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# **The Statement of National Transportation Policy: Assessment and Suggestions for Change**

Research conducted for the Canada Transportation Act Review

Report prepared by  
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# **The Statement of National Transportation Policy: Assessment and Suggestions for Change**

**A Paper by Trevor D. Heaver\*  
for the Canada Transportation Act Review Panel**

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## **Summary**

The paper is in six parts. Part two supports the need for a policy statement and outlines the core elements required of a statement. The policy should set down the broad objectives for the transport sector and describe the principles intended to be followed by government for the achievement of those objectives.

Part three identifies, within an historical context, the major forces that have shaped The National Transportation Policy (NTP). They are:

- Growing acceptance of the role of competition as the source of efficiency;
- Acceptance of the need for carrier-neutral public policies in competitive markets;
- Residual unease about “national policy,” for example, regional development;
- The interest of shippers in protection from potential abuse of market power by transport service providers (targeted at railways but applicable generally).

Part four examines in sequence the NTP in the acts of 1966, 1987 and 1996. It provides more background discussion of the 1966 legislation to establish the logical structure of the first NTP. This structure is fundamental. It provides the framework against which to analyse the appropriateness of many subsequent amendments. The NTP of 1966 had five components. They were:

- The objectives for transport.
- The reasons for the objectives.
- The means to achieve the objective
- The conditions needed for the means to be effective
- Constraining factors.

The framework is used in the analysis of each statement of the NTP in three exhibits. Exhibit 1 places all the components of the NTP, 1966, in this framework. The text following it explains some of the discussion about the preceding Bill C-231 to account for the actual content of the *Act*.

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Exhibit 2 identifies those parts of the NTP that were changed and those parts that remained the same. Some short comments on changes are made in the exhibit. A longer one dealing with regulation follows it. The shift to intramodal competition is clearly done and logical. Most other changes add confusion, are in the wrong place or are plain wrong. It appears that some changes were made on the basis that two wrongs make a right!

Exhibit 3 uses the same framework as the previous exhibits but deals only with those items that were changed.

The conclusion derived from section four is that the NTP needs radical revision built around the framework of the version of 1966. I suggest the following for each of the components:

- Simplify the statement of objectives to “efficient and adequate.”
  - Simplify the reasons. Can we go so far as to return to the 1966 wording? If a reference to persons with disabilities is still needed, let's just have it once. I believe it would be much better elsewhere.
  - The existing simple statement on means is fine.
  - Much needs to be done under the conditions. It needs a new treatment in a single sub-section of all non-economic transport attributes that may be required of the industry, for example safety and environmental standards. It needs a reworking of the regulatory conditions in (b), (c), and (g). I set out a suggestion below **without** investigation of the appropriateness for including the clauses as they are under (g).
- a) Economic regulation of carriers and modes of transportation occurs only where competition is insufficient. (This presumes continuation of the current policy of no specific constraint in the transport legislation for predation.)
- b) Economic and other regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation.
- c) Each carrier and mode of transportation, as far as practical, carries traffic.....
- The sections (d) and (h) and the reference to harmonized policies in the current NTP should be deleted.
  - There is no need to change the text in the current (e) and (f), the only parts of the NTP to be unscathed, really since set out by the MacPherson Commission!

In the last part of the paper I suggest that a rejuvenated National Transportation Policy can play a more effective role in the conduct and monitoring of transport in Canada. It should be applied against legislation, such as the *Shipping Conference Exemption Act*. Principles of the NTP should also have relevance in regulatory cases. Protecting and applying those principles are a part of the public interest. As parties themselves are normally looking after their own, private interests, the Panel should consider whether

*amicus curiae* briefs have a place in the procedures of the Canadian Transportation Agency.

Finally, given the length of this paper I hope that the sentiment behind the inclusion of the Endpiece is appreciated!

## **1. Introduction**

This paper is a response to a request from the Canada Transportation Act Review Panel to review section 5 of the *Canada Transportation Act*, the National Transportation Policy (NTP), and to advise on its potential modification or replacement. The paper is to consider the historical development of the section, its objectives and continued relevance and is to offer advice for potential improvement.

I express my personal views in this paper. They are derived from my experiences in research and teaching transport and logistics for over 40 years and from various experiences working as a consultant to shippers and railways on policy and pricing matters.

I have organized my comments into five further parts. The next part of the paper deals with the purpose of the statement of policy. This is important to the form and content of the policy. It lays the foundation for considering in part three the major forces that have shaped the statement of policy over time and which are still valid. It is then appropriate to examine in part four how changing economic and political conditions have influenced that evolution of the NTP. The content of the policy statements of 1966, 1987 and 1996 is examined and compared. Advice for potential improvement is offered in fifth part of the paper. Finally, the paper concludes with comments about the link between a policy statement and other transport legislation.

## **2. The purpose of a statement of national transportation policy**

There is no national policy on steel. Does Canada need a national transportation policy statement?

A sectoral statement of national policy is necessary when an industry is sufficiently different from other sectors of the economy that a general policy statement is not appropriate. (This observation assumes that a general, intelligible statement exists. If such is not the case, an opportunity exists for transport to show the way!) So, is transport sufficiently different from other industries? To this, I answer, “yes” – which is just as well or many of us would be out of business!

This conclusion is supported by the high level of government participation in the area. First, the federal government directly, for example, in remote ports and airports, in land at major ports and airports and in maritime navigation, and indirectly, for example, in the St. Lawrence, is heavily involved in investments in transport. These exceed the role in other industries. Second, conditions in transport markets are different than in other markets because of the greater actual or potential pockets of monopoly power, especially with the railways, compared with other industries. Third, the international regimes under which transport is conducted require government to have a greater and different level of involvement than in industry in general. For these reasons, the presence of government is

significant and different. The government and those affected by government decisions need to know what the objectives and methods of government will be.

The purposes of a statement of transport policy are to set down the broad objectives for the transport sector and the principles to be followed by government for the achievement of those objectives. The principles are the general guidelines for government programmes affecting transportation. The policy statement must transcend individual topics to deal with principles that will be relevant for extended periods of time.

A policy statement needs to be general but to give a clear sense of direction. It needs to be readily seen as applicable to the wide range of particular conditions to which it may apply. Yet, it needs to be short. It is not surprising that developing a policy statement is difficult and that there is a tendency to elaborate and elaborate. Unfortunately, as lawyers know, (or is that, “should know”) more words can lead to more confusion. A review of the development of the NTP will show this to be the case.

### **3. Major forces behind the National Transportation Policy**

Inevitably, policy is a creature of the perceptions that exist at a time. But, hopefully, through investigations and the process of developing legislation, legislators collectively gain the wisdom necessary to sort out ephemeral positions from those with lasting value. Unfortunately, this review of the evolution of the current NTP suggests that our legislators have fallen seriously short of this wisdom. A more evident logic in the NTP is needed to reduce the risk of losing sight of the wood for the trees.

A review of major milestones in the policy debate reveals four driving forces:

- Growing acceptance of the role of competition as the source of efficiency;
- Acceptance of the need for carrier-neutral public policies in competitive markets;
- Residual unease about “national policy,” for example, regional development;
- The interest of shippers in protection from potential abuse of market power by transport service providers (targeted at railways but applicable generally).

#### **3.1 The MacPherson Commission, competition and the *National Transportation Act 1966-67***

*Greater reliance on competition and a reduced role for “national policies.”* The foundation of current transport policy was conceived within and brought forth forty years ago by the MacPherson Commission with the insightful and persuasive influence of Fred Anderson. Unlike previous commissions, it saw the railway rate problems that had been laid at its door to be a part of a wider transport situation that was becoming ever more evident. It saw that the growth of competition caused by new transport services by water, road and air was not yet recognized in public policies. This led to inefficient transport and ineffective government policies. The Commission recommended solutions consistent with greater reliance on competition as a national transport policy. The expectation was

an improvement in the efficiency of the transport system and a hoped for, but not assured, viability of railway services.

The recommendation for greater reliance on competition carried with it implications for other government policies. Transport firms could not be expected to perform non-remunerative services in the public interest without compensation and all government programmes affecting transport needed to be carrier neutral. The rationalization of the range of government policies was subject to less debate at this time than the mechanisms for implementing reliance on competition.

That view of competition as intermodal competition arose for two reasons. The first reason was the Commission's view (and that of others, including shippers) that the railways were not ready for intramodal competition. The second reason was that the government ignored the Commission's view that modes with ready entry and exit, notable trucking, could be opened to the full range of inter-company competition. It was a call ahead of its time in North America. So, opening transport markets to the forces of intermodal competition was the primary innovation of the day, which meant railway deregulation.

An example of the general support for greater reliance on competition is the position of the Mining Association of Canada.<sup>1</sup> It did not "quarrel" in principle with the basic concept "that competition between all the varying modes of transport is the best regulator or criterion for attaining an economic and efficient transportation system at the lowest cost." (Standing Committee on Transport and Communications, Nov.10, 1966, A-30, p. 2521.) Very few did quarrel. An example is the National Farmers Union that argued, "interprovincial transportation should remain an instrument for the development and maintenance of a viable economic and political nation." (Standing Committee on Transport and Communications, Oct.27, 1966, A-17, p.2127.) I show, later in the paper, the various ways in which the government embraced reliance on competition in 1966 and beyond, yet the old notion of using transport to achieve national policy has kept reappearing. Of course, an efficient transport system **is** vital to achieving economic goals and the wealth created and more efficient transport system can support non-economic goals more effectively.

*Regulatory constraints on market power.* The general support for the principle of the Act did not prevent lengthy debate. One of the most contentious issues was the level and form of protection to be afforded to shippers using the railways.<sup>2</sup> Shippers were accustomed to protection against unfair rate discrimination under the *Railway Act*. That major cases previously revolved around general rate increases and not around cases of unfair rate discrimination did not diminish the shippers' insistence on the need for

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<sup>1</sup> It was not until the discussion of shipping policy in 1984 and, soon after, the general transport policy discussion that shippers formed coalitions for more effective lobbying and presentations.

<sup>2</sup> Protection of carriers, notable the trucking industry from railway rates below cost, was debated but not disputed strongly.

specific rate protection.<sup>3</sup> They argued that they needed protection beyond that of the maximum and minimum rates, as recommended by the MacPherson Commission, supplemented by the so-called public interest clause included in Bill C-231.

The battleground lined up between the government (and the railways) and shippers. Mr. Pickersgill, as Minister of Transport, hoped that modest amendments to the public interest clause would provide a protection for shippers in "...a formula which will prevent endless, vexatious and frustrating appeals to the commission..." (Standing Committee on Transport and Communications, Nov.17, 1966, p. 2594-95.) The government was reluctant to make modifications to the public interest clause. It wanted a mechanism to make sure that cases coming forward were "important." Shippers wanted to ensure that individually they were protected from potentially abusive positions by the railways. They agreed with Mr. Fawley, Q.C., Counsel for the Government of Alberta that "it is highly impractical to put those words 'public interest' in the bill without defining them." (Standing Committee on Transport and Communications, Nov.22, 1966, p. 2767.) To overcome this problem, shippers wanted the required conditions for rates and services present in the *Railway Act* to be included in the new legislation. They won their way by its addition into the NTP and into the public interest clause.

### **3.2 The national policy debate of the mid 1970s**

It may have been expected that the passage of the *National Transportation Act* and the debate that accompanied it would have put to rest the notion that the "transportation must be an instrument of national policy, designed to achieve broad social and economic objective." (The Throne Speech, Sept. 30 1974.) That expectation would overlook the ability of political forces to give new appeal to ill-conceived notions.

The key factor was the coalition of the four western provinces to push their grievances against a Liberal government with little representation in the west. It was predictable that at the 1973 Western Economic Opportunities Conference one of the western complaints would be against transportation (railway) rates.<sup>4</sup> (Political propaganda needs to have ready popular support. Therefore, old myths can be more useful than new, less popularly understood realities!) The Minister of Transport, Mr. Marchand, was persuaded on the basis of various instances of transport rates quoted to him that "Transportation is in a mess." This set in motion a study by a Task Force. A three-volume report was issued by Transport Canada including a summary report in 1975, "Transportation Policy, A Framework for Transport in Canada." To support "the desire of the government to use transportation as an instrument of public policy," (Summary Report, 1975, p. 28) the requirements and objectives of the public and private sectors would be met by adopting ten principles, substantially different from those in the existing NTP.

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<sup>3</sup> Mr. Rae of the Canadian Manufacturers Association noted, "Even under the present rules the number of times that the Board of Transport Commissioners are involved in situations between a couple of shippers is fairly infrequent." SCOT, Oct. 19, 1966, p. 1952.

<sup>4</sup> Trevor D. Heaver, "Wrong Way to Solve Ill-Defined Problems", *Executive*, 15, 78: 13-15 (July 1973).

This initiative to reinsert national policy as the goal of transport policy came to a sudden end. The absence (I understand the **complete** absence) of shipper support for proposed legislation and the unfortunate accidental death of Mr. Jim Davey, Senior Assistant Deputy Minister – Special Projects, led to a rapid but silent withdrawal of the ill-fated initiative. However, the episode highlights the realities of political pressures founded on regional issues and the sensitivities of federal politicians to those pressures. They did not result in a major overturning of transport policy in the mid 1970s but they did result in modifications to the NTP in the 1980s.

### **3.3 Freedom to Move**

A greater contrast in policy orientation between that of 1975 and 1985 is hard to imagine. The Sixth Report of the Standing Committee on Transport dealing with *Freedom to Move: Change Challenge, Choice*, describes the Transport Canada document as “a philosophical paper setting out in broad terms the intentions of the Government...” Those intentions were for “Less regulation leading to less government interference” and “Greater reliance on competition and market forces.”

The shift in policy was the result of some important changes in government and public attitudes. The late 1970s witnessed a dramatic disillusionment with big government. In particular, the reduction of economic regulation was ‘in the wind.’ However, significant reduction of many other aspects of government presence in transport was left for another day in Canada.

Deregulation of transport in the US had important implications for Canada. It made US services more aggressive competitors for Canadian business. (This led to much *de facto* deregulation of the airlines in 1984.) It showed Canadian shippers through example and through their opportunity to negotiate with US railways that shippers have considerable bargaining power with railways. As a result, they abandoned their preference for negotiating collectively and sought to require carriers to negotiate individually. They also sought to allow confidential rates. The substantial change in the policy environment was to promote intramodal competition and to use extensions of competition by regulation to mitigate levels of market power enjoyed locally by carriers, primarily the railways. (The same policy was used in the telephone industry.)

The extension of interswitching limits and introduction of competitive-line rates led the railways to characterize the proposals at best as regulatory reform and not deregulation. They were concerned about increasing regulation. This was a different type of pressure coming to bear on the policy process. If they could not stop the application of proposed measures they, at least, sought to see them constrained. (They also sought some greater managerial freedoms offsetting the imposed competitive arrangements, but action on this front was delayed until the inevitable crisis loomed to force government’s hand.)

However, in spite of or, perhaps, because of an almost fervent drive for greater reliance on market competition, traditional concerns about regional economic development arose

and were acted upon. The concerns arose most strongly from Atlantic Canada where the politics of economic and electoral conditions seemed to result in concessions in the legislation. No such concession had been gained in 1975! The ill-conceived revisions to the NTP of 1987 suggest that concessions were made to win over political interests with fringe positions.

### **3.4 MacPherson's dream comes true - almost: the mid 1990s**

The environments of the mid 1960s, the mid 1970s and the mid 1980s had not been sufficient to cause the government to address matching its own practices with the principles that it had laid down as the NTP in 1966. It had attended to the regulatory side of its house that affected the conduct of others but it had not attended systematically to the operational and promotional aspects of its own functions. I have generously referred to the government's application of the policy principles beyond regulation as "creeping." In light of this, the shift in policy in the mid 1990s was "remarkable."<sup>5</sup>

The condition of government finances in the mid 1990s led to systematic initiatives under Minister Young's "New directions for transportation," (the phrase first used to characterize changes introduced in 1984). Prior to this, crisis management had led to some rationalization of government programmes, such as the payment of subsidies for the carriage of grain at statutory rates in 1984, but no systematic effort was given to the development of carrier-neutral programmes affecting government subsidies and burdens imposed on transport by policies. It took the pressures of a crisis in government finance create an environment conducive to shift government programmes to the policy recommended by the MacPherson Commission. Placing more facilities and services on a commercial basis, for example ports and airports and moving to actually implement programmes of (partial, at least) cost recovery for air and marine navigation services were important steps in making neutral government's involvement in transport markets. The *Canada Transport Act* resulted in some modest changes to the NTP. These are best reviewed under the sequential treatment of the legislation.

## **4. Canada's statements of National Transportation Policy**

The three statements of transport policy are examined. In the case of the 1966 legislation, the characteristics of policy in the preceding Bill are also presented to emphasize the logical structure of the policy statement and to account for some of the particular wording.

### **4.1 The *National Transportation Act of 1966-67***

The *National Transportation Act of 1966-67* did not fully follow the recommendations of the MacPherson Commission. For example, it did nothing about deregulating the trucking industry. Also, it did not follow the Commission's simple structure of minimum

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<sup>5</sup> Trevor D. Heaver, "Transport Policy the Main Issues in Canada," *Proceedings Canada-UK Colloquium on Transportation*, (Publisher -?!: London, 1995.) Mimeo version of paper, see p. 5.

and maximum rate regulation for the railways. Nor did it implement the non-regulatory policy principles that the commission argued were necessary for reliance on competition to work and that the government set down in the NTP. However, it did set down a statement of policy that should have acted as an excellent base for the development of the policy. The NTP of 1966 was as a youth, trim, well focused and ready to compete, if not fully conversant with the realities of the world.

The structure of the statement of National Transportation Policy (NTP, 1966) in the *National Transportation Act of 1966-67* is broken down in Exhibit 1. This exhibit differs from some other characterizations.<sup>6</sup> