traffic trends; and two major issues – funding the system, and environmental concerns. The Panel points out, "Economists suggest that achieving the efficient amount of road use – and balanced use among all modes – is a question of charging users for the real costs they impose."(17)

The real cost would include infrastructure costs, wear and tear on the roads themselves, and social costs. Social costs would include the costs of accidents, environmental degradation and even congestion costs (for slowing down others). Over the past 10 to 20 years, a lot of work has been done to develop costs; such a system could be implemented if the political will to do so was in place.

In the past, there has been widespread public opposition in Canada to toll roads; however, perhaps as a result of environmental concerns and the economic "belt-tightening" of the past decade, the public has become more open to the concept (and the reality) of such roads. Highway 407 in Ontario, the Coquihalla Highway in British Columbia, and the Confederation Bridge to Prince Edward Island are often cited as examples.

It is generally accepted that highway users – especially heavy commercial vehicles – do not pay their full costs. Automobiles cause relatively little road wear, but impose heavy environmental and congestion costs; heavy commercial vehicles impose very significant road wear costs.

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(17) Canada Transportation Act Review Panel (2001), p. 181.

The most likely solution to achieve equitable funding and modal choices that reflect social costs is the creation of a road agency that would be responsible for providing the infrastructure and raising the needed funding from the users of the network. This is often referred to as the New Zealand model. Recommended ten years ago by the Royal Commission on National Passenger Transportation,(18) it has also been the subject of study by the Standing Committee on Transport of the House of Commons.(19)

Specifically, the Panel recommended that the World Bank/New Zealand concepts of road and transport funding and management agencies be adapted for Canada. This approach would include the following features:

- users should pay for roads, by means of appropriate charges and fees;
- charges for roads should be based on costs imposed, differentiated so far as practical by the nature of vehicle, type of road, and amount of congestion;
- managers of the road network should have responsibility for both charging and spending decisions;
- users should be involved in decisions on charges and expenditures; and
- alternatives to road spending in other modes should be allowed to compete for road funds.

The Panel believes that charging for external costs, even at a low level initially, would cause significant changes in road use. These changes could include: automobile users combining car trips or shifting them to off-peak times; a broad shift to transit and more efficient vehicles and fuels; and very importantly, a shift from larger, heavier trucks (that cause significant highway damage) to lighter-weight vehicles (that cause less road damage) and perhaps some shift to transport by train and ship or to greater use of intermodal movements.

FERRIES, INTERCITY BUSES AND PASSENGER TRAINS (Recommendations 11.1 to 11.8)

This chapter is an update of the Royal Commission on National Passenger Transportation, which reported in 1992.(20) Basing its thinking on the Commission's principle

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(18) Royal Commission on National Passenger Transportation, *Directions: The Final Report of the Royal Commission on National Passenger Transportation*, Vol. 1, Ottawa: Minister of Supply and Services, 1992, p. 130.

(19) House of Commons Standing Committee on Transport, Report, *A National Highway Renewal Strategy*, 2nd Session, 35th Parliament, February 1997.

(20) Royal Commission on National Passenger Transportation (1992).

that users of the system should pay for the costs they incur, the Panel makes a number of recommendations.

It was recommended that government should continue to commercialize passenger services, including divestiture to the private sector and other levels of government. Specifically, subsidies to ferries and VIA should be reduced. As well, VIA should be restructured to establish: a full cost- recovery policy for rail service in the Quebec City-Windsor corridor; and a separate operating entity, for the corridor, that should be given commercial freedom in its governing legislation.

Also, in regard to bus passenger travel, it was recommended that governments continue the process already initiated to address regulatory fragmentation in the bus industry; and that the National Safety Code be structured to make all vehicles carrying paying passengers subject to a consistent pattern of safety regulation.

These changes are more easily said than done.

THE NATIONAL INTEREST IN URBAN TRANSPORTATION
(Recommendations 12.1 to 12.4)

As with newly commercialized infrastructure and the provision of roads and highways, urban transportation was an area not central to the mandate, but one which was identified by the Panel as requiring their examination and consideration.

It is important for several reasons. A significant amount of urban transportation is commuting by private automobile, with the attendant problems of congestion, vehicle emissions and urban sprawl. Secondly, this traffic interacts with freight traffic and urban delivery (often called local cartage). Thirdly, with urban sprawl bringing the edges of cities together, it is often difficult to differentiate between urban transportation and intercity traffic.

Drawing on research commissioned for the Review, the Panel raised important issues and made recommendations to ameliorate the current situation. The Panel also raised the following important points: in an era of deregulation, commercialization and privatization, urban transit remains a monopoly of municipal agencies; and a full user-pay approach has not been applied to transit. Of course, it can well be argued that highway users do not pay the cost they incur.

