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Abstract

In order to fully comprehend the working of an administrative board or tribunal it is first necessary to establish the principles which form the basis of their operations. The concept of justice and equanimity between parties has come down to us in the form or theory of "a rule of law". In attempting to examine the role of the Board of Transport Commissioners in so far as it affects railways in Canada the concepts of natural justice and impartiality form the test pattern in the light of which the history, development, and operation of transportation is examined and the procedure, practice and problems of the Board are discussed.

An examination of the historical development, character, functions and practices of the Board, bearing in mind the evolution of the transport industry and the requirements of a "rule of law" even in administrative or quasi-judicial bodies, leads to the conclusion that it cannot be described accurately by either "administrative" or "judicial" designations. It is, nevertheless, possible to devise a "rule of law" in the administrative sense. It is the central thesis of this paper that the Board of Transport Commissioners for Canada is a judicial body possessing those aspects of administrative tribunals which are conducive to flexibility and informality in the discharge of its supervisory and regulatory functions.

AN EXAMINATION OF THE ROLE OF
THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA
AS A REGULATORY TRIBUNAL

by

Arthur R. Wright

A thesis
submitted to Carleton University
in partial fulfillment of the requirements for
the degree of Master of Arts in Public Administration.

School of Public Administration
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Preface

The Board of Transport Commissioners for Canada is a statutory body established by Parliament for the purpose of supervising and regulating some of those aspects of transportation which fall within the legislative jurisdiction of the dominion government. A study of the Board's role is necessarily limited by the inadequacies of the secondary literature dealing with the subject. For this reason reliance has been placed upon an examination of the statutes under which the Board receives its authority and upon a selection of those cases which in the author's opinion illustrate the primary functions and most noteworthy practices of the Board. Assistance in corroborating factual material has been received from officials of the Board of Transport Commissioners. The responsibility for interpretation must remain that of the author.

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Chapter I

Introduction

The Rule of Law and Administrative Bodies

We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.¹

These words, written in 1888, gave scholarly recognition to the changing theory of government which had had its beginnings in the Factory Act of 1802 and which has since expressed itself in the increased intervention of the state in those economic and social matters which profoundly affect the day to day activities of the individual. From the time of the Reform Act of 1832 the movement away from the laissez-faire policy of the previous century in England began to give way to

an impulse of mixed humanitarian and democratic source to improve through positive state action the general conditions of life of the people. ... Democratic legislatures began gradually to seek out ameliorating expedients of a regulatory, conservatory and social service nature; to a degree, the Sheriff of Nottingham had become Robin Hood.²

This change in the conception of the proper role for government was a slow but inexorable one, fraught with

¹ Maitland, F.W., The Constitutional History of England, (Cambridge, 1961), Paperback Edition, p. 501.

² Hopkins, E.R., "Administrative Justice in Canada", Canadian Bar Review, XVII:9 (November, 1939), p. 625.

opposition from the vested interests of the day but encouraged by the ideal of the equality of man.

As the functions of government grew in breadth and in scope it was inevitable that Parliament through lack of time and lack of expert ability would be unable to cope with the increasingly heavy load of detailed legislation which was required for the efficient administration of the new services. Slowly the legislative functions of Parliament were to be delegated to the administrative branches of government through statutory authority in those areas in which Parliament was no longer competent to legislate in detail. "The emergence of what has been called in sombre fashion a 'headless fourth branch of government'"³ with its resultant body of law concerning administrative matters was the phenomenon which Professor Maitland recognized while his contemporaries held firm in their adherence to the ideal of a "rule of law" as enunciated by Professor Dicey in his Introduction to the Study of the Law of the Constitution.

Dicey's "rule of law" was posited upon three chief principles which he held to be fundamental to the British Constitution. Firstly, no man was to be punished except upon conviction of an offence of the law legally

³ Ibid., p. 619.

established before the ordinary courts.⁴ Secondly, no man was to be considered above the law but whatever his rank was to be subject to the law and to the jurisdiction of the courts.⁵ Thirdly, "the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts."⁶

This law of the constitution, Dicey explained, maintains that the rights of man are not the result of the constitution but rather that the constitution itself is a consequence of the rights of the individual and that the idea of a privileged position before the law is alien to the spirit of the constitution. In his words:

... there can be with us nothing really corresponding to the 'administrative law' ... of France. ... This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.⁷

Dicey's reluctance to accept the possibility of administrative law in England can be partially explained by the fact that the only system of administrative law with which he was familiar was the droit administratif

⁴ Dicey, A.V., Introduction to the Study of the Law of the Constitution, Tenth Edition, (London, 1961), p. 188.

⁵ Ibid., p. 193.

⁶ Ibid., p. 195.

⁷ Ibid., p. 203.

of France⁸ which he felt gave special privileges to administrative officials in their dealings with private citizens.⁹ He did not see that the French system of administrative courts was not partial to the administration but was rather performing the function of ensuring that the individual had recourse from unjust administrative action.

The chief difficulty in reconciling administrative law to the British Constitution seems to resolve around the misunderstanding of what it actually is and a mis-interpretation of the theory of separation of powers popularized by Montesquieu and revered by the constitutionalists of Dicey's day. It was thought to be impossible for the British system of government to survive if there was any combination of executive, legislative and judicial functions of government within any one branch.¹⁰ The Cabinet system of government in Britain and Canada had, however, created a link between the executive and legislative branches of government

⁸ The French system of administrative law and administrative courts is discussed in: Freedeman, C.E., The Conseil D'Etat in Modern France, (New York, 1961); Hamson, C.J., "The Executive and the Courts: The English Scene and its French Counterpart", Canadian Bar Review, XXV:2 (February, 1957), pp. 150-169; Hamson, C.J., Executive Discretion and Judicial Control, (London, 1954).

⁹ Wade, H.W.R., Administrative Law, (London, 1961), p. 7.

¹⁰ Finkelman, J., "Separation of Powers: A Study in Administrative Law", University of Toronto Law Journal II:2 (1936), p. 314.

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without apparent ill effect. Dicey sought to protect the individual from arbitrary and "non-responsible" decisions of the administration by recourse to his theory of the "rule of law" with which he felt "administrative law" was incompatible. In fact, the rights of the individual can be protected (although this has not always been the case) in a system wherein executive, legislative and judicial functions are combined by the provision of appropriate procedures of impartiality, fairness and appeal. Although it is impossible to decide exactly at what point administrative law made its appearance in the British system of government it is evident that it can no longer be stated to be incompatible with the customs and traditions of British government.¹¹

Definitions of administrative law are almost as numerous as the cases from which it is derived. If we accept the definition of law of Thomas Aquinas, that is, "an ordinance of reason made for the common good by the public personage who has charge of the community",¹² we can conclude that administrative law is:

... that portion of the statute law which prescribes the structure and functions of the state agencies, grants the rights and powers and defines the duties of the officials who carry on the

¹¹ Allen, C.K., Law in the Making, Sixth Edition, (London 1961), p. 519.

¹² Quoted in Goodhart, A.L., English Law and the Moral Law, (London, 1953), p. 5.

administration of government from day to day. It is a part of constitutional law, being concerned with the detailed powers of the executive branch of government.¹³

Administrative law also includes a large body of case law which has resulted from the determinations of numerous administrative, and quasi-judicial bodies which have been called upon to decide disputes arising from the exercise of administrative functions. Although this body of administrative judgements was for long denied the status of law by traditional constitutionalists it has now come to be generally accepted as an extremely important part of constitutional law. The critics have been answered in the following terms:

If law consists of rules which are recognized as obligatory, then there can be no ground on which the character of law can be denied to those rules which are recognized as obligatory by administrative tribunals. There is no magic in the fact that one tribunal is called judicial and another administrative, provided that both of them are governed by obligatory rules. The distinction between them lies in the fact that far more discretion is usually given to the administrative tribunal than is given to the court of law.¹⁴

The elements of administrative law are three in number: statute law dealing with administrative matters, decisions of administrative tribunals, and the rules and regulations

¹³ Corry, J.A., "Administrative Law and the Interpretation of Statutes", University of Toronto Law Journal, I:2 (1936), p. 286.

¹⁴ Goodhart, A.L., op. cit., p. 63.

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or delegated legislation laid down by regulatory departments, commissions and boards.

It is within the commissions, boards or tribunals that the theory of separation of powers is laid to rest for within these bodies the legislative, executive and judicial functions of government are combined in so far as they affect a particular area of jurisdiction. In the same way that Parliament realized it could no longer legislate in detail on matters requiring expert knowledge so it was realized that the ordinary courts could not possibly deal with all the administrative issues which came before them.¹⁵ The result has been the delegation of legislative power to the executive and the subsequent creation of semi-independent bodies to regulate, administer and adjudicate the ever-increasing number of governmental activities.

One of the most striking differences between the regulatory commission and the court is the fact that the regulatory body is not a passive referee waiting for disputes to be brought to it for judgement. The commission or board may initiate proceedings itself, take active steps to enforce a policy, and at the same time it must represent the public interest.¹⁶ It cannot be a totally impartial body in the manner of a court for it is

¹⁵ Allen, C.K., Administrative Jurisdiction, (London, 1956), p. 1.

¹⁶ Willis, J., Canadian Boards at Work, (Toronto, 1941), p. 116.

promoting a particular policy and its decisions are going to reflect the aims and ends of that policy. Immediately, it will be seen that the strictly judicial concepts of bias and natural justice cannot literally be applied to bodies which combine the judicial and administrative functions.

Boards and commissions are a natural outgrowth of the change in the nature of the state from laissez-faire to positive action. The limits of new government functions cannot ordinarily be fully defined or anticipated with the result that a flexible organization with discretionary powers is best suited to the changing needs of government. The traditional governmental functions can still be handled adequately by what has become known as departmental organization but many of the new services are partially judicial in nature and require some degree of expertise, two reasons for attempting to remove the service from direct political pressure. The need or desire in commercial type enterprises for speed and efficiency in managerial action preclude the organization of such services on a departmental basis as there must exist the ability to adapt quickly to changing business or financial conditions.¹⁷ These considerations and the fact that many government services are undertaken on an experimental basis form the

¹⁷ Ontario, Report, 1959, Committee on the Organization of Government in Ontario, (Toronto, 1959), p. 49.

most common reasons for the organization of boards, commissions and administrative tribunals.

The procedural rules of such bodies are important¹⁸ if they are to adequately carry out their functions independently of political control. They cannot be restricted to the court-room formality of the ordinary law courts without losing the desirable attributes of speed, economy and efficiency. In most cases they are permitted to devise their own rules and procedural practices in accordance with the particular subject matter with which they deal.

... Having an informal procedure and not being burdened by the ordinary rules of evidence, (they) can act more quickly and cheaply than the courts which are too slow and costly and have a complicated procedure.¹⁹

The minimum requirements of procedure necessary for the proper conduct of board's functions were laid down in a case before the Judicial Committee of the Privy Council wherein it was held that an administrative or executive board entrusted with judicial functions must act in good faith, without bias, and, in accordance with the principles of natural justice, grant both parties the opportunity to present their case.²⁰ It should, however, be noted that

¹⁸ Ibid., p. 28.

¹⁹ Pollard, R.S.W., Administrative Tribunals at Work, (London, 1950), p. xii.

²⁰ Local Government Board v. Arlidge, (1915) A.C. 120.

no tribunal is completely free in setting its procedure for it is always limited by the terms of its enabling statute.²¹ The problems involved in attempting to decide what is the proper procedure for an administrative or quasi-judicial tribunal have occasioned the appointment of numerous commissions of inquiry which have laid down general principles to which it is thought such bodies should conform.

The Donoughmore Committee,²² which reported in 1932, was appointed to investigate the problems of delegated legislation, and to decide whether too large a degree of independence had been given to government departments and civil servants in the United Kingdom. Its report followed the publication of Lord Hewart's attack upon the civil service²³ in which he warned of the dangers of delegated legislation²⁴ and the growing power of the bureaucracy. The Committee concluded that there was no great cause for alarm as a result of the creation of numerous semi-autonomous boards and tribunals as long as a few fundamental

²¹ Board of Education v. Rice, (1911) A.C. 179.

²² Great Britain, Report, 1932, Committee on Ministers' Powers, (London, 1932).

²³ Hewart, Lord C.J., The New Despotism, (London, 1929).

²⁴ The problems of delegated legislation which are not treated in this paper are ably discussed in: Silk, E.H., "The Publication of Regulations and Other Delegated Legislation", Canadian Bar Review, XX:7 (September, 1942), p. 604ff., Hewitt, D.J., The Control of Delegated Legislation, (Sydney, 1953), Carr, C., "Parliamentary Control of Delegated Legislation", Public Law, (Autumn, 1956), p. 200ff., and Kersell, J.E., Parliamentary Supervision of Delegated Legislation, (London, 1960).

precautions were taken to curb the incidence of abuse of such powers. It recommended that all decisions of a tribunal should be subject to review by the ordinary courts on questions of jurisdiction; that the principles of natural justice²⁵ must be observed; that reports of investigations carried out by a board which have a bearing on the decision of a case be provided for the parties; and that a simple procedure of appeal be provided as a matter of law.²⁶ The Committee rejected proposals which were put before it for the establishment of system of administrative courts as it shared the view of Dicey, presented above, that such institutions were not part of the British constitutional system.

In the United States the Attorney-General's Report on administrative practices formed the basis for the Administrative Procedure Act of 1946 which "lays down the general procedural principles which are to govern administrative exercise of powers of delegated legislation and adjudication".²⁷ The Act guaranteed the right of the accused to a hearing; attempted to establish an internal

²⁵ According to the principles of natural justice no man may be a judge in his own case, a party to a dispute must be given the opportunity to be heard and must know the case he has to meet, and is entitled to know the reasons for the decision.

²⁶ Fitzgerald, R.C., "Safeguards in the Exercise of Functions by Administrative Bodies", Canadian Bar Review, XXVIII:5 (May, 1950), p. 541.

²⁷ Schwartz, B., "Memo to Committee on Administrative Tribunals and Enquiries", Canadian Bar Review, XXXV:7 (August-September, 1957), p. 747.

division within agencies of the prosecuting and adjudicating functions and recommended a statutory provision for judicial review of administrative decisions.²⁸ In 1955 the Commission on Organization of the Executive Branch of Government, part of the second Hoover Commission, made further recommendations for the conduct of administrative matters.²⁹ It was suggested that an Administrative Court of the United States be established and that the procedure of tribunals, whose decisions would be reviewed by the Administrative Court, should follow more closely the pattern of the ordinary courts. The recommendation was also made that an Office of Legal Services and Procedure should be created to exercise a continuous surveillance over the tribunals and the problems of administrative procedure. Although these latter recommendations have not been carried out it is evident that the trend in the United States is toward a greater judicialization of the administrative process.³⁰

In Britain twenty-five years elapsed between the Donoughmore Committee report and the release of the Franks Committee Report³¹ in July of 1957. The Committee based its report and recommendations on the principle that:

²⁸ Jaffe, L.L., "The American Administrative Procedure Act", Public Law, (Autumn, 1956), pp. 222-229.

²⁹ Schwartz, B., op. cit., p. 752.

³⁰ Ibid., p. 754.

³¹ Great Britain, Report, 1957, Committee on Administrative Tribunals and Enquiries, (London, 1957).

... tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. ... The intention of Parliament to provide for the independence of tribunals is clear and unmistakable.³²

The British Committee did not go as far in its recommendations as the American committee had done in an effort to judicialize the administrative process. It did however recommend the creation of a Council on Tribunals³³ somewhat similar in nature to the Office of Legal Services and Procedure recommended by the Hoover Commission. The main recommendations of the Committee were approved and put into effect in the Tribunals and Enquiries Act of 1958. The Council on Tribunals would serve as a supervisory body reviewing the constitutions and workings of tribunals under its jurisdiction, considering and reporting on matters referred to it by the tribunals and advising on procedural change within the tribunals. It would also

³² Ibid., p. 9, para. 40.

³³ For a discussion of this proposal and other recommendations of the Committee's report see: Wade, H.W.R., "The Council on Tribunals", Public Law, (Winter, 1960), pp. 351-366; Willis, J., "Administrative Decision and the Law: The Views of a Lawyer", Canadian Journal of Economics and Political Science, XXIV:4 (November, 1958), pp. 502-511; Cheffins, R.I., "Administrative Tribunals - United Kingdom, Ontario Recommendations", Canadian Bar Journal, IV:2 (April, 1961), pp. 123-132; Robson, W.A., "Administrative Justice and Injustice: A Commentary on the Franks Report", Public Law, (Spring, 1958), pp. 12-31; and Abel, A.S., "The Franks Committee Study: A New Landmark", Canadian Public Administration, II:1 (March, 1959), pp. 7-18.

serve as an appellate tribunal on matters of fact while appeals on points of law and jurisdiction would be directed to the High Court.³⁴ The Committee also recommended that the rules of natural justice should be observed, that the tribunals should have the power to subpoena witnesses and compel the production of documents, that witnesses should be examined on oath and permitted to take part in open cross-examination, and that decisions should be fully reasoned and readily available to the parties.³⁵ Although no provision was made for the erection of administrative courts it may be concluded from the Committee's report and the subsequent act adopting its recommendations that the process of judicialization of tribunals is underway in England though not to the same extent as is the case in the United States.

In Canada the problems of administrative law and administrative tribunals have not been examined by a national commission. The Committee on the Organization of Government in Ontario examined some aspects of administration in that province but no attempt has been made to establish a uniform code for tribunals or standardize their procedures to insure that the interests of the public are protected. It was, however, suggested in the Gordon

³⁴ Robson, W.A., "Administrative Justice and Injustice: A Commentary on the Franks Report", Public Law, (Spring, 1958), p. 17.

³⁵ Ibid., p. 24.

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Committee Report that a uniform code of procedure for all tribunals should be established to guarantee:

... adequate notice to interested parties; full particulars of the case that has to be met; the right to inspect, before the hearing, reports or other documents that are to be received as evidence; and the right to be represented by counsel.³⁶

These minimum safeguards are generally accepted by tribunals in Canada, however, the specific interpretation of them and the diversity of forms of procedure adopted by various tribunals quickly dispel the idea that there exists in Canada any uniformity in the practice of boards, commissions and tribunals although fealty is declared for similar principles. Actual practice is as diverse as the functions for which boards have been established.

Therefore, in order to determine the degree to which such tribunals in Canada conform to the principles of justice and equity which have been developed in other countries it is necessary to examine the nature and practices of each body individually.

The concepts of justice and equity were not understood in the same sense by Professor Dicey as they are in our present "much governed nation". In his enunciation of "the rule of law" Dicey did not recognize that certain sections of English society did enjoy a privileged

³⁶ Ontario, Report, 1959, Committee on the Organization of Government in Ontario, (Toronto, 1959), p. 28.

position before the law, indeed it was just such a situation which he sought to prevent and which he feared would be the inevitable result of a separate law of administration. He idealized the "rule of law" as the opposite of "the rule of men" yet it is from his writing that our present definitions of natural justice and the rights of man are partially derived. It is then important and necessary to carry forward his principles and the subsequent developments which have been mentioned above in our consideration of the administrative process.

Bearing this background in mind we can proceed upon a firm footing to the examination of a particular tribunal as it has developed in the past and as it operates in the present. In the words of Professor K. C. Davis:

Repetitious talk about Dicey should yield to factual investigation inside the ministries and to realities about necessary limitations on judicial functions in reviewing administrative action.³⁷

The limitations in applying judicial methods to the process of adjudication by administrative bodies will be examined in a factual manner as they relate to a particular tribunal. The broader questions of delegated legislation and methods of reviewing administrative action by the courts or by a parliamentary commissioner will not be discussed. The decision to limit the scope

³⁷ Davis, K.C., "English Administrative Law - An American View", Public Law, (Summer, 1962), p. 139.

of the paper in this way is necessary in order that sufficient time and space may be devoted to an area of research which Professor Davis feels has received too little attention:

Instead of studying further such over-worked subjects as judicial review of administrative action, we need to learn more about the regulatory process itself, its internal arrangements and methods, and its external relations ... with executive departments, with independent agencies, with lobbyists, with regulated interests, with protected interests.³⁸

My choice of the Board of Transport Commissioners for Canada as an example of the administrative and regulatory process at work may seem somewhat strange, bearing in mind that the Board is actually a court of record. It will be seen, however, that it possesses a wide and important variety of administrative, regulatory and supervisory functions which make it, by environment if not by birth, a vital part of the administrative process. Furthermore, the extent of the judicialization of administrative tribunals in the United States and Great Britain has been commented upon and it seems reasonable that if a similar change is to take place in Canada it should appear first in the administrative body

³⁸ Davis, K.C., "Reflections of a Law Professor on Instruction and Research in Public Administration", The American Political Science Review, XLVII:3 (September, 1953), p. 749.

which is most closely alligned with the regular courts. The function of the Board as a control agency is not emphasized in detail. The most important and by far the largest part of the Board's work is related to the problems of railways in Canada and it is to this subject that I have confined myself. The paper concentrates on the composition, functions, practice and procedure of the Board in regard to railways but an attempt has been made to use these elements as illustrations of the importance of its work in the development of Canadian transportation. With these limitations in mind I have undertaken the following study of what has been described as "the most important administrative board in Canada".³⁹

³⁹ Currie, A.W., "The Board of Transport Commissioners as An Administrative Body", Canadian Journal of Economics and Political Science, XI:3 (August, 1945), p. 342.

Chapter II

History and Organization,

Pre-World War II Era

In the years immediately following Confederation the problem of regulation of railway growth and railway rate structures was not a matter of great concern to the federal government. Government policy was aimed at the improvement of rail facilities in order to establish a transcontinental railway system which would aid in binding the new country together "a mare usque ad mari". Even before confederation the individual colonies and private entrepreneurs had been involved in various railway building schemes. With such unrestricted competition being officially encouraged by the governments of the day it was inevitable that services would be duplicated and that the emergence of a homogeneous and unified national railway policy would be impossible. During the 1870's and early 1880's it became obvious that the federal government would have to take steps to prevent the cut-throat competition then existing in areas served by several railway lines and to prevent the imposition of abnormally high charges levied in those areas where one company enjoyed a monopoly.¹

¹ Canada, Annual Report, 1953, The Board of Transport Commissioners for Canada, (Ottawa, 1954), p.5.

The Conservative government in 1886 appointed the first of many royal commissions which were to study various aspects of Canada's railways problems in the years to come. The Commission established at that time was instructed to examine the entire matter of rate regulation and to examine the proposals for the Interstate Commerce Commission which were under study in the United States² in order to decide whether a similar body might serve the needs of Canadian railways.

The American railways had expanded in a period of unprecedented boom and were, in the early 1880's, beginning to suffer the results of uncontrolled expansion and unrestricted competition. Their problems were a result of the collapse of the construction boom and the evils of pooling and monopoly. The Interstate Commerce Act of 1887 forbade the objectionable practices referred to and created an independent regulatory commission to aid in the enforcement of the new transportation policy.³ The new commission was not given power to fix rates for the railway companies under its jurisdiction but could determine that a rate charged by a company was unreasonable and issue a court-supported order requiring the railway to adjust its rates.

² McLean, S.J., "The Work of the Board of Transport Commissioners for Canada", ed. Willis, J., Canadian Boards at Work, (Toronto, 1941), p. 8.

³ Cushman, R.E., The Independent Regulatory Commissions, (New York, 1941), p. 37.

The idea of an independent commission had encountered much opposition in the United States as it seemed to be an abrupt denial of the American doctrine of "separation of powers". Nevertheless, the need for some form of regulation was recognized and the Commission was established under the direction of the Secretary of the Interior as an executive agency endowed with quasi-judicial powers which would exercise a supervisory and executive power over the railways and would advise Congress on proposed legislation dealing with railway matters.⁴

The Royal Commission of 1886 examined the studies which had been made in the United States and, after sifting the arguments proposing and opposing an independent commission, recommended that the control of railway rates be assigned to the Railway Committee of the Privy Council, a sub-committee of the Cabinet. This recommendation was acted upon immediately and the Railway Committee of the Privy Council was given rather restricted powers of regulation. It should be noted however that the monopoly position given the Canadian Pacific Railway on its western lines was maintained as it was exempted from the jurisdiction of the Committee.⁵

As the building and westward expansion boom declined during the next decade the inadequacies of the

⁴ Ibid., p. 55.

⁵ Canada, Report, 1932, The Royal Commission to Inquire into Railways and Transportation in Canada, (Ottawa, 1932), p.79.

Committee as a means of regulation, although apparent to the Department of Railways and Canals, did not attract attention until the upswing in railway activity which began shortly after the Liberals' success in the election of 1896. With the commencement of two additional transcontinental railways, the Canadian Northern and the Grand Trunk Pacific, the problems of developing a rational transportation policy brought to light some well substantiated criticisms of the Railway Committee of the Privy Council. In the first place the members of the committee were not particularly familiar with railway problems and were politically vulnerable to outside influences. Secondly, the membership of the committee changed constantly making it impossible to obtain continuity in the interests represented or the views presented. Finally, the Committee sat only in Ottawa and made no specific provisions to ensure that all parties with an interest in a particular question had an opportunity to present their views.⁶ With the realization that the Railway Committee had not adequately performed the functions with which it had been entrusted the federal government, in 1902 appointed Dr. S. J. McLean to make a study of the problems of railway expansion, their control and regulation. His report, based upon a

⁶ Currie, A.W., Economics of Canadian Transportation, (Toronto, 1954), p. 421.

comparative analysis of the Interstate Commerce Commission in the United States, the Railway tribunals in Britain and the Railway Committee of the Privy Council in Canada,⁷ formed the basis for the Railway Act which was passed the following year. The new act created an independent regulatory commission, a

...board or authority which lies outside the regular executive departments and which has for its major job the exercise of some form of restrictive or disciplinary control over private conduct or private property.⁸

Generally, the newly constituted Board of Railway Commissioners was to have authority over all railways within the legislative jurisdiction of the Parliament of Canada.⁹ Those railways which operated wholly within the confines of one province under provincial charter remained outside the jurisdiction of the Board. More specifically it was to introduce a general system of rate regulation and to exercise powers relating to the construction, maintenance, safety and operation of railways in Canada.¹⁰ The tenure of the three members

⁷ Currie, A.W., "The Board of Transport Commissioners as An Administrative Body", CJEPS, XI:3 (August 1945) p. 352
See also MacGibbon, D.A., Railway Rates and the Canadian Railway Commission, (Boston, 1917) pp. 82, 83.

⁸ Cushman, op. cit., p. 4.

⁹ R.S.C. 1952, Vol. IV, Chapter 234, s.5.

¹⁰ Canada, Annual Report, 1953, The Board of Transport Commissioners for Canada, (Ottawa, 1954), p. 5.

of the board would be for a ten year period after which they would be eligible for reappointment, retiring at the age of seventy-five. It was felt that through these safeguards the board would be an independent body not subject to the policy fluctuations of the party in power. Advocates of strict government supervision of the Board's activities succeeded in securing a provision that allowed the Cabinet to remove members for cause but this provision was replaced by an amendment in 1905 which provided for removal only by a joint address of both Houses of Parliament.¹¹

The new board was to combine legislative, judicial and executive functions under one authority. In regard to railway matters it was to become a little government unto itself¹² although no attempt was made to separate its various functions internally. The argument for independence of the Board from the government stemmed primarily from the unavoidable slowness of the bureaucracy and a dawning realization that the problems of the railways would continue to grow in number and in importance. That the Board was intended to be able to deal adequately with these problems as they arose is the conclusion to be reached from the arguments put forward

¹¹ Currie, A.W., Economics of Canadian Transportation, (Toronto, 1954), p. 421.

¹² See Corry, J.A., "The Genesis and Nature of Boards", ed. Willis, J., Canadian Boards at Work, (Toronto, 1941), Introduction.

supporting the independent agency. These arguments were adopted from the American experience by Professor McLean in his study and used to support his recommendations.

It was said that the Board would be able to speed up railroad litigation, that it would provide uniformity and continuity in its decisions, that expert judges would be able to bring technical skill to bear on problems with which they were familiar, that the regular courts would be relieved of the mass of railway litigation and that railway questions, being of national importance should be dealt with by a court having jurisdiction throughout the country.¹³ It was felt that impartiality would be obtained in the decisions of the Board by removing it from political control but the safeguard adopted in the United States of guaranteeing appointment from both parties¹⁴ was not adopted in the Canadian system with the result that the Board became an avenue of party patronage. Despite this influx of the party faithful the Board apparently achieved an impartiality in its decisions which has never been seriously questioned.

Although possessed of administrative and executive functions it was determined at the time the legislation

¹³ Cushman, op. cit., pp. 88, 9.

¹⁴ Salomon, L.I., The Independent Federal Regulatory Agencies, (New York, 1959), p. 53.

was drafted that the Board would be a judicial body. The confusion of terms which had plagued the Interstate Commerce Commission was not to be transferred to Canada. The subtle differences between judicial, quasi-judicial, quasi-administrative and administrative acts did not become matters of great importance because it was made clear by the Minister of Railways and Canals when the resolution was introduced in the House of Commons that, "All orders and regulations of the Board are judicial determinations".¹⁵ The Board was, therefore, established as a court of record with all the rights and privileges of a superior court.¹⁶ It was felt that the judicial character of the Board would give it a prestige otherwise impossible of attainment while at the same time protecting its impartiality¹⁷ and making its decisions more acceptable to the railways. The character of the Board is then that of an independent regulatory tribunal, distinguished from government departments, corporations or boards but combining legislative and administrative functions with its judicial nature.¹⁸

¹⁵ Canada, Parliament, House of Commons, Official Report of Debates, June 1, 1903, p. 3855

¹⁶ R.S.C., 1952, Vol. IV, Chapter 234, s. 33, s.s. (3).

¹⁷ This contention was supported by the Hon. C. D. Howe in his statement: "...the board of transport commissioners is a judicial board. ...the government has no jurisdiction over its decisions". Canada, Parliament, House of Commons, Official Report of Debates, June 15, 1956, p. 5064.

¹⁸ Willis, J., (ed.) Canadian Boards at Work, (Toronto, 1941), p. viii. Also see page 23.

The establishment of the Board in 1903 did not create the same "for and against" factions which the creation of the Interstate Commerce Commission in the United States had occasioned in 1886 and 1887.¹⁹ In fact a perusal of the House of Commons debates of 1902 and 1903 gives one the impression that the important role which the board would play in later years was not realized. There seemed to be very little organized opposition to the Board's establishment and the contributions of the members of the House consisted primarily of questioning the type of body to be established and the composition of the Board itself. Even at this early period there was some pressure to assure regional representation and attempts were made to elicit some assurance that the farmers' interests would be protected.²⁰

The composition of the Board remained unchanged until 1908 when its membership was enlarged to six members to handle the increasing number of applications made to it. The amendments at this time also provided

¹⁹ For a short survey of the federal regulatory bodies in the United States see Salomon, L.I., The Independent Federal Regulatory Agencies, (New York, 1959). A more scholarly and historical approach, to the Interstate Commerce Commission in particular, is contained in Chapter III of Cushman, R.E., The Independent Regulatory Commissions, (New York, 1941).

²⁰ Canada, Parliament, House of Commons, Official Report of Debates, June 1, 1903, p. 3857.

that the Board could sit in two panels whose decisions would have effect as decisions of the full board. This change gave the Board greater mobility and permitted it to dispatch its increasing case work with greater expediency.

In 1914 the Canadian Northern and the Grand Trunk Pacific were not yet completed as transcontinental lines. The National Transcontinental which was to serve as the eastern link of the Canadian Northern System had been taken over by the government and was being operated as a government railway. The Intercolonial had been extended so that it operated from Montreal to Halifax. In a word, the tremendous continental expansion of the railways which had been backed by federal, provincial and municipal governments was not yet completed when the First World War broke out. In the following months prices and labour costs rose while every attempt was made to complete the railroads in order that they might stand the added strain placed upon them by the demands of the war. In 1916 a new attempt to solve old and new problems was undertaken with the appointment of another royal commission.

The Drayton-Acworth Commission which reported in 1917 examined the complex railway system which had developed in an effort to devise a scheme whereby the nearly bankrupt rail companies would be able to continue

their services to the public. The Commission started with the proposition that: "there are several reasons peculiar to Canadian conditions why state ownership and operation should be avoided",²¹ and concluded by making recommendations which, in the long run, had the effect of establishing a publicly owned and operated rail system in direct competition with the privately owned system. It was felt that the existing railway systems of that day should be maintained but that an attempt should be made to bring order out of the chaos which had developed as a result of unrestricted and uncontrolled expansion. Inevitably, in view of the precarious financial structure of the railways, it was recommended that the government should take over control of the Grand Trunk Pacific Company and the Grand Trunk Company²² as well as the Canadian Northern Railway.²³ It was felt that this action upon the part of the government would ensure that the rail services were continued. Suggestions were then made for the formation of a new company²⁴ which would unite the three railways into one system presided over by a board of trustees. It was suggested that this company although owned by the federal government should be operated independently and

²¹ Canada, Report, 1917, Royal Commission to Inquire into Railways and Transportation in Canada, (Ottawa, 1917), p. xlv.

²² Ibid., p. xxxv.

²³ Ibid., p. xlv

²⁴ To be known as the Dominion Railway Company.

fully subject to the jurisdiction of the Board of Railway Commissioners.²⁵ Under the plan outlined above the other government owned railways such as the Intercolonial and the National Transcontinental would continue to be operated under the Department of Railways and Canals and would have no legal connection with the new rail company.

In 1917 the first moves were made by the government to acquire the assets of the railways concerned and in most cases generous allowances were made to the shareholders. The companies passed under government ownership but were largely operated as completely separate units, very little attempt being made to cut out duplicated services or to bring in any element of rational railroad policy. In 1919 the name "Canadian National Railways" was adopted for the new "system" though it soundly lacked the principles of a system at that time.²⁶ The new organization assumed control over the previously government owned railways and was brought within the jurisdiction of the Board of Railway Commissioners. At the same time the functions of the Board were enlarged to include supervision over

²⁵ Fournier, L.T., Railway Nationalization in Canada, (Toronto, 1935), p. 60.

²⁶ Canada, Report, 1931-2, Royal Commission to Inquire Railways and Transportation in Canada, (Ottawa, 1932), p. 83.

free transportation and the location of new rail lines but the government retained the right to review its decisions while Parliament remained the only body entitled to grant charters to railway companies.²⁷ In 1922 the Grand Trunk assets were obtained by the new company and on January 30, 1923 were merged with the lines of Canadian National Railways to form the Canadian National Railway Company.²⁸ Now united into one system all of the previously independent companies with the exception of the Grand Trunk retained their separate identities through the years while various attempts were made to bring order to the financial jungle in which they found themselves. In the end the recommendation of the Drayton-Acworth Report that all government owned railway lines be operated as one system²⁹ became a reality.

It soon became obvious that the reorganization of a number of near-bankrupt railways into one system did not remove all of the problems to which they had been exposed as separate entities. The competition between the Canadian Pacific and Canadian National Railways for new traffic and new territory prompted³⁰ the appointment in 1931 of yet another royal commission

²⁷ Ibid., p. 84.

²⁸ Fournier, L.T., op. cit., p. 61

²⁹ Canada, Report, 1917, Royal Commission to Inquire into Railways and Transportation in Canada, (Ottawa, 1917), p. lii.

³⁰ Fournier, L.T., op. cit., p. 256.

to investigate the practicability of co-operation between the two companies in areas which could not economically support both of them.

The terms of reference of the Duff Commission instructed it to:

...inquire into the whole problem of transportation in Canada, particularly in relation to railways, shipping and communication facilities therein, having regard to present conditions and the probable future developments of the country.³¹

The survey of the Duff Commission examined the railways from their inception and discussed the many proposals which had been made as complete or partial solutions to the problems of rail transportation in Canada. It proposed ³² that the two railways should co-operate in the provision of services in certain areas. In order to avoid the dangers of a monopoly situation, however, the form which such co-operation would take would be subject to the approval of the Board of Railway Commissioners. These proposals were adopted by the government and were contained in the Canadian National - Canadian Pacific Act of 1933.³³ The same act dealt with

³¹ Canada, Report, 1931-32, Royal Commission to Inquire into Railways and Transportation in Canada, (Ottawa, 1932), p. 5.

³² Fournier, L.T., op. cit., p. 288.

³³ R.S.C., 1952, Vol. II, Chapter 39, s. 17, s.s.(5).

the Commission's proposal for an arbitral tribunal³⁴ to be composed of the Chief Commissioner of the Board and representatives of the two railways and to be charged with the duty of adjudicating disputes over the use of terminal facilities, running rights, construction of new lines and the pooling of services. In the Act a Board of Arbitration was established under the chairmanship of the Chief Commissioner³⁵ with full power to issue orders having the authority of the Board of Railway Commissioners³⁶ and possessed of over-riding jurisdiction in matters conflicting with the Board's decisions.³⁷ The new Act also extended the authority of the Board of Railway Commissioners to the question of line abandonment³⁸ and guarded against the possibility of actual amalgamation between the two railways despite considerable pressure from some quarters for a complete unification of the two rail systems.³⁹ At the same time the management of the Canadian National Railways was reorganized by the appointment of a three-member board of

³⁵ R.S.C., 1952, Vol. II, Chapter 39, s. 19

³⁶ Idem, s. 21.

³⁷ Idem, s. 25. This tribunal was disbanded by the Transport Act, 1938.

³⁸ Idem, s. 2, s.s.(3).

³⁹ See especially Fournier, L.T., op. cit., p. 344, 5, "...if the standards of service are to be preserved, and if the burden of cost on the taxpayer...is to be reduced, there must be a cessation of competitive railway operation in Canada".

trustees who appointed the President, and controlled and submitted the annual budget and annual report for the approval of the Governor in Council.⁴⁰ No attempt was made at this time to provide any form of regulation for truck transport or motorbuses as the competitive impact of this new form of transportation had not yet been appreciated by the government or by the railways.⁴¹

During the middle years of the depression attempts to achieve the type of co-operation envisaged in the Act of 1933 were only partially successful as each company found its revenues declining and was forced to attract as much traffic to its lines by whatever means as it could legally do. The Board of Railway Commissioners received scant attention during this period as no construction was being carried out nor could the railways press realistically for increases in rates. It was a period of relative inactivity.

The Board of Railway Commissioners was changed considerably in character by the Transport Act of 1938,⁴² formally known as "an Act to establish a Board of Transport Commissioners for Canada, with authority in respect of transport by railways, ships and aircraft". It was stated that the duty of the Board would be the

⁴⁰ Fournier, op. cit., p. 286,7.

⁴¹ Idem, p. 272.

⁴² R.S.C., 1952, Vol. IV, Chapter 271.

"co-ordinating and harmonizing operations of all carriers engaged in transport". If this attempt had been successful in providing a co-ordinated transportation policy for the country as a whole then perhaps the royal commissions and transportation inquiries which have since taken place would not have been required. Warnings were sounded at the time similar to those which had been heard when the Interstate Commerce Commission was established in the United States to the effect that the complexity of transportation problems was so great that a unified and centrally administered policy was an impossibility.⁴³ The new Board of Transport Commissioners created by the Act was to be a much stronger and more independent body than had been its predecessor. Its new functions were to be threefold in character. It was firstly, to work out the details of public policy objectives formulated in general terms by Parliament; secondly, it was to carry out detailed administration of the acts affecting transportation and in so doing make, supervise and enforce detailed regulations; and thirdly, to adjudicate disputes affecting transportation.⁴⁴ In order that it might adequately and effectively carry

⁴³ See footnote 19 on page 7. If subsequent developments in the regulation of transportation are considered the warnings would appear to have been well founded.

⁴⁴ Corry, J.A., "The Genesis and Nature of Boards", ed. Willis, J., Canadian Boards at Work, (Toronto, 1941), Introduction.

out the tasks with which it was entrusted the Board was given greater autonomy in fixing its own procedures, a practice undoubtedly adopted from the successful experience in the United States. The major criticism of the newly constituted regulatory agency was that the Act paid lip service to the principle of a rationally regulated transportation system but that it neglected to include within the jurisdiction of the regulatory body the right to exercise control over motor transport which was then becoming a highly competitive force.⁴⁵ The government contended, with some justification, that truck transportation was a matter largely within the jurisdiction of the provincial governments and that it could not, therefore, be regulated by a creature of the federal government. While this constitutionally correct view must be upheld it is singularly unfortunate that no attempt was made to remove this obstacle to the realization of a truly national transportation policy.⁴⁶

⁴⁵ Canada, Report, 1951, Royal Commission on Transportation, (Ottawa, 1951), p. 277.

⁴⁶ The problems involved in the formation of a national transportation policy are discussed in chapter VI.

Chapter III

History and Organization,

Post-World War II Era

Little change occurred in the composition or character of the Board during the war years. The most important development in the period was the creation, in 1944, of the Air Transport Board¹ which assumed authority and regulatory powers over air transport and civil aviation, functions which had been entrusted to the Board of Transport Commissioners by the Transport Act of 1938. Following the War the Liberal Government, in 1948, introduced amendments to the Judges Act, the Transport Act and the Railway Act in order, ostensibly,² to strengthen the judicial character of the Board by providing that the Chief Commissioner should be a Justice of the Exchequer Court. These amendments in no way limited the choice of the government in choosing a Chief Commissioner for it was fully within their power

¹ See Gosse, F.P., The Air Transport Board and the Regulation of Commercial Air Services, (M.A. Thesis mss.), (Ottawa, 1955).

² There was some controversy over whether the proposed appointee, the Honorable Mister Justice Archibald, made the passage of the amendments a condition of his resignation from the Nova Scotia Supreme Court. These provisions have since been replaced by a proviso that any Chief Commissioner who is not reappointed shall automatically become a Puisne Judge of the Exchequer Court.

to choose any superior court judge or lawyer with ten years standing at the bar and appoint him as a supernumerary judge of the Exchequer Court. Mr. Ilsley, then the Minister of Justice, summarized the purpose of the amendments in the following words:

To a unique extent the chief commissioner of the Board of Transport Commissioners is connected with the building up of a most important branch of our jurisprudence, the part of it which deals with rate making, with reasonableness, with unjust discrimination, and many allied subjects. It is a position which calls for the exercise of the highest judicial qualifications, and it is worthy of the dignity of a judge.³

Earlier in the same debate Mr. Ilsley had stated: "The board of transport commissioners is itself a court of record. He (the chief commissioner) is a judge; when he is chairman of the board of transport commissioners his work is judicial".⁴ The proposed amendments were passed by Parliament and became law in 1948 although the criticism of the Board which had been growing since the war was not yet to be stilled. The occasion for most of the criticism came annually when Parliament was considering the estimates for the Board's operations. Most of the remarks centered upon the inability of the Board to handle the perplexing problems of freight rates in a manner satisfactory to the East as well as to the

³ Canada, Parliament, House of Commons, Official Report of Debates, June 16, 1948, p. 5298.

⁴ Ibid., June 15, 1948, p. 5236.

West. In attacking the Board on this issue the then Leader of the Opposition, Mr. Drew, took careful aim:

I submit that if the board, within more than two years and with all the evidence it has heard (reference is to a general freight rate investigation), can only deal with this problem on the basis of a uniform horizontal increase,...then once again I say that the Board has demonstrated ...it is not capable of functioning in the way it should function.⁵

Mr. Drew then moved an amendment that the item for administration and maintenance of the Board of Transport Commissioners for Canada should be reduced from the sum of \$624,800 to the figure of one dollar.⁶ The action by the Conservative opposition brought to a head criticism which had been building up for a number of years. The major task of the Board, which we will consider in greater detail in Chapter IV has been the fixing of, or regulation of, freight rates. In the days of westward expansion, "the dominion and provincial governments, the Board, and the railways had a common policy of fitting the rate structure to the needs of the growing west".⁷ Once this expansion had fallen off the policy became one of "equalization of freight rates to the furthest possible extent as being the only means of

⁵ Ibid., June 2, 1950, p. 3120.

⁶ Ibid., June 2, 1950, p. 3121.

⁷ Currie, A.W., "Freight Rates and Regionalism", CJEPS, XIV:4 (November 1948), p. 429.

dealing equitably with all parts of Canada".⁸ The Board has attempted, without great success, to lessen the regional differences of freight rates but the demands of the railways for rates high enough to cover operating expenses, taxes, depreciation and to provide a reasonable return on investment⁹ has prevented the achievement of complete equalization. The Board has the unenviable task of protecting the public interest while at the same time preserving the ability of the railways to operate necessary and sometimes uneconomical services. With this realization in mind and criticism of the Board's stewardship reaching new heights the government in 1951 appointed a royal commission¹⁰ to re-examine the question of rising railway costs and the necessity for freight rate increases.

The commission concentrated its energies on the basis upon which the freight rate structure had been erected. In the words of the report: "the Board's duty is to consider the justness and reasonableness of rates not only as a whole but in particular as well"¹¹ Proposals were examined from the railways as well as

⁸ Quoted from Order in Council P.C. 886 - 1925, June 5, in Canada, Report, 1940, Royal Commission on Dominion - Provincial Relations, (Ottawa, 1954), Book II, p. 197.

⁹ Currie, A.W., "Rate Control on Canadian Public Utilities", CJEPS, XII:2 (May 1946), p. 150.

¹⁰ The Royal Commission on Transportation, 1951, often referred to as the Turgeon Commission.

¹¹ Canada, Report, 1951, Royal Commission on Transportation, (Ottawa, 1951), p. 70.

from the shippers and consignees but the commission was unable to devise an alternative freight rate base. The commission's report suggests that the task of devising such a rate base is properly that of the Board and not that of a royal commission. It recommended that the Board should, if possible, avoid straight horizontal freight rate increases and alternatively devise increases based upon traffic studies of particular commodities.¹² Presumably this proposal would involve a determination of what products were least affected in terms of freight traffic by increases in rate. These products would then bear the brunt of future increases with little danger of the volume of freight traffic being reduced. The report concluded that the legitimate increase in railway costs gave the railways reason to seek increases¹³ but stated that "the duty of the Board is to fix just and reasonable rates, that is, just and reasonable in respect to the carriers on the one hand and the shippers or consignees on the other for the service performed".¹⁴ Unfortunately, the recommendations of the Commission were neither comprehensive nor definite enough to be practicable. No remedies for specific problems were proposed by the Commission, nor did it make concrete suggestions for the

¹² Idem, p. 61.

¹³ Hewetson, H.W., "The Report of the Royal Commission on Transportation", CJEPS, XVII:4 (November 1951), p. 538.

¹⁴ Canada, Report, 1951, p. 258

guidance of either the Board or the government. In effect, the Board was left to "work out its own destiny and to adapt old legislation to a modern economic society".¹⁵ It was forced to the position of attempting to operate a complex economic system with terms of reference not much greater than those set forth in the Railway Act of 1903.

The structure of the Board has changed little in the past decade despite continuing criticism of the Board's activities by members of Parliament. The problems of the railways have continued and have been complicated by the emergence of full scale, long distance truck competition together with indications that air freight service may soon be able to compete effectively with the rail services. This shifting of emphasis in the field of transportation was remarked upon in an appendix to the Turgeon Report wherein it was noted that the railways had first replaced the canals as the chief avenues of commerce and were, in turn, slowly but undeniably being replaced by trucks and airplanes.¹⁶ The problem of increasing competition coupled with falling revenues was the focal point for the study undertaken by the MacPherson Commission in 1961.

¹⁵ Currie, A.W., Economics of Canadian Transportation, (Toronto, 1954), p. 425.

¹⁶ Innis, H.A., "Memo on Transportation", in Report, 1951, The Royal Commission on Transportation, (Ottawa, 1951), p. 294.

The first two volumes of the report of the Royal Commission on Transportation, 1961, have been submitted to the government and released to the public. It is obvious that the commission undertook its task in a business-like manner with the intention of devising a scheme whereby the railways will be able to concentrate on those services for which they are best suited. The recommendations of the Commission reflect an original, if not revolutionary, approach to the problems of Canadian transportation. The recommendations follow consistently a principle heretofore unaccepted by commissions dealing with transportation problems.

The principle developed is that burdens, which are the result of obligations imposed upon the railways by tradition, law and public policy, be lifted (through the assumption of their costs by Parliament).¹⁷

One of the most pressing problems affecting the railways in recent years has been the rapid decline in passenger traffic. In only a few sections of the country has this trade ever been profitable and in recent years continuous passenger traffic deficits have had to be covered by increasing the freight rates. Recognizing that this trend is unlikely to be reversed the MacPherson Commission has stated frankly, "the railways must eventually withdraw

¹⁷ Canada, Report, Vol. I March 1961, The Royal Commission on Transportation, (Ottawa, 1961), p. 52.

all uneconomic passenger services".¹⁸ Supporting this conclusion is the broader contention that all unprofitable rail services and operations must be abandoned if the railways are to operate efficiently and profitably. It is further recommended that in those cases where public policy dictates continuation of unprofitable services then it should be the duty of Parliament to provide public funds to cover the deficits.¹⁹ In this way it is hoped that the competitive position of the railways in the overall transportation market will not be distorted nor will higher rates be necessary on those services which are profitable to compensate for those which are not. The Commission recommends that freight rates should be based, not on what the traffic will bear without regard to the fiscal need of the carrier, but rather on the cost of the service performed.²⁰

The government has not yet acted upon the recommendations of the commission nor has it instituted a subsidy program to assist the railways on a transitional basis. The Commission recommended that these subsidies should be on a diminishing scale to enable the railways to adjust their services while other subsidies would be provided where the withdrawal of services is contrary to public policy. How effective such a program would be

¹⁸ Idem, p. 45.

¹⁹ Idem, p. 29.

²⁰ Idem, p. 30.

cannot yet be ascertained. It would appear that the program reflects a new approach to the problems of transportation in Canada and for that reason alone appears to be a step in the proper direction. The Commission has suggested that the purpose of regulating the transportation industry should be the protection of the public interest and that such regulation should be applied equitably to all carriers whether privately or publicly owned.²¹ Furthermore it is recommended that the Board of Transport Commissioners, as the regulatory agency, should control rates in a manner which will limit the impact of monopoly on shippers and will not detrimentally affect the revenues of the railways. The means used to control rates must encourage efficiency on the part of the railways, must be sufficiently flexible to meet changes in railway costs and must not conflict with the most efficient use of the resources of the transportation industry as a whole.²² Finally it is recommended that the Board of Transport Commissioners be re-organized to include a cost-analysis division so that a rational base can be determined for rate-setting.²³ These latter recommendations are, in the words of the civil service, "being given careful consideration".

²¹ Idem, p. 29.

²² Canada, Report, Vol. II (December 1961), The Royal Commission on Transportation, (Ottawa, 1961), p. 98,9.

²³ Idem, p. 176,7.

The position of the transportation industry in Canada is a dynamic one. It has been necessary throughout the period which has been briefly covered for frequent changes to be made and new approaches taken. The changing nature of the industry will require that full use be made of the technological improvements which are available to it. The present problems will have to be dealt with by the Board of Transport Commissioners as it is now constituted. In order to assess the role which the Board plays as a regulatory agency it is necessary to examine its character and organization at the present time and then to go on in subsequent chapters to discuss its functions, procedures and appeal provisions.

Parliament and the courts have furnished a variety of definitions for the Board of Transport Commissioners. The then Minister of Transport, Mr. Chevrier defined the Board in 1951 as, "a court of record, (which) must deal with evidence, and must base its judgement upon the evidence placed before it".²⁴ A broader definition encompassing all of the functions of the Board was given in 1939 by Sir Lyman Duff, Chief Justice of Canada:

The Board of Transport Commissioners is a statutory Court, but it succeeded to all powers, authorities and duties of its predecessor, the Railway Committee

²⁴ Canada, Parliament, House of Commons, Official Report of Debates, October 27, 1951, p. 522.

of the Privy Council, and it is endowed with regulative powers (powers which in their nature are legislative) as well as large administrative powers.²⁵

This concept of the Board can be further clarified by recourse to a second definition supplied by Mr. Chevrier:

The Board of Transport Commissioners is a statutory tribunal and as such must rely for its authority upon the Railway Act. A warrant must be found in the act for its orders or they are null and void.²⁶ Its decisions are remedial and corrective in intent, endeavouring to remedy a situation rather than punish a dereliction. The Board's responsibility is to see that all parties receive fair treatment. It is legislation based on this premise of fair treatment which confers wide general powers on the regulatory board but is sparing in specific directives. The Board is given wide powers of initiative to meet particular situations, but is not encouraged to expand its regulations as an end in itself.²⁷

The Board is then a statutory tribunal with regulatory, supervisory, and adjudicatory functions. It is a court yet it is not required to follow the procedures of a court. It is an administrative body yet it must act judicially. It is a judicial body yet its decisions are influenced by policy considerations and the protection of the public interest. It is not however a policy making body for "the function of laying down policy is that of the government and parliament and not that of the Board of

²⁵ Canadian National Railway Co., v. Bell Telephone Co. of Canada, (1939) S.C.R. 308.

²⁶ See Duthie V. Grand Trunk Railway (1905) 4 CRC 304.

²⁷ Canada, Parliament, House of Commons, Official Report of Debates, October 26, 1951. pp. 433,4.

Transport Commissioners".²⁸ "The Board of Transport Commissioners ... is set up to administer government policy, not to make it".²⁹

In all areas of its activity, whether they be legislative, executive, regulatory, supervisory or judicial, the Board is subject to pressure from three sources. Firstly, the carriers are primarily interested in running an efficient, profitable operation. The shippers and consignees are interested in obtaining transportation for their goods at the lowest possible rates while the government itself is inevitably predisposed toward whatever action will arouse the least opposition or the most support from the voters. In most cases the aims of these three interests are not only diverse but opposed to each other. In such a situation the independence of the board is of utmost importance if the conflicting interests are to be resolved. It is this distinguishing characteristic of independence which is vital to the board if it is to operate effectively and impartially. It is a truism to say that the independence of such a tribunal is real only in so far as the individual members of the

²⁸ Canada, Parliament, House of Commons, Official Report of Debates, June 28, 1950, p. 4263.

²⁹ Idem, p. 4274. Also see Currie, A.W., "The Board of Transport Commissioners as an Administrative Body", CJEPS, XI:3 (August 1945), p. 358, "The Board's functions are semi-judicial and not the making of policy for that is Parliament's task".

tribunal are independent of outside influence. The personnel of the Board will therefore reflect the degree of freedom which the Board exercises in coming to its decisions.

For many years the appointments reflected the politics of the party in power and this criticism is still made of the members of the Board:

Too often in Canada appointments to such Boards have been on the basis of service rendered to a political party rather than a particular knowledge of the subject the Board has to deal with. ... The personnel of these Boards should be men of standing in the community, men with some knowledge of the subjects with which they are dealing.³⁰

The requirement that the Chief Commissioner and Assistant Chief Commissioner should both be lawyers, (as the chairman's opinion on a point of law prevails),³¹ has also drawn criticism from opposition spokesmen. In the words of Hazen Argue:

When it comes to selecting the personnel of the Board of Transport Commissioners I feel the government should endeavour to get the best possible candidates for the job, whether they be lawyers, the members of some other profession or merely laymen with outstanding ability. ... Able people should not be barred from becoming chief commissioner or deputy chief commissioner merely because they do not happen to be members of the legal profession.³²

³⁰ Canada, Parliament, House of Commons, Official Report of Debates, October 26, 1951, p. 467, (P.E. Wright of Melfort, Sask.).

³¹ R.S.C. 1952, Vol. IV, Chapter 234, s. 12, s.s.(2).

³² Canada, Parliament, House of Commons, Official Report of Debates, October 26, 1951, p. 460.

In fact, however, the other members of the Board are not required to possess legal qualifications, therefore the opportunity is provided for representation of non-lawyers. It would not seem desirable to any legally minded person to encourage a situation in which non-lawyers could conceivably be ruling upon points of law. Pressure has been exerted from the very inception of the Board for various interests to be represented in its membership.³³ It has been accepted that the western farmers should be represented and that the trade unions should have their spokesman on the Board. In the fifty-eight years of its existence approximately sixty percent of the members have been lawyers, twenty percent have been farmers and twelve percent labour union leaders. The other eight percent has included a newspaper editor, a druggist, a garage owner and a real estate agent.³⁴ Politicians have been singularly successful in obtaining appointments to the board. Until 1951 two thirds of the members of the Board had, at one time or another, been elected to some political office, four of the members being former provincial premiers.³⁵

³³ See footnote 20 on page 27.

³⁴ The percentages are taken from Currie, A.W., Economics of Canadian Transportation, (Toronto, 1954), and appear to have remained virtually constant.

³⁵ A.G. Blair, T.C. Norris, W.J. Patterson, and T.A. Greenway.

The composition of the Board has recently reflected a tendency to promote staff officers to positions as commissioners and in this way to take advantage of their expertise and technical knowledge. The present Chief Commissioner joined the staff of the Board as Assistant Counsel and brings to his present position an extensive knowledge of the Board's work in the past. The Deputy Chief Commissioner is traditionally of French Canadian background, the present Deputy having previously served as Director of the Engineering Branch. Similarly the former Director of the Traffic division has very recently been appointed a Commissioner. At the present time the trade unions and farmers are also represented on the Board and consideration is given to regional representation as far as this is compatible with the forementioned considerations.

One of the problems which has taken on greater importance in recent years is the matter of salaries. Under the Railway Act the Chief Commissioner is paid the same salary as the President of the Exchequer Court while the Assistant Chief Commissioner, Deputy Chief Commissioner and Commissioners receive \$14,000, \$13,000 and \$12,000 respectively.³⁶ As these amounts are provided in the Act they are not revised at regular intervals with the

³⁶ R.S.C., 1952, Vol. IV, Chapter 234, s. 26, s.s.(1).

result that at the present time some officers of the Board's staff receive higher remuneration than the men who are technically their superiors. If some adjustment is not made in this regard it will be difficult to attract the calibre of men desired for positions on the Board, a factor which may tend to cast doubts on the independence of the men who serve in the future.

The Board is limited in its freedom of action by a number of additional factors. Firstly, in order to prevent even the appearance of discrimination or favoritism the Board is subject to a limited review of its decisions by the courts on matters of law or jurisdiction within a one month period after the initial decision has been handed down.³⁷ The Governor in Council may also intervene in any matter decided by the board and change or quash the decision.³⁸ However, with these two exceptions as long as the Board acts within its jurisdiction it is supreme.³⁹ Secondly, the Board is restricted in its freedom by the fact that questions can be raised in the House of Commons particularly on the estimates debates, and motions of censure can take the form of an amendment to reduce the Board's appropriation.⁴⁰ This method of control is not

³⁷ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 53, s.s.(2).

³⁸ The subject of appeals is fully discussed in Chapter V.

³⁹ Currie, A.W., "The Board of Transport Commissioners as An Administrative Body", CJEPS, XI:3 (August 1945), p. 347.

⁴⁰ See page 39.

entirely effective however for direct criticism of the Board is not permitted:

The Board of Railway Commissioners (read Transport Commissioners) is a court of record, and therefore may not be attacked except by way of impeachment.⁴¹

Thirdly, the Board is said to be "limited" in that it is required to lay an annual report before Parliament and is dependent upon Parliament for its funds.⁴² Again this limitation is not very effective as a means of exercising control even though it does provide an ultimate sanction which could be used should the necessity arise. In fact, the Board possesses a considerable degree of independence in that it may initiate proceedings itself,⁴³ may establish its own procedure,⁴⁴ and may make rules and regulations on any matter within its jurisdiction.⁴⁵ Certainly the restrictions which do exist do not constitute a threat to its independence.

In speaking of the desirability of the Board having its own independent sources of information the Turgeon Commission recommended that,

...an administrative and judicial tribunal dealing with matters of the kind here involved (should) be

⁴¹ Canada, Parliament, House of Commons, Official Report of Debates, May 16, 1926, p. 3106.

⁴² Railway Act, R.S.C., 1952, Vol IV, Chapter 234, s. 31, s.s.(1); s. 29.

⁴³ Idem, s. 36.

⁴⁴ Idem, s. 54.

⁴⁵ Idem, s. 34, s.s.(1).

provided with an adequate staff of experts.⁴⁶

This same principal was adopted by the MacPherson Commission in an even more specific form in its recommendation that a cost-analysis division be established within the Board's staff.⁴⁷ Although the latter recommendation has not been formally implemented by a reorganization of the staff an examination of the present organization⁴⁸ indicates the Board has a considerable degree of technical and professional advice at its disposal.

The staff of the Board of Transport Commissioners is organized in six divisions two of which maintain district offices outside of Ottawa. The headquarters staff is divided into administrative, legal, economics and accounting, engineering, operating, and traffic departments. The establishment of the Board staff currently totals one hundred seventy four of whom one hundred forty three serve in Ottawa with the remainder engaged in operational, mechanical and engineering inspections through the eight District Offices,⁴⁹ which are located in St. John's, Newfoundland, Moncton, New

⁴⁶ Canada, Report, 1951, Royal Commission on Transportation, (Ottawa, 1951), p. 273.

⁴⁷ Canada, Report, Vol. II December 1961, Royal Commission on Transportation, (Ottawa, 1961), p. 176,7.

⁴⁸ See chart on following page

⁴⁹ Canada, Annual Report, 1961, The Board of Transport Commissioners for Canada, (Ottawa, 1962), p. 6.

BOARD OF TRANSPORT COMMISSION

CHIEF COMMISSIONER – ROD KERR, Q.C.

ASSISTANT CHIEF COMMISSIONER – H. H. GRIFFIN

DEPUTY CHIEF COMMISSIONER – J.E. DUMONTIER

COMMISSIONER – J.M. WOODARD

COMMISSIONER – W.R. IRWIN

COMMISSIONER – A.S. KIRK

SECRETARY OF THE BOARD – C. W. RUMP

ECONOMICS AND ACCOUNTING

M.E. Burwash

Director

R.H. Wright

Ass't Director

Responsible for providing economic, statistical and financial information and advice required for decisions by the Board in connection with investigations, applications, hearings and reviews of carrier performance pursuant to Board Orders and Rulings; the form and content of periodic reporting by railways, water carriers, communications and other companies subject to the jurisdiction of the Board; analysis and interpretations of transportation and communication trends in recurrent reports and special submissions; processing and publication of the Annual Waybill Analysis of All-Rail Carload Freight Traffic; administration of uniform accounting classifications; conducting field examinations of company records; issuance of accounting interpretations and rules governing the preservation of records; formulae governing freight and traffic costing and general accounting allocations, and the methods to be followed in establishing "out of pocket" and "all inclusive" costs; special studies and research on the economics of companies under the jurisdiction of the Board, including problems which are known to be developing and which may be expected to involve Board decisions.

ENGINEERING

R.A. Shier

Director

A.G. Hibbard

Ass't. Director

The Engineering Branch deals with and advises the Board on all applications concerning construction and maintenance of railway lines, and administration of the Railway Grade Crossing Fund.

Conducts field inspection and examines plans before recommending the approval of construction and maintenance of railway lines, sidings, railway-highway farm crossings, junctions, signals, bridges, fences, drainage, etc.

Conducts field inspections, examines plans and estimates of cost for construction of grade separations, installations of automatic protection or safety features at railway-highway crossings.

Maintains complete record of railway-highway crossings and grants, commitments and payments from the Railway Grade Crossing Fund.

LAW

J. M. Fortier

General Counsel

M.M. Goldberg

Ass't. Counsel

The law Branch advises the Board and its Officers on questions of law, jurisdiction, practice and procedure; drafts orders, regulations and legislation; represents the Board on appeals and references to the Supreme Court of Canada and other courts when necessary; attends the Board's public hearings and when necessary examines witnesses; confers and corresponds with Counsel representing parties to applications before the Board; prepares briefs, memoranda and précis on matters dealt with by the Board.

Supervises the maintenance of the Board's Library and other related work of a professional legal nature.

R. M. MacDonald
A. Lesage

The Operating Branch makes recommendations relating to the operation of public, safety of rolling stock of facilities, fire prevention and the safe operation of the railway. The Branch is (1) Operating, (2) Maintenance and (3) Engineering.

In view of the day to day operations under the Board's jurisdiction, the Operating Branch is responsible for the management of management groups and other applications to existing services. Operating Branch has the power to carry out the duties of the District several local functions are carried out by the Board which are amendments or

DISTRICT

OFFICES

- ENGINEERING AND

OPERATING

DISTRICT

MONCTON, N.B.

WINNIPEG, MAN.

CALGARY, ALTA.

ST. JOHN'S, Nfld.

MONTR.

PORT COMMISSIONERS FOR CANADA

FEDERAL PUBLIC STATUTES CONFERRING JURISDICTION ON THE BOARD INCLUDE:

RAILWAY ACT – Chap. 234, R.S.C. 1952. Confers extensive judicial, regulatory and administrative functions in respect of, inter alia, location, construction, operation and uniform accounting of railways subject to Parliament; protection at highway-railway crossings; The Railway Grade Crossing Fund; railway express, telegraph, telephone and international bridge tolls.

TRANSPORT ACT – Chap. 271, R.S.C. 1952. Confers jurisdiction to license ships on the Great Lakes, MacKenzie and Yukon Rivers; their charges and tolls; and agreed charges of certain rail and water carriers.

BRIDGES ACT – Chap. 20, R.S.C. 1952. **C.N.R. – C.P.R. ACT** – Chap. 39, R.S.C. 1952.

MARITIME FREIGHT RATES ACT – Chap. 174, R.S.C. 1952. **RADIO ACT** – Chap. 233, R.S.C. 1952.

ST. LAWRENCE SEAWAY AUTHORITY ACT – Chap. 242, R.S.C. 1952. **TELEGRAPH ACT** – Chap. 262, R.S.C. 1952.

C.N.R. ACT – Chap. 29 of 1955 Statutes. **FREIGHT RATES REDUCTION ACT** – Chap. 27, 7-8 Elizabeth II.

APPROPRIATION ACT – Nos. 4-61 and 5-61 Vote 590 – Subsidies

OPERATING

R. M. MacDonald Director
A. Lesage Ass't. Director

The Operating Branch advises the Board and makes recommendations in matters relating to adequacy of rail service to the public, safety of operation, safe condition of rolling stock and equipment, suitability of facilities, investigation of accidents, fire prevention along railway right-of-way and the safe transportation of commodities. The Branch is divided into four sections: (1) Operating, (2) Mechanical, (3) Fire Prevention and (4) Explosives and Other Dangerous Commodities.

In view of the Branch's concern with the day to day operation of railways coming under the Board's jurisdiction, close working relations are maintained at all levels of management as well as with labour groups and other interested parties. Applications to abandon, reduce or augment existing services are investigated by the Operating Branch. Rolling stock and motive power is regularly inspected. To carry out the field work involved in these duties District Offices are maintained at several locations outside Ottawa. The current rules respecting most of these functions are contained in some 160 Board Orders which are subject to periodic amendment or revision as the need arises.

SECRETARY'S (Administrative)

C.W. Rump Secretary
J.D. Beaton Ass't. Secretary

The Secretary's or Administrative Branch is divided into three sections: (1) General Administrative Services, (2) Records and (3) Accounts.

In addition to the maintenance of minutes of Board meetings the Secretary's Branch keeps a record of all proceedings conducted before the Board by way of public hearings, makes all arrangements for such hearings at or outside Ottawa; deals with all official correspondence of the Board; has custody and care of all official records and documents belonging or appertaining to the Board; maintains official copies of every Judgment, Regulation, Ruling and Order of the Board; issues certified copies of such orders and regulations as requested; makes recommendations on matters affecting the employment and accommodation of the Board's staff; initially deals with inquiries for information covering the Board's work from interested parties, the Press, etc.

TRAFFIC

H.W. Ellicott Director
J. Hanley Ass't. Director

Deals with, and advises the Board on, all matters concerning Traffic, Tolls and Tariffs in respect of:

Freight (Rail and Water).
Passenger (Rail and Water).
Express.
Agreed Charges.
International Bridges and Tunnels.
Telegraph.
Telephone.
Radio Messages (Radio Regulations).
Maritime Freight Rates Act.
Freight Rates Reduction Act.
Trackage Maintenance Subsidy.
Licensing of Ships.
Free and Reduced Rate Transportation.

JANUARY 1962

DISTRICT

OFFICES

OPERATING

NEW, Nfld.

MONTREAL, P.Q.

TORONTO, ONT.

SASKATOON, SASK.

VANCOUVER, B.C.

(Organizational Chart of B. of T.C.
showing organizational divisions,
and district offices and including
brief descriptions of the work of
each division).

Brunswick, Montreal, Toronto, Winnipeg, Saskatoon, Calgary and Vancouver.

Having traced very briefly the history of transportation policy in Canada and having followed the development of the Board of Transport Commissioners for Canada from its creation to its present organization we are aware of the complexity of the problems it faces. We have described how it developed and what it is. It remains for us to describe what it does and how it does it.

Its responsibilities and powers are great and its decisions affect, directly or indirectly, practically every person in Canada. It was created as independent judicial and regulative tribunal, to be a body of experts, competent for the purpose and acquiring experience through service in office, supported by the specialized training, experience and skill of a permanent staff devoting themselves to the public service of Canada, and it is charged with the task of exercising impartially, within its jurisdiction and subject to the law, the powers that Parliament sees fit to give to it.⁵⁰

To an examination of these powers we now turn.

⁵⁰ Kerr, R., "The Board of Transport Commissioners for Canada", Canadian Bar Journal, 1:1 (February 1958), p. 61.

Chapter IV

Jurisdiction and Functions

The principal duties of the Board of Transport Commissioners for Canada are to deal with complaints that any provision of the Railway Act or the Transport Act, 1938, has been violated and to hear applications requesting the Board to make an order which it is authorized by these acts to make. The Board has jurisdiction in regard to:

- a) the construction, maintenance and operation (including rates) of dominion railways;
- b) the rates of dominion telephone, telegraph and express companies;
- c) the tolls on international bridges and tunnels;
- d) the licensing and rates of ships on the Great Lakes, the Mackenzie river and the Yukon river.¹

The above description of the functions and duties of the Board was given by the then Minister of Transport, Mr. Chevrier, in reply to a question in the House of Commons. It is doubtful if a more concise yet comprehensive answer could be formulated. The Board has no jurisdiction of itself but only that granted it by Parliament. It is a statutory creation and, "its jurisdiction is only such as the statute gives by its express terms or by necessary implication therefrom".² It is important, therefore, to recognize that the Board

¹ Canada, Parliament, House of Commons, Official Report of Debates, March 14, 1949, p. 1430.

² Duthie v. Grand Trunk Railway Co., (1904) C.R.C. 304 at 311.

is concerned only with matters under the Railway Act or the other acts giving it authority.

The business of the Board is to enforce the railway legislation of the Dominion Parliament, and, for that purpose, to order the performance of some acts and to prohibit others. It was not created to supplant or even to supplement, the Provincial Courts in the exercise of ordinary jurisdiction, but to exercise an entirely different jurisdiction, though, perhaps, occasionally overlapping that of the provincial Courts.³

Originally the jurisdiction of the Board was confined almost exclusively to railway problems but over the years it has been extended, at first to tangentially related areas, and later into the broader area of the transportation industry.

The original act of 1903 was amended in 1908 bringing express,⁴ telegraph and telephone tolls⁵ within the competence of the Board. In the following year the Railway Grade Crossing Fund was established to assist in covering the costs of grade separation and warning devices at rail-highway intersections, the administration of which was entrusted to the Commissioners.⁶ Tolls on International Bridges and tunnels were added in 1929⁷ and

³ Ibid., p. 315

⁴ Now regulated by Canadian National Railways Act, S.C., 1955, Vol. II, Chapter 29, S. 25, s.s.(2)

⁵ Now regulated by the Telegraph Act, R.S.C., 1952, Vol. IV, Chapter 262, s. 31-33.

⁶ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 258-270.

⁷ Currie, A.W., Economics of Canadian Transportation, (Toronto, 1954), p. 422.

in 1933 the approval of the Board was required for the abandonment of railway lines.⁸ The Transport Act of 1938 redefined the Board's duties as "co-ordinating and harmonizing the operations of all carriers engaged in transport"⁹ and increased its area of activity to include air and water transport,¹⁰ agreed charges between shipper and carrier,¹¹ and applications for licences to transport goods or passengers.¹² Henceforth all tariffs were required to be filed with the Board and all rates and tolls were to be subject to its approval.¹³ The Board was further empowered to make rules and regulations concerning the classification of freight, tariffs and tolls, notice of change, publication, effective dates, and "generally for the purposes of this Act".¹⁴ The Board's authority over Air transport was later withdrawn with the establishment of the Air Transport Board in 1944. Jurisdiction over pipelines and pipeline construction rested with the Board until the formation of the National Energy Board in 1959. Under the Bridges Act the Board is required to inspect new bridges and may condemn, or require alterations to, existing structures and may enforce its

⁸ Canadian National-Canadian Pacific Act, R.S.C., Vol. II, Chapter 39, s. 2, s.s.(3).

⁹ Transport Act, R.S.C., 1952, Vol. IV, Chapter 271, s. 3.

¹⁰ Ibid., s. 10-12.

¹¹ Ibid., s. 32.

¹² Ibid., s. 5.

¹³ Ibid., s. 14-18.

¹⁴ Ibid., s. 30.

orders by providing penalties for violation or non-compliance.¹⁵ Under the provisions of the Radio Act¹⁶ it may make rules governing the transmission of messages from ship to shore equipment. Similarly, limited authority is given to the Board by the St. Lawrence Seaway Authority Act in regard to tolls and to complaints of unjust discrimination.¹⁷ In these latter two cases the authority of the Board is not exercised but is held in reserve and may be applied in the future should conditions warrant such action. All of these acts contribute to the authority of the Board and extend its jurisdiction in some degree, however as the present task is concerned primarily with the Board's functions in relation to railways, attention will be focused upon those problems which the Railway and Transport Acts attempt to remedy.

The general jurisdiction of the Board extends to all the powers of its predecessor the Railway Committee of the Privy Council¹⁸ and empowers it to inquire into, hear or determine any matter arising out of the provisions of the Railway Act. In any matter of dispute it is required to hear and determine the question and may compel the attendance of witnesses, and the production of papers and

¹⁵ R.S.C., 1952, Vol. I, Chapter 20.

¹⁶ R.S.C., 1952, Vol. IV, Chapter 233, s. 6.

¹⁷ R.S.C., 1952, Vol. IV, Chapter 242, s. 15.

¹⁸ Currie, A.W., Economics of Canadian Transportation, (Toronto, 1954), p. 422.

documents to assist it in arriving at a decision.¹⁹ It possesses the powers and privileges of a superior court yet it is not bound by its own decisions or the decisions of any other court.²⁰ It also differs from a regular court in that it may not only submit questions to the Supreme Court for an advisory opinion²¹ but may appear as a party to a case in which it has made the original decision.²² It is then in the anomalous position of combining legislative, judicial and administrative functions in different degrees in the exercise of its several functions. Its legislative functions consist in making regulations which have the force of law and which may have been determined in a judicial manner. Its judicial functions consist in adjudicating disputes, possibly concerning regulations which it has made. Its administrative functions consist in working without the political pressures of a government department enforcing regulations which it has made and which may be the subject matter of a hearing before it in its judicial capacity.²³

Under the provisions of the Railway Act and the Transport Act the powers of the Board fall roughly into four categories. Firstly, the Board must approve the

¹⁹ R.S.C., 1952, Vol. IV, Chapter 234, s. 33.

²⁰ *Ibid.*, s. 45, s.s.(1).

²¹ *Ibid.*, s. 44, s.s.(1).

²² *Ibid.*, s. 53, s.s.(6).

²³ See Angus, H.F., "Administrative Decision and the Law: the Views of an Administrator", *CJEPS*, XXIV:4 (November, 1958), p. 512 for a discussion of the interrelationships of legislative, judicial and administrative functions.

initial location of proposed railway lines and authorize the construction, abandonment or removal of all trackage. It should be recalled that only Parliament can issue a charter to a railway company but once that company has been incorporated its rail-lines, actual and proposed, fall within the jurisdiction of the Board of Transport Commissioners. Secondly, the Board makes regulations for the safety and convenience of employees and passengers and issues orders concerning the running rights and operations of trains and equipment. Thirdly, and most importantly, the Board is responsible for the regulation of tariffs and tolls on passenger, freight, express and telegraphic traffic. The fourth category into which the powers of the Board may be placed concerns the investigation and adjudication of complaints arising out of the exercise of the above three functions.²⁴

The Board's powers relating to construction are extensive and of far-reaching application. They include such divergent tasks as determining the gauge of railway track,²⁵ the taking of land without the owner's consent,²⁶ and the approval of plans for relocation of stations.²⁷ In

²⁴ One of the earliest, and still substantially accurate, accounts of the Board's activities is MacGibbon, D.A., Railway Rates and the Canadian Railway Commission, (Boston, 1917) pp. 85ff.

²⁵ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 164.

²⁶ Ibid., s. 174.

²⁷ Ibid., s. 191.

some matters, however, the Board finds its freedom of action restricted. In Canadian Northern Railway Company v. William A. Taylor²⁸ the Board found that an order it had issued for the removal of a siding which had previously been approved, could not be put into effect without the company's consent as a question of private property was involved.

The problems of the abandonment of unprofitable lines of railway have also reflected the limitations to freedom of action and have involved it in considerable controversy. If the recommendations of the MacPherson Commission on Transportation are to be implemented and the railways thus encouraged to operate on a profitable basis this controversy is likely to increase. The Board hears applications from the railways for permission to abandon lines but is faced with the difficulty of assessing the objections of shippers and residents of the towns to be affected by the curtailment of service. Under the Railway Act the Board is empowered to hear disputes between the railways and municipalities but the political repercussions of disputes of this nature inevitably result in the Board's decision being affected by considerations of policy. On the other hand, if the Board approves the application for abandonment of service it

²⁸ (1913) 4 W.W.R. 416.

becomes subjected to political criticism as the following example from a speech by Hazen Argue illustrates:

I think for all practical purposes today the Board of Transport Commissioners have shut their eyes to the public demand that minimum services be maintained. For all practical purposes today the Board of Transport Commissioners are acting purely and simply as agents of the railway companies of this country and are doing their bidding when it comes to curtailment of services, the closing of stations, and the reduction of train services of all kinds.²⁹

Similar criticism and public pressure is aroused when the board determines questions of branch line construction,³⁰ the necessity for industrial spurs or sidings,³¹ or the desirability of public and private railway crossings.³² In all of these matters the Board is acting somewhat like an umpire or referee between two opposing factions or points of view and in most cases it is impossible that the decision reached will be satisfactory to both parties.

The Board's authority for the safe and efficient operation of the railways' services³³ extends to matters such as the provision and erection of safety and protective

²⁹ Canada, Parliament, House of Commons, Official Report of Debates, June 27, 1960, p. 5453.

³⁰ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 183-6.

³¹ Ibid., s. 188.

³² Ibid., s. 258-270.

³³ Ibid., s. 281.

devices at public crossings and on trains and equipment, the testing and inspection of car equipment,³⁴ rolling stock and locomotives, the maintenance of signals,³⁵ and the handling and storage of explosives and dangerous commodities.³⁶ Railway accidents and collisions between trains and cars are a continuous source of litigation before the Board³⁷ and therefore much of its effort is expended in attempting to find means of reducing the number and seriousness of such accidents. The prevention of fires attributable to railway operations³⁸ is still an important part of the Board's task despite the fact that nearly all railways in Canada are now dieselized. Operating rules for the railways,³⁹ taking into consideration the requirements of service, safety and speed are submitted, for the Board's approval and suggestions, by the Railway Association of Canada. An extensive revision of the Uniform Code of Operating Rules, as these rules are called, took place in 1961 and will become effective in October of 1962.⁴⁰

³⁴ Ibid., s. 286.

³⁵ Ibid., s. 290, s.s.(1), p. (g).

³⁶ Ibid., s. 354.

³⁷ Kerr, R., "The Board of Transport Commissioners for Canada", Canadian Bar Journal, I:1, (February, 1958), pp. 56,7.

³⁸ Railway Act, R.S.C., Vol. IV, Chapter 234, s. 290, s.s.(1), p.(f).

³⁹ Ibid., s. 290. s.s.(1).

⁴⁰ Canada, Annual Report, 1961, Board of Transport Commissioners for Canada, (Ottawa, 1962), p. 22.

Under authority of the Railway Act the Board

...has power to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require.⁴¹

The "just and reasonable rates" which the board is required to approve may be concerned with freight, and passenger traffic, the assessment of demurrage charges or the classification of commodities for rate making purposes.⁴²

As an illustration it will be helpful to examine the Board's responsibilities in relation to its most important function, the problem of freight rates. Legally the Board has no power to make rates but merely to regulate and supervise the rate making policies of the railways, a fact pointed out by the Rowell-Sirois Commission:

... while the railways determine their rates the Board must authorize all rates before they come into force,.... It is to be noted that the Board, unlike the Interstate Commerce Commission of the United States, has no control over minimum rates. Its control is restricted to the maximum that the railways may charge.⁴³

It would appear then that the Board is responsible for

⁴¹ Railway Act, R.S.C., Vol. IV, Chapter 234, s. 328, s.s.(5).

⁴² Currie, A.W., "the Board of Transport Commissioners as an Administrative Body", CJEPS, XI:3 (August, 1945), p. 343.

⁴³ Canada, Report, 1940, Royal Commission on Dominion - Provincial Relations, Book II, (Ottawa, 1954), p. 195.

authorizing the maximum rates to be charged but in some cases Parliament has itself established a maximum which cannot be interfered with. The Crow's Nest Pass Agreement provided statutory rates on certain products six years before the Board of Railway Commissioners was formed. When, in 1925, the Board attempted to adjust the rates included in the agreement it was held that the statute and agreement made before the Board was created were binding and could not be set aside.⁴⁴ The Maritime Freight Rates Act of 1927⁴⁵ was challenged in 1933 and it was then determined by the Supreme Court that the Board could approve lower tariffs than it had originally approved but that it could not interfere with the maximum set by Parliament.⁴⁶ A recent example of the prerogative of Parliament in establishing maximum rates is furnished by the Freight Rates Reduction Act of 1959⁴⁷ which not only provides for a reduction in the allowable rates but in return provides for subsidies to be paid to the rail companies in the amount by which the rates have been reduced. It is apparent then that although "The Board of Transport Commissioners is the only body authorized by

⁴⁴ Re Crow's Nest Pass Rates, (1925) S.C.R., 155 at 169.

⁴⁵ R.S.C., 1952, Vol. III, Chapter 174.

⁴⁶ Re Maritime Freight Rates Act, 1927, (1933) S.C.R. 423 at 431.

⁴⁷ S.C., 1959, Vol. I, Chapter 27.

Parliament to consider the question of freight rates",⁴⁸
 Parliament itself retains the right to set limits and
 create exceptions to the authority of the Board. Even
 if discrimination in freight rates exists as a result of
 Parliament's actions the Board cannot interfere for as
 Chief Justice Anglin stated in the Crow's Nest Pass Case:

It is quite within the power of
 Parliament to provide that on
 certain traffic lines of railway
 rates and charges in respect of
 certain traffic shall not exceed
 stated amounts regardless of any
 discriminatory effect which the
 making of such rates and charges
 may produce.⁴⁹

The discriminatory effect of freight rates is not always
 sufficient cause to justify an application for revision
 to the Board. In a series of cases it has been pointed
 out that the Railway Act actually "justifies discrimination.
 It is only an undue, unfair or unjust discrimination that
 the law is aimed against".⁵⁰ This means that the

⁴⁸ Canada, Parliament, House of Commons, Official Report of Debates, March 9, 1953, p. 2750, (Mr. Chevrier).

⁴⁹ (1926) 30 C.R.C. 32 at 47. In view of this fact it is not accurate to describe the freight rate structure as "the price list at which railways sell their services." It would rather seem that the freight rate structure is, or has become, merely the basis of that part of the railways revenue which is not received through some form of subsidization. See Currie, A.W., "Freight Rates and Regionalism", CJEPS, XIV:4 (November, 1948), p. 427.

⁵⁰ City of Toronto and Town of Brampton v. Grand Trunk and Canadian Pacific Railway Companies, (1911) 11 C.R.C. 370. See also In re Western Tolls, (1914) 17 C.R.C. 123 and Cuneo Fruit v. Grand Trunk, (1915) 18 C.R.C. 414.

discrimination must be so-called "unlawful discrimination" and that it must be related to the actual obligations of the railway to the public as defined by statute.

Over the years many proposals have been received by the Board regarding the basis on which rate making is undertaken. Originally, as we have seen, the Canadian government's policy was one of aid and encouragement to the railways without any form of vigorous regulation of rates or competition.⁵¹ In the chaotic period of the first decade of this century, when three transcontinental railways were building and competing with each other, the necessity for regulation was recognized and the Board of Railway Commissioners was established to perform that function. The freight rate structure that evolved was an historically based one,⁵² never completely satisfactory and yet never entirely redrafted or modernized to conform to existing conditions. By the time of the General Freight Rates Investigation of 1927 the policy of equalization of freight rates was receiving lip-service even though policy considerations and the realities of Canadian geography prevented it from being adopted as a rational basis for rate making. The Chief Commissioner of the Board, the Honorable H. A. McKeown, stated at that time:

⁵¹ MacGibbon, D.A., Railway Rates and the Canadian Railway Commission, (Boston, 1917), p. 52.

⁵² Currie, A.W., "Freight Rates and Regionalism", CJEPS, XIV:4 (November, 1948), p. 427.

... the railways must receive sufficient revenue to efficiently operate to provide for all legitimate needs, and to make fair return to those whose money is invested in such business undertakings.⁵³

In the same case it was stated by Commissioner Boyce that:

It has been laid down as a principle that the Board's functions do not extend to the removal, by adjustment of freight rates, of those natural geographical disadvantages, which in a country of such enormous extent and widely covered area, must naturally exist.⁵⁴

In an effort to equalize the freight rate increases which became necessary over the years the Board adopted the principle of the horizontal increase⁵⁵ which meant that an increase on any particular commodity class was granted on a straight percentage basis which had the unfortunate result of increasing the discrepancy in cents per hundred pounds between those shippers in the West and in the East. The problem has always been one of attempting to mediate between conflicting interests. It is not difficult to devise a policy in theory for as early as 1923 Commissioner McLean, who had been instrumental in the creation of the original Board of Railway Commissioners, laid down the ground rules for its policy:

It will, I think be admitted that an honestly organized and efficiently managed railway should be in a position to earn annually over and above its

⁵³ Re General Freight Rates Investigation, (1927) 33 C.R.C. 127 at 135.

⁵⁴ Ibid., 127 at 240.

⁵⁵ Re General Increase in Freight Rates, (1948) 62 C.R.T.C. 1.

operating expenses and costs of maintenance, such a sum as will enable it to pay its interest and other proper charges, and generally to maintain its credit and standing in the financial world. In this connection it is well to remember that ... the Board reserves to itself the right to, at any time, or notice, readjust the rates to meet conditions as they arise.⁵⁶

The difficulty is encountered when the theoretical policy must be practically applied in which case the granting of an increase to the railways to permit them to "earn their keep" would often work undue hardship on those who would be required to pay the increased tolls. The realities of rate regulation do not seem to conform with the theoretical basis upon which rates are said to be struck.

In 1954 proposals were made once again for a "Rate-Base-Rate-of-Return" method of determining the level of freight rates.⁵⁷ This proposal would involve the determination of the actual net investment of the railways and the deciding of what percentage of that investment would constitute a fair rate of return to the investors. The freight rates would then be adjusted so as to permit such an established rate of return to become a reality. This suggestion had been discussed earlier by the Turgeon Commission on Transportation who had dismissed it as being impractical and commented upon the principle

⁵⁶ Governments of Manitoba and Saskatchewan v. Railway Association of Canada, (1923) 26 C.R.C. 298 at 307.
⁵⁷ Re General Increase in Freight Rates, (1954) 70 C.R.T.C. 186 at 203.

then applied, that is the use of what is referred to as the prudent investment of the Canadian Pacific Railway as a yardstick or guide in the determination of the amount of rate increases.⁵⁸ It is through the use of the Canadian Pacific that the Board determines, in its mind, what are reasonable rates. This procedure was challenged in the courts on the grounds that the practice was unfair and discriminatory but the practice was upheld in the judgement of Mr. Justice Locke:

The statute (the Railway Act), however does not prescribe the methods to be adopted by the Board in discharging those duties (to fix just and reasonable rates) and it is for the Board, and not for this Court, to decide what are just and reasonable rates and what changes or alterations are required by reason of changing conditions or cost.⁵⁹

In view of this decision it is clear that the Board may set or approve whatever rates it deems necessary or desirable in the light of prevailing conditions or costs. This decision complements or broadens one handed down many years previously in which it was held that the Board possessed, as a matter of law, the right to approve the rates of a railway company so long as it acted within the four corners of the statute from which it derived its

⁵⁸ Canada, Report, 1951, Royal Commission on Transportation, (Ottawa, 1951), p. 67. See also Currie, A.W., "Rate Control on Canadian Public Utilities", CJEPS, XII:2 (May 1946), p. 148.

⁵⁹ Re General Increase in Freight Rates, 1956, (1958) 76 C.R.T.C. 97 at 104.

authority.⁶⁰ In a decision rendered still earlier it was decided that the Board may disallow rates, not only when it considers them too high, unjustly discriminatory, or unreasonable,⁶¹ but also if, in the Board's opinion they are too low under existing conditions to ensure the provision of safe and efficient service to the public.⁶²

Despite the limits which may be placed upon the Board in its regulation of rates and tolls it is obvious that it exercises considerable discretionary power in functions which are, superficially at least, of a judicial nature. The most recent judicial pronouncement upon the policy of the Board in relation to freight rates was laid down in 1960 at which time it was said:

... the national freight rates policy (is that) ... every railway company shall, so far as is reasonably possible, in respect of all freight traffic of the same description carried upon the like kind of cars or conveyances, charge tolls at the same rate.⁶³

It is this policy which is currently being followed. If the recommendations of the recent MacPherson Commission that the basis for freight rates should be cost-oriented⁶⁴

⁶⁰ Government of Alberta v. Canadian National Railways and Canadian Pacific Railway, (1931) S.C.R. 656.

⁶¹ Dawson Board of Trade v. White Pass and Yukon Railway Company (No. 2), (1911) 11 C.R.C. 402.

⁶² Manitoba et al., v. Canadian National Railway et al., (1926) 30 C.R.C. 18 at 31.

⁶³ Minister of Agriculture of British Columbia v. Canadian National Railways Canadian Pacific Railway et al., 79 C.R.T.C. 117 at 126.

⁶⁴ Canada, Report, March 1961, Vol. I, Royal Commission on Transportation, (Ottawa, 1961), p. 30.

is followed and a cost analysis division is established within the staff of the Board⁶⁵ it is likely that this policy will become more of a reality than it has been in the past.

The power of the Board of Transport Commissioners to conduct investigations and to adjudicate disputes has been referred to above.⁶⁶ The Railway Act provides that the Board may act or inquire into any matter on its own initiative⁶⁷ or without notice⁶⁸ but it usually intervenes only when requested to do so by a party affected by rules, regulations or determinations of the Board. It conducts regular investigations of safety equipment and railway rolling stock and equipment as was mentioned in the section of this paper dealing with its jurisdiction in regard to safety.⁶⁹ In 1961 the Board's engineers travelled more than 360,000 miles conducting inspections and examinations of projects falling within the jurisdiction of the Board.⁷⁰ The Board's mechanical inspectors also travelled widely, and investigations of all railway and rail-car accidents were carried out.⁷¹ This

⁶⁵ Canada, Report, December 1961, Vol. II, Royal Commission on Transportation, (Ottawa, 1961), p. 176.

⁶⁶ See page 63.

⁶⁷ R.S.C., 1952, Vol. IV, Chapter 234, s. 36.

⁶⁸ Ibid., s. 58.

⁶⁹ See pages 62 and 63.

⁷⁰ Canada, Annual Report, 1961, Board of Transport Commissioners for Canada, (Ottawa, 1962), p. 18.

⁷¹ Ibid., p. 23

continuous system of inspection and investigation in the field enables the Board to be familiar, at all time, with developments relating to any part of its responsibility and in many cases to settle issues at the point of conflict without recourse being made to Ottawa. The Board itself conducted hearings in twenty-two centres outside of Ottawa thus making full use of its mobility⁷² and lessening the expense involved for parties to a dispute. During the course of the year 3,156 applications were made to the Board complaining of, or seeking relief from, the rules and regulations made under the provisions of the Railway Act, the Transport Act, the Maritimes Freight Rates Act or other legislation under the jurisdiction of the Board. From this vast number of applications the Board was able to dispense with all but thirty-four⁷³ through appropriate administrative action so it is apparent that this "court of record" is much more than a court in the exercise of its functions.

Although it is a court it nevertheless possesses extensive regulative, legislative and administrative powers.⁷⁴ It differs from a purely judicial body in that it must not only decide a case correctly between two

⁷² Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 18.

⁷³ Canada, Annual Report, 1961, Board of Transport Commissioner for Canada, (Ottawa, 1962), p. 5.

⁷⁴ Kerr, R., "The Board of Transport Commissioners for Canada", Canadian Bar Journal, 1:1, (February, 1958), p. 50.

parties but also must decide it in the best interests of the public. It is apparent therefore that the functions of the Board of Transport Commissioners for Canada cannot be neatly categorized nor compartmentalized, rather they overlap and intertwine. However,

... the importance of its functions and the high standards which should be maintained ... cannot be stressed too strongly. Its decisions are of vital importance to, and have far-reaching effects upon, almost every person in Canada.⁷⁵

⁷⁵ Canada, Report, 1951, Royal Commission on Transportation, (Ottawa, 1951), p. 273.

Chapter V

Procedure and Appeals

Unlike the United States, with its Administrative Procedure Act, and Britain, with its Tribunals and Enquiries Act, Canada has no over-riding legislative enactment established for the purpose of promoting uniformity in the practice and procedure of administrative or judicial tribunals. Consequently, the practice of these bodies differs considerably and greater flexibility is possible in tailoring the procedure of a particular tribunal to its specific needs or requirements. Again, unlike the United States or Britain, Canada has never experienced a general investigation or study of its administrative procedures or tribunals, although it is obvious that the recommendations made in such studies in other countries have been adopted in our own administrative process.

Each commission which has been appointed to study the problems of administrative adjudication and discretion has arrived at the same general recommendations in regard to the procedure of administrative bodies. The so-called "principles of natural justice" have been accepted as the minimum safeguards against abuses of administrative power.

The Committee on Minister's Powers,¹ which reported in 1932 reiterated that no man should be a judge in his own case, that every party must be heard and receive notice of the case which he must meet, and that every party is entitled to know the reasons upon which the decision is based. However, adherence even to these minimum rules has not been universal in tribunals for in Re Ashby the independence of the tribunal was held to be virtually complete.

The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion and, having no fixed standard to follow it is guided by its own ideas of policy and expediency.²

Similarly, in a later case it was held that "tribunals which are not Courts are not bound by the methods of Courts but may adapt whatever methods are best suited to carry out their functions".³ In so far as the Board of Transport Commissioners for Canada is legally a Court it would be expected that its procedure would be judicial in nature. In fact the practice and procedure of the Board is less formal than that of many tribunals which are primarily administrative.

¹ Fitzgerald, R.C., "Safeguards in the Exercise of Functions by Administrative Bodies", Canadian Bar Review, XXVIII:5 (May 1950), p. 538ff. See also Finkleman, J., "Government by Civil Servants", Canadian Bar Review, XVII:3 (March 1939), pp. 166-177.

² Re Ashby (1934) 3 D.L.R. 565 at 568.

³ Rex v. Pantelidis (1943) 1 D.L.R. 569 at 577.

It has been noted previously that of the 3,156 applications received by the Board in 1961 only thirty-four required that formal hearings be held.⁴ The remaining mass of applications were dealt with solely by administrative action on the part of the Board's officials although all decisions are given in the name of the Board and have been reviewed by at least one of the Commissioners. In most cases no formal procedure is followed. "An application to the Board" initially takes the form of a letter from the complainant outlining the conflict and seeking the correction of a situation or the redress of some grievance. In many cases the matter is able to be disposed of simply by referring it to the company concerned requesting that whatever action is necessary be taken and that the Board be kept informed. In matters referring to some aspect of managerial discretion, over which the Board has no jurisdiction, the complainant is advised that the matter is one of internal policy of the railway or other company concerned and that his original letter has been forwarded to the proper source for whatever action the company may decide to take. In other cases falling within the jurisdiction of the Board it may be necessary for one of the Board's inspectors to investigate the complaint and recommend that appropriate

⁴ Canada, Annual Report, 1961, Board of Transport Commissioners for Canada, (Ottawa, 1962), p. 5.

action be taken. However, in a large number of cases the complaint concerns an individual's interest as distinguished from what the Board has decided is in the interests of the general public and in such cases the policy of the Board is explained on the particular question and no further action is required. It should be emphasized that over the years the Board has developed a mass of accumulated experience which makes many of its operations seem mechanical, but in fact the staff of the Board are able to recognize "typical" complaints or problems similar to those which have occurred in the past and apply solutions which have stood the test of time.

Under the provisions of the Railway Act⁵ the Board is empowered to make general rules and to regulate its own practice and procedure. Such a provision is consistent with the position of most administrative tribunals but is an exception to the powers normally entrusted to tribunals which are predominantly of a judicial character. The Rules of Practice devised by the Board established the formal procedure to be followed in making applications and in their disposition. The present rules were revised in 1949 and have been amended only once since that time but they are sufficiently flexible to enable the Board to make adjustments as they become desirable.

⁵ R.S.C., 1952, Vol. IV, Chapter 234, s. 54.

All proceedings before the Board are initiated by the receipt of a letter from an applicant setting forth the facts and grounds of the complaint, the section of the Act under which the complaint is made and the nature of the remedy sought.⁶ In actual practice this form is rarely adhered to according to the rules but the required information is obtained through subsequent correspondence. If another party is concerned copies of the applicant's complaint will be forwarded to that party with all supporting documentation which will be used as evidence.⁷ The respondent must then prepare an answer to any allegations made within twenty days if resident in Ontario or Quebec or within thirty days if resident in any other part of Canada. Copies of the respondent's answer are sent to the applicant guaranteeing that he is fully aware of the case which must be met and all the evidence relating thereto.⁸ If the staff officers of the Board are satisfied that sufficient documentation has been submitted by the parties to the dispute and it is not possible to remove the points of conflict by administrative action the Board will then give notice to the parties stating the time, date and place at which the hearing is to be held.⁹

⁶ Canada, Rules of Practice, The Board of Transport Commissioners for Canada, (Ottawa, 1949), para. 3, s. 1,2.

⁷ Ibid., para. 3, s. 4.

⁸ This provision predated the recommendations of the Franks Committee to the same effect.

⁹ Canada, Rules of Practice, The Board of Transport Commissioners for Canada, (Ottawa, 1949), para. 8, s. 6.

The actual hearings of the Board are conducted in a very informal manner, more in the nature of an inquiry than according to the formal requirements of an ordinary court of law. Safe guards are provided, however, in the Rules of Practice of the Board and in the Railway Act to insure that the interests of the parties, the railways and the public are protected. An amendment to the Board's rules in 1957 provided that the evidence of witnesses at the hearings shall be upon oath or affirmation¹⁰ but provision is provided that the Board may dispense with such requirements with the consent of the Parties concerned.¹¹ The hearings may be conducted in private or in public depending on the nature of the dispute and may be held before any two or more of the Commissioners.¹² Briefs presented to the Board may be submitted as evidence and are open to oral cross-examination during the proceedings.¹³ Although provision is made for the representation of the parties by counsel any party may represent his own interests or be represented by a non-lawyer.¹⁴ Most hearings are initiated on application to

¹⁰ Ibid., (as amended 1957), para. 18, s. 4.

¹¹ Ibid., para. 9.

¹² Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 12, s.s.(1).

¹³ Canada, Rules of Practice, The Board of Transport Commissioners for Canada, (Ottawa, 1949), para. 18, s. 2.

¹⁴ A study of the question of representation can be found in McLarty, M.R., "The Right of Legal Representation Before Administrative Tribunals", Public Administration, XXXI (Winter, 1953), pp. 365-375.

the Board by one of the parties to a dispute but it should be recalled that, unlike an ordinary court of law, the Board is empowered to initiate proceedings of its own volition and may, therefore, hold a hearing on any matter within the jurisdiction given it by Parliament. All hearings of the Board, whether commenced on the initiative of the Board itself or by the action of a party to a dispute, continue, as far as is practicable, from day to day until a decision is reached.

The Board is not restricted in its hearings to the procedures of an ordinary court nor is it required to follow the same procedure in one case as it may have followed in a similar case previously determined. The first of these "unwritten rules" of the Board was determined in a case which arose in 1939 wherein it was stated:

The Board is not bound by the ordinary rules of evidence. In deciding upon questions of fact, it must inevitably draw upon its experience in respect of the matters in the vast number of cases which come before it as well as upon the experience of its technical advisors. Thus, the Board may be in a position in passing on questions of fact in the course of dealing with, for example, an administrative matter, to act with a sure judgement on facts and circumstances which to a tribunal not possessing the Board's equipment and advantages might yield only a vague and ambiguous impression.¹⁵

¹⁵ Canadian National Railways v. Bell Telephone Company, (1939) S.C.R. 308.

In the second case, the Board had previously accepted the railways suggestions concerning the method of determining the rates to be charged in one instance. In the Rate-Base-Rate-of-Return Case the Supreme Court issued, inter alia, the following declaration:

But if the Board is bound to grant relief, (about which there was no argument), which is just to the public and secures to the railways a fair return, it is not bound to accept for the determination of the rates to be charged, the sole method proposed by the applicant. The obligation to act is a question of law but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere.¹⁶

The freedom of the Board in matters of procedure and the methods used in the exercise of its functions is not limited by the rules and regulations which the Board itself has established for the orderly disposition of its business. The "un-judicial" quality of the Board is emphasized by the fact that no proceedings before it can be set aside or declared void on purely technical grounds.¹⁷ It does not provide a haven for lawyers who have gained the reputation of being technical proceduralists.

The position of witnesses at a formal hearing before the Board is similar to that of witnesses at a hearing of a superior court. Subpoenas may be issued

¹⁶ Re General Increase in Freight Rates, (1958) 76 C.R.T.C. 12 at 13.

¹⁷ Kerr, R., "The Board of Transport Commissioners for Canada", Canadian Bar Journal, 1:1, (February, 1958), p. 54.

under the Board's seal, singly or collectively, and may be served in any part of Canada¹⁸ however the Board cannot compel persons to attend a hearing in a province other than that in which the subpoena is served.¹⁹

Witnesses, applicants or respondents to an action may also be compelled by the Board to produce any books, papers or documents which the Board feels are necessary for the disposition of the case even if the production of such material would incriminate one of the parties.²⁰

Some measure of protection is granted however in that no self-incriminating evidence coming to light in proceedings before the Board can be used in any subsequent proceedings except proceedings for perjury in the case at issue.

Furthermore, any order of the Board concerning witnesses or evidence to be submitted may be made an order of the Exchequer Court or any superior court of any province.²¹

The Board may also set penalties for violation of its orders and may cite parties for contempt although this particular power has never been exercised.²²

The judgements of the Board may be handed down in writing or given orally but in all cases they are available

¹⁸ Canada, Rules of Practice, The Board of Transport Commissioners for Canada, (Ottawa, 1949) para. 17.

¹⁹ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 63, s.s.(1).

²⁰ Ibid., s. 66.

²¹ Canada, Rules of Practice, The Board of Transport Commissioners for Canada, (Ottawa, 1949), para. 21, s.1.

²² Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 34, s.s.(3).

to the parties and are open to the inspection of the public in the offices of the Board in Ottawa. The Board may grant the relief sought by an applicant in whole or in part, or, it may substitute a form of relief which in its opinion is more adequate than that requested.²³

There is no limitation on the Board's discretion in determining the compensation to be awarded to any party. It may award costs²⁴ to the parties or may refrain from doing so if it appears that costs are unwarranted. In arriving at a judgement the Board very often makes use of its own inspectors' reports of investigations which are carried out independently from any formal hearing.

Although this procedure is, without a doubt, "non-judicial" in its nature the principles of natural justice are protected by the Board's customary practice of permitting all parties an opportunity to refute the contentions of such reports. Finally, the Board is not limited to the finding of fact on the evidence presented. The Supreme Court has determined that the Board may base its decision upon considerations of the "probable effects" which a certain policy will have even though it is impossible to document such "effects" at the time the judgement is made.²⁵

²³ Canada, Rules of Practice, The Board of Transport Commissioners for Canada, (Ottawa, 1949), para. 20, s.s.(1).

²⁴ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 62.

²⁵ See the remarks of Kerwin, J., in Reference by the Board of Transport Commissioners for Canada re - Transport Act, 1938, (1943) S.C.R. 333 at 347.

It is also within the competence of the Board to review its own decisions, either on petition within thirty days of a decision, or, on its own initiative in the light of new information.²⁶ This "built-in" review mechanism is a device frequently encountered in administrative bodies but only rarely found in bodies which are primarily of a judicial nature.

The Railway Act provides that the Board's decisions shall not be subject to any form of external review on questions of fact as long as the Board operates within the jurisdiction granted it by Parliament.²⁷ It is, however, subject to review or appeal on questions of law or jurisdiction. Professor H.W.R. Wade contends that "judicial review" should be distinguished from a system of appeals on the grounds that "review" is an essential part of the doctrine of ultra vires based, not on the merits of the case, but rather on the legality of the proceedings and is, therefore, concerned only with questions of jurisdiction.²⁸ The rights of appeal, on the other hand, "may or may not exist, and though it is often most desirable that they should exist, this is a question of policy".²⁹

²⁶ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s. 52.

²⁷ Ibid., s. 45.

²⁸ Wade, H.W.R., Administrative Law, (London, 1961), p. 43.

²⁹ Ibid., p. 43.

Historically, the process of review has been guaranteed through the use of the prerogative writs of certiorari, mandamus, prohibition, quo warranto, procedendo, and habeas corpus, however, in so far as the Board of Transport Commissioners is concerned,

... the (Railway) Act forbids the operation of any prohibition, injunction, certiorari, or any other process in any court against the orders of the Board.³⁰

The reason for this "prohibition of prohibitions" is that the Act provides elsewhere for various methods of appeal from the Board's decisions. Prior to 1951 an appeal from the Board to the Supreme Court on a question of law could be made only with the permission of the Board. In the words of the then Minister of Transport:

Parties to a proceeding before the Board now have the right to apply to a judge of the Supreme Court for leave to appeal to that Court on a question of jurisdiction. It is proposed to give parties the right to apply to a judge of the Supreme Court for leave to appeal on either a question of law or a question of jurisdiction. This amendment would make an application to the Board for leave to appeal unnecessary.³¹

The amendment removed the Board from the anomalous position in which it had been required to decide whether its own judgements should be referred to a higher court and although there had never been evidence of injustice in

³⁰ Currie, A.W., "The Board of Transport Commissioners as an Administrative Body", CJEPS, XI:3 (August, 1945) p. 347.

³¹ Canada, Parliament, House of Commons, Official Report of Debates, (October 26, 1951), p. 434.

the Board's handling of applications for leave to appeal the amendment removed even the appearance of injustice.

The policy of the Supreme Court in handling cases on appeal from the Board has been similar to that involving other statutory tribunals. The leading case was decided in 1919 wherein Chief Justice Davies stated:

... when exercising its functions in fixing the rates which a company may charge, the decision of the Board is final and we have no right to interfere or express any opinion upon it unless it clearly appears either (1) that the Board in exercising its judgement has refused to consider facts which it ought to have considered, or (2) has considered facts it should not have considered, or (3) has admittedly proceeded on a view of facts rightly taken into consideration which is erroneous at law.³²

The policy of the Supreme Court is, therefore, not to interfere with the decisions of the Board unless the Board has followed a wrong principle or disregarded a right one.

The question of jurisdiction has not raised any particular difficulties in appeals from the Board's decisions. The determination of the cases which have been appealed has turned upon the proper construction of the empowering statutes and has not created any insuperable

³² Ottawa Electric Railway Company v. Township of Nepean, (1919) 60 S.C.R. 216 at 219. See also Re Manning, (1943) 1 D.L.R. 383, and Re Railway Association of Canada et al., (1960) 78 C.R.T.C. 97 at 105.

obstacles. Questions of law which have been appealed created considerably more difficulty for many years. In 1939 a definitive statement was handed down by the Supreme Court which has substantially removed these difficulties.

The phrase 'question of law' which the Legislature has employed in the enactment is prima facie a technical phrase well understood by lawyers. So construed 'question of law' would include questions touching the scope, effect or application of a rule of law which the courts apply in determining the rights of parties; and by long usage, the term 'question of law' has come to be applied to questions which, when arising at a trial by judge and jury, would fall exclusively to the judge for determination; for example, questions touching the construction of documents and a great variety of others including questions whether, in respect of a particular issue of fact, there is any evidence upon which a jury could find the issue in favor of the party on whom rests the burden of proof.³³

The reluctance of the Supreme Court to interfere or reverse the decisions of the Board has been considerable. This fact is at least a partial answer to those who claim that an appeal from a tribunal to the regular courts has the unsalutary affect of substituting an inexperienced opinion for an expert one.³⁴ In the fifty-seven years of the Board's operation the disposition of cases which have been

³³ Canadian National Railway Company v. Bell Telephone Company of Canada, (1939) S.C.R. 308 at 316.

³⁴ See Lawford, H.J., "Appeals Against Administrative Decisions: I The Functions of Judicial Review", Canadian Public Administration, V:1 (March, 1962), p. 50.

appealed to the Supreme Court has been as follows:³⁵

Dismissed (including refusal to grant leave to appeal)	82
Allowed	19
Pending	1
Withdrawn, discontinued, etc.,	12
Total	114

It would appear from these figures that although sufficient appeal procedures from the judgements of the Board do exist there is little danger of the Board becoming merely a court of first instance whose decisions are little respected by the regular courts. It is interesting that the Board, although legally constituted a court and enjoying the powers and privileges of a superior court, may, on an appeal from one of its decisions, appear as a party to the case before the Supreme Court.³⁶ In this instance, as in others mentioned previously, the Board is placed in the peculiar position of settling disputes by a procedure primarily judicial in nature and yet it possesses some of the attributes normally considered to be those of an administrative tribunal.

The problem of reconciling the independent character of the tribunal with the concept of responsible government is apparent in the Board of Transport Commissioners as it is the many crown corporations. In order that the functions may be carried out efficiently

³⁵ Canada, Annual Report, 1961, Board of Transport Commissioners for Canada, (Ottawa, 1962), p. 9.

³⁶ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s 53, s.s.(9b).

and with greater dispatch than in an ordinary government department or in the ordinary law courts the Board must be granted a considerable independence in its methods and procedures yet it must never occupy the position of being outside of the control of the elected representatives whose task it is to govern the country and conduct government business. The claims of "responsibility" are an essential part of our constitution and it has become recognized that where almost total independence is necessary in order to allay suspicions of political interference there must still remain the vestige and the appearance of accountability to the electorate. The Board of Transport Commissioners possesses this bond of responsibility through the ties which bind it to the Governor in Council. The appointment of the Commissioners by the Governor in Council has been discussed in Chapter II but the degree to which the power of appointment serves as an element of control is relatively minor. The Governor in Council does, however, possess considerable power over the Board in regard to its judgements and the appeals which may result from them.

The normal avenue of appeal from a decision of the Board has consistently been to the Supreme Court on questions of law or jurisdiction. In matters which do not fall within these two categories the courts are prohibited from exercising any authority over the Board. In order,

however, that full opportunity to be heard should be a reality and not merely a legal fiction, and, more importantly, in order that the government may exercise that degree of control which is required by the nature of responsible government the Railway Act provides an alternative method of appeal which is completely independent of the regular courts of law. By this provision³⁷ the Governor in Council is given statutory authority to intervene, either at his own discretion or on petition by any interested party, person or company, and to vary or rescind any order, decision, rule or regulation of the Board of Transport Commissioners.³⁸

In ordinary circumstances questions of law will be appealed to the Supreme Court but this historical fact in no way limits the authority of the Governor in Council, (in fact, the Cabinet), to inquire into any matter within the jurisdiction of the Board. If occasion should arise the Cabinet has full powers to intervene to reverse the decisions of the Board if, for example, a particular policy of the Government were being thwarted by the Board's actions. The use of the power in such circumstances has

³⁷ Railway Act, R.S.C., 1952, Vol. IV, Chapter 234, s 53, s.s.(1).

³⁸ The powers of the Governor in Council, in this regard, are discussed in Currie, A.W., Economics of Canadian Transportation (Toronto, 1954), p. 436; and in McLean, S.J., "The Railway Act of Canada", Canadian Bar Review, VI:6 (June, 1928), pp. 414-429.

been extremely infrequent and must, of course, be used sparingly if the reputation of the Board for independent action is to be preserved. Most of the cases which are considered by the Governor in Council are received on petition from persons protesting such actions of the Board as the approval of freight rate increases or the abandonment of rail lines or other facilities. It has become extremely rare for the Governor in Council to intervene upon his own initiative. Although the number of appeals to the Governor is less than the number of cases which have been appealed to the Supreme Court the disposition of the cases shows a considerable similarity. From 1904 until the end of 1961 the Governor in Council disposed of seventy-two cases³⁹ in the following manner:

Dismissed	39
Allowed	6
Referred back to Board	15
Withdrawn, discontinued, etc.	12
Total	<u>72</u>

Again, a similarity may be noted between the policy of the Governor in Council when considering such cases and the policy of the Supreme Court as discussed above. The most recent case in which this policy was clearly enunciated was an appeal from a decision of the Board which authorized the establishment of a joint telegraph office and pooling of tolls and revenues. The judgement was delivered in Order in Council P.C. 1961-638 of April 28th wherein it was stated:

³⁹ Canada, Annual Report, 1961, The Board of Transport Commissioners for Canada, (Ottawa, 1962), p. 8.

... in appeals to the Governor in Council from orders and judgements of the Board of Transport Commissioners it is the practice not to interfere with such orders and judgements unless it is evident that the Board has proceeded upon some wrong principle, or that the Board has otherwise been subject to error; where the matters at issue ... are questions of fact depending for their solution on evidence adduced before the Board, or are otherwise matters in respect of which the Board is particularly fitted to determine, it is the practice, except as aforesaid, not to interfere with the findings of the Board.⁴⁰

It may be concluded, therefore, that in the exercise of its functions the Board of Transport Commissioners operates with a considerable degree of independence regarding the procedure to be followed while at the same time being subjected to a sufficient appeal procedure to enable the interests of the railways, the shippers and the public to be adequately protected against misuse of that independence. The concept of responsibility is not emphasized to the point of restricting the impartiality or decisiveness of the Board, nor is the need for independence emphasized to the extent of removing the Board from a proper and constitutional degree of public control.

⁴⁰ Commercial Telegraphers' Union v. Canadian National Railways and Canadian Pacific Railway, (1962) 81 C.R.T.C. 359 at 361.

Chapter VI

Summary and Conclusions

The Board of Transport Commissioners for Canada, established in 1938, and its predecessor, the Board of Railway Commissioners, established in 1903, were created to provide a reasonable balance between prompt and effective action in carrying out public policy and due consideration for the interests of individual citizens. Generally speaking, this is the aim or the purpose for which all administrative or regulatory bodies are created.¹ The Board is not, nor has it ever been, a policy making body for its actions are completely circumscribed by the provisions of the Railway Act, the Transport Act, and the other acts of Parliament from which it derives its authority. Its jurisdiction is limited but within those limits it may exercise considerable discretion in the methods, manner and procedure which it adopts to effectively discharge the duties given to it. Unlike the ordinary courts the Board does not adhere to the strictly legal and often rigid procedure which has caused our courts to become slow, cumbersome and

¹ Robson, W.A., "Administrative Justice and Injustice: A Commentary on the Franks Report", Public Law, (Spring, 1958), p. 15.

expensive. The wheels of administrative justice turn much more rapidly than do those of "judicial justice".

The advantages of the flexible characteristics of tribunals are generally known and accepted. The process of litigation becomes relatively cheap, accessible, and free from the technicalities which so often bedevil courtroom lawyers.² The advantages of expert knowledge supplied by an experienced staff are numerous and cannot be overemphasized. The general principles which govern the practice of the Board are those characteristic of most administrative bodies. "General considerations of fairness, policy or expediency rather than particular recorded rules of law are intended finally to govern their determinations".³ The basic requirements of openness, fairness and impartiality⁴ are provided for by practice and custom. The independence of the members of the Board is protected by their ten year term of office although it has been suggested that the Commissioners' term of office be made identical to that of superior court judges. While providing for independent Board action

² Willis, J., "Administrative Decision and the Law: the Views of a Lawyer", CJEPS, XXIV:4 (November, 1958), p. 503.

³ Hopkins, E.R., "Administrative Justice in Canada", Canadian Bar Review, XVII:9 (November, 1939), p. 620.

⁴ Great Britain, Report, 1957, Committee on Administrative Tribunals and Enquiries, (London, 1957), Cmnd. 218, p. 9, para. 41.

Parliament has protected the principles of responsible government by providing for the intervention of the Governor in Council in any matter before the Board, although of course the power is used sparingly, and by providing that appointment to the Board shall be made by the Governor in Council. All of these characteristics tend to make the Board ably suited mechanically to the expeditious disposition of the problems which lie within its competence. It is, however, difficult to categorize a tribunal, even by an examination of its characteristics, as either a judicial or administrative body.

The Franks Committee obviously looked upon tribunals as adjudicating bodies and considered them to be of a judicial character. On the other hand the Gordon Committee in Ontario felt that tribunals were chiefly ministerial agencies and therefore must be responsible for their actions to a minister of the Crown.⁵ In the light of the foregoing examination of the Board of Transport Commissioners we must ascribe to that body the characteristics of both reports.

A tribunal may be said to be judicial if its decisions contain the following elements: it must involve a dispute between two parties; the disputants must have the opportunity to present their cases; questions of fact

⁵ Cheffins, R.I., "Administrative Tribunals - United Kingdom, Ontario Recommendations", Canadian Bar Journal, IV:2 (April, 1961), pp. 126-127.

must be determined upon the evidence; questions of law must be determined by the submission of legal argument; and the decision or finding must be based upon the facts in the dispute and an application of the law to those facts.⁶ It is an uncontestable fact that the Board observes the first two of these elements. However, evidence submitted to the Board often includes hearsay and unsubstantiated opinion upon which facts are determined. Similarly, the Board makes use of its own inspectors' and staff reports. The proceedings of the Board do not conform to the rules of court and points of law are, in the final analysis, determined by the opinion of the Chief Commissioner or Assistant Chief Commissioner. If we accept that the facts as determined by the Board do not conform to facts as determined by a court it can be argued that the Board's decisions are based on the application of the law to the facts although the anomalous position of the Board as a protector of the public interest necessarily involves considerations of policy. From this argument it must be concluded that the Board is not a judicial body in the same sense as the ordinary courts.

If then the Board is not a judicial body, strictly speaking, it remains to be seen whether or not it can be

⁶ Fitzgerald, R.C. "Safeguards in the Exercise of Functions by Administrative Bodies", Canadian Bar Review, XXVIII:5 (May, 1950), p. 545.

said to be wholly administrative. The Committee on Ministers Powers defined an administrative action as one in which there is,

... no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collect any evidence, or to solve any issue. The grounds upon which he (or a tribunal acting administratively) acts, and the means which he takes to inform himself before acting, are left entirely to his discretion.⁷

Immediately it can be seen that the Board does not operate in this manner. It has many legal limitations imposed upon it by statute although it does possess considerable discretion in deciding upon the procedure to be followed in reaching its decisions. It would perhaps be better to say that in so far as the Board does possess supervisory and regulatory functions it is an administrative board. However, like many boards, it is also judicial "in the sense that the tribunal has to decide facts and apply rules to them impartially."⁸ In this sense, the Board of Transport Commissioners combines the attributes of administrative and judicial bodies in order to adequately deal with its variegated functions.

Generally speaking, the Board has operated effectively in an area in which complete satisfaction to

⁷ Great Britain, Report, 1932, Committee on Ministers Powers, (London, 1932), Cmd. 4060, p. 75.

⁸ Wade, H.W.R., Administrative Law, (London, 1961), p. 197.

all problems is impossible. In 1917, in the midst of the turmoil which resulted in the acquisition by the government of the railways later to become the Canadian National Railways, it was stated that:

... on the whole, while the Board (of Railway Commissioners) has caused the reduction of excessive rates, and has eliminated certain abuses of discrimination, it has not used its powers over rates and tariff to influence the ordinary commercial development of the Dominion. It has essentially functioned as a convenient informal court of justice rather than as a regulative commission.⁹

In its context this statement is undoubtedly true. It should be noted that the development of most of the railways in Canada preceded the establishment of the Board in an unregulated and overly optimistic era of expansion. It should not be expected that the Board, created when the era of westward development had almost reached its peak, would be in a position to control, encourage or regulate commercial development. In Canada the railways were not built to serve existing industry. On the contrary, industry tended to congregate at the railway junctions in a haphazard and often uneconomical manner. Had the development of the railways been controlled with the same zealousness as is now apparent in applications for the construction of new lines to exploit natural resources it is possible that the Board

⁹ MacGibbon, D.A., Railway Rates and the Canadian Railway Commission, (Boston, 1917), p. 239.

would have been able to exert some influence on commercial development. This, however, was not intended to be its function though the Board has often been criticized for not performing it.

A more telling criticism of the Board has often been the subject of debate within the House of Commons. The following remark typifies the most wide-spread criticism to which it has been subjected.

Up to date, however, the Board has failed to do the job it was appointed to do in maintaining reasonable equalized freight rates across the Dominion of Canada.¹⁰

The problem of freight rates has been the most troublesome task which the Board has faced in regard to the railways. The Board's policy has been to devise an over-all freight rate structure which would enable the railways to transport goods at a rate high enough to give a return sufficient to cover operating and overhead expenses and to realize a reasonable profit while at the same time attempting to assure the shipper that his goods were being transported at a rate not in excess of need. Now that the generalization has been made it should at once be stated that the problems of railway transport in Canada do not submit to generalizations. The general idea outlined has never been implemented and the one

¹⁰ Canada, Parliament, House of Commons, Official Report of Debates, (October 26, 1951), (Mr. P.E. Wright), p. 467.

safe generalization is that it never will be. Over-all the Board has attempted to reduce the inequalities of the incidence of tolls charged for like classes of goods shipped in similar types of rolling stock. It is inevitable that consumers in the western and eastern provinces will continue to pay higher freight charges than those in central Canada. The reasons for this situation include the obvious one of greater distance as well as such factors as low density population, dispersed economic and industrial development, and in many cases, a lack of remunerative return haul traffic. Other discrepancies in the incidence of freight rates are perpetuated as a matter of government policy, the most outstanding example being the freight rate structure on grain which is based on the agreement of 1897. With each freight rate increase granted by the Board these regional discrepancies are increased. The Board has adopted the "horizontal increase" as the most equitable means of raising the level of permissible charges on most commodities with the result that the residents of the extremities of the country bear an increasingly large share of the increase as has been explained in Chapter IV. The MacPherson Commission recommendation that a system of costing be used as the basis for rate-making is an alternative but even if adopted it will serve only as a new means of treating the same symptom. The "disease"

in this case, to continue the metaphor, lies in the very nature of the economy of the country. It is the result, not of the regulation of the Board nor of the methods used, but rather of the fact that the country itself is not an economic unit. It is therefore a disease which cannot be cured but at best controlled.

The second major problem that has faced the Board has been the demand or wishful thinking for "a national transportation policy". As nearly as can be determined the idea first arose during the building of the Canadian Pacific Railway during the MacDonald era and has been resurrected at irregular but frequent intervals since that time. Ideally it should be possible for a transportation system to be devised in which water, rail, road and air transport services are complimentary to each other but brought down to the practical level the ideal becomes an impossibility. In the first place the very concept of such a system with no duplication of facilities or services and no sharp competition would require such stringent regulation as to almost necessitate government ownership of all transportation facilities. Secondly, the problem of size and co-ordination under state control would almost inevitably involve a lessening of efficiency and economy although the benefits of a unified system might outweigh the difficulties. Thirdly, there is the constitutional problem involving the

jurisdictions of the provincial and federal government over various forms of transportation. Finally, the achievement of such a system would be an economic and political impossibility because of the interests involved. It may be concluded, therefore, that the criticism of the Board for not achieving such a policy is unfair and unfounded for it is not within its competence to do so.

The Transport Act of 1938 contained the only real attempt that has been made by the government to provide some form of co-ordination between the various forms of transportation but in the words of the Turgeon Commission:

... while Parliament made provision in 1938 for a Board of Transport (instead of Railway) Commissioners it did not go as far as it might have gone towards bringing about a complete co-ordination of 'all carriers engaged in transport.'¹¹

The problem was the same then as it is now, that the federal government does not have jurisdiction to regulate all forms of commercial transport services. It was soon found, after 1938, that the new Board of Transport Commissioners was unable to devise common principles for the regulation of different carriers. It would appear that the idea for such a policy has subsequently been abandoned as jurisdiction over air transport and

¹¹ Canada, Report, 1951, Royal Commission on Transportation, (Ottawa, 1951), p. 277.

pipelines is now exercised by separate boards with the result that the transport commissioners have once again become chiefly railway commissioners.

The procedure of the Board of Transport Commissioners conforms generally to that recommended by inquiries into administrative practice in the United States and Great Britain. Although the Board is free to establish procedural requirements without statutory limitation in practice it operates according to the principles of natural justice, although the actual conduct of its hearings is marked by a large measure of informality. Its decisions are not subject to procedural writs but adequate provision is made for review of its decisions on points of law and jurisdiction by leave of a judge of the Supreme Court. The fact that relatively few of the Board's decisions have been reversed on appeal indicates a considerable degree of astuteness on the commissioners' part in arriving at well informed and reasoned decisions.

The process of judicialization which we have noted in connection with tribunals in the United States and Great Britain has not progressed to the same extent in Canada. The Board of Transport Commissioners in particular appears to combine those aspects of administrative and judicial bodies which best suit the type of case which

is before it. The advantages of its informality far outweigh whatever advantages could be gained from a more rigid adherence to the practices of the regular limitations applied to the courts to ensure that the rights of the public and of individuals are protected. It has chosen to adhere to an administrative rule of law which guarantees the parties in a dispute fair and equal treatment in the presentation and disposition of their case. It is true that these safeguards are not legally binding but are merely the practice which the Board has chosen to adopt. It is a rule of self-imposed law under which the Commissioners operate but it is a rule of law embellished by more than half a century of custom and tradition.

The role of the Board of Transport Commissioners is that of a statutory tribunal which has been granted authority by Parliament to perform executive, legislative and judicial functions in conformity with the specific statutes from which its authority is derived. It is a regulatory body entrusted with the task of controlling railways in Canada. It has adapted the informality and efficiency of administrative bodies to the task of regulation while retaining its judicial nature. Constituted a court of record by statute, the Board of Transport Commissioners for Canada has become by practice a judicial

body possessing those attributes of an administrative body which give it flexibility and efficiency in the discharge of its supervisory and regulatory functions.

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