The Panel made the following recommendations: transit operating agencies and their funders should seek the most cost-effective ways of improving their services (this is often achieved through operational changes rather than expensive capital projects); and experimentation with innovative forms of service (smaller vehicles, shared taxis) should be encouraged.

A very interesting recommendation is that urban transit be permitted to qualify for funding from road user charges. If one authority is deciding whether to give a certain amount of money to roads or transit, it is likely that in many cases, in terms of cost per person moved, transit would be the better choice. In addition, transit authorities could be made to focus on their key task by having payments to transit authorities made on the basis of their actual performance in inducing shifts from private automobile use to transit.

PRESERVING URBAN RAIL CORRIDORS
(Recommendations 13.1 to 13.6)

An important issue often raised in urban transportation is how to ensure commuter use of traditional rail lines which for historical reasons often give access to the central business district. This issue is critical in two situations: when rail lines are still being used for freight traffic; and when the railway wishes to abandon a line.

For lines still in use, the Panel recommended that section 118 of the *Canada Transportation Act*, as amended by the Panel's proposals, be made available to commuter authorities (at present, the section merely requires the carrier to produce a tariff for a shipper who requests one).

Also, the point is made that future commuter rail contracts should be made public and that current contracts be made public unless it can be demonstrated that they contain commercially sensitive information.

The Panel recommends that section 145 of the *Canada Transportation Act* be amended so that a railway which intends to discontinue lines be required to offer those lines to commuter rail authorities before offering them to a municipal or district government.

In regard to abandoned lines it must be remembered that, because these rights of way go through the centre of downtown, it is extremely valuable real estate and the railway companies wish to maximize their return. To ensure the price isn't excessively high, it is

recommended that land being transferred at net salvage value be valued at no more than its "across the fence" value (i.e., the same value as neighbouring land). Also, spur lines should be included in the current process by which lines are offered for sale to public authorities.

Most interestingly, it is suggested that the purchase of railway lines for use as urban transit corridors qualify for funding. This is similar to what is suggested for urban transit.

OTHER RECOMMENDATIONS

The Panel examined a number of other areas and made several recommendations that varied from the very specific to those of a very broad nature.

Transportation Accessibility for Persons with Disabilities: "That the attendant air fare issue be resolved as quickly as possible."

The Trucking Industry: The relevant chapter touched on a number of important issues: the federal role in trucking; the problem of a two-tier regulatory system; the spectre of re-regulation; and NAFTA issues. However, the chapter generated just one recommendation of an exceedingly general nature:

> That federal, provincial and territorial governments collectively recognize the need for a cohesive framework to govern the multiple elements of the trucking sector. Further that jurisdictions establish a time frame for developing and implementing an effective framework to govern all elements of the trucking industry.

The Impact of E-Business on Transportation: In this area, the Panel made two recommendations. The first was to establish a cooperative program with the national carrier associations in all modes to facilitate and encourage the development of e-business skills. The second was to develop e-government initiatives aimed at streamlining both internal and government/industry communication processes.

The Environment and Sustainable Development: This chapter, as with the trucking chapter, touched on the importance of transportation for greenhouse gas emissions and climate change and referred to sustainable development. Reference was also made to the work on transportation

done by the National Climate Change Strategy group. The lone recommendation, again, was quite general.

> That the statement of objectives of national transportation policy in the *Canada Transportation Act* recognize the environmental goals of national policy.

PUBLIC POLICY DEVELOPMENT

Most of the recommendations of the chapter dealing with this issue revolve around the need for data and research from which government policy can be developed. (Such data is often lost when a transport industry is deregulated.)

There is also an important point that transport policy and legislation should be guided by underlying principles, such as those identified in the report, that are common to all transportation modes.

In addition, the Panel made seven more legislative changes of a technical nature. Most involve the Agency and legislative review issues. The Panel recommends that section 53 of the *Canada Transportation Act* be brought into line with the national transportation policy, as amended by the Panel's proposals.

NATIONAL TRANSPORTATION POLICY

The Panel noted what many submissions had brought forward in regard to a national transportation policy. Despite talk of "vision," the practical call was for more federal funding. There is a call for federal leadership, yet also a desire to protect current provincial jurisdiction and allow for regional variance.

Although asked to recommend changes to the policy statement, the Panel only made proposals, suggesting it should fall to the Minister and Parliament to draft the statement.

The proposed policy guidelines closely reflect the wording and spirit of the current policy statement in section 5 of the CTA.

CONCLUSION

The Review has given a clear reiteration of the national transportation policy and the principles upon which it is based, as well as the need for "competition within and among the various modes of transportation."

So far, stakeholder reaction to the report has been muted. The most direct response was that of the Minister of Transport, who pointed out that: the proposed continental open skies could lead to poorer service in smaller, less-profitable markets; and, in general, introduction of foreign carriers to the domestic market should not be regarded as a panacea.(21)

To consider the overall import of the report, therefore, it may be useful to return to the three questions raised above in the section on the economic deregulation of railway operations. These questions are:

- how to provide competitive rail alternatives, specifically how to allow rail access;
- how to ensure fair competition between the rail and the highway modes; and
- how to regulate railways that operate throughout North America.

A. Competitive Alternatives in the Rail Mode

The interim report tried to address the long-standing and "vexing" problems inherent in the issue of rail access. The Panel found it difficult to arrive at conclusions in the time allotted. It reiterated the issues and suggested some criteria for deciding.

In the final report, the Panel worked hard to arrive at a compromise solution. It may be that, with positions so clearly opposed, it is virtually impossible to please both parties, and it is also possible that a compromise will leave both parties at best ambivalent in their reaction. Finally, it is always hard to know before the fact if specific provisions will actually operate equitably for both sides in day-to-day commercial reality.

The Review's recommendations may bring some improvements to the regulation of railways in regard to enhancing competition, but it is not at all certain that, if enacted, the package of recommendations would resolve the rail access question.

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(21) Toulin (2001).

B. Competition Between Railways and Highway Transport

Perhaps less central to the formal mandate of the Review, but key to any inquiry into the rail industry is the following issue: how to ensure fair competition between railways, which operate on their own infrastructure, and highway transport, which operates on publicly provided infrastructure.

The Review has broached the question of roads and highways and implicitly rail-highway competition. The members of the Panel made the important point that rail issues cannot be resolved definitively without highway transport being taken into account. Considering that 70% of freight (by value) moves by highway, this view is undoubtedly correct. The Panel reviewed all the important issues related to the provision of roads and highways, which are key to understanding rail-truck competition, and reiterated recommendations regarding highway funding, which were originally made ten years ago and later reviewed by the House of Commons Standing Committee on Transport.

C. Rail Regulation in the North American Context

In the *Issues Under Consideration* document, the Panel asks the following question: To what extent should Canada's laws and regulations be harmonized with those of the United States?

In its final report, noting that harmonization is one of the seven guiding principles that directed its thinking, the Panel says: "harmonization or compatibility in all facets of transportation among countries is a policy imperative that should be supported and facilitated by legislative mechanisms."

It is not spelled out if the recommendations made in regard to rail, air and marine are in harmony with U.S. regulations. However, discussions on the trucking industry specifically address the North American Free Trade Agreement (NAFTA). The Panel notes that much has been achieved but raises specific outstanding problems that call for federal action.

More importantly, in reference to the National Transportation Act Review Commission's findings of almost a decade ago, the Panel acknowledges the collective efforts of all the jurisdictions in the country to promote compatibility of standards but notes that uniformity of trucking standards across the country still has not been achieved.

D. Other Issues

The Review Panel addressed several other important issues – roads and highways, urban transportation, and airports – that arose in the course of the inquiry.

As noted above, Panel members examined the issue of roads and highways and how they are paid for. The need for the federal government to show leadership was highlighted.

Ironically, highway transport may be the key issue for the railway industry and government regulators. As the railways say, highway policy is railway policy.(22) The Panel's inquiry into highway issues has brought this to the fore.

Urban transportation seems remote from issues of rail freight and air travel, but it is intimately related. Private automobile travel is dominant in intercity travel (under 500 km); intercity and commuter travel and consequent road use is difficult to separate, and commuting to and from work by private automobile remains a costly but dominant choice by consumers. It is therefore vital that urban transportation, and the role of transit and the private automobile, be considered in any review of transportation policy. This has been done in the current report.

The most significant change in transportation in Canada since deregulation has been the federal withdrawal from transport operations, notably as it relates to infrastructure. Because air travel is the dominant mode of travel for trips over 500 km, this policy change is probably most significant in airport operations, and has been done without the benefit of guiding legislation. The Auditor General(23) has expressed concerns, and the department is addressing those concerns and developing legislation. The discussion of airports in the current review could prefigure the legislation and the relevant issues that may arise in consultations. This area is now also a necessary aspect of the consideration of transportation policy.

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(22) Railway Association of Canada, (2001) p. 3.

(23) Auditor General of Canada, *Report to the House of Commons, Matters of Special Importance – 2000*, Ottawa: Minister of Public Works and Government Services Canada, December 2000, Chapter 10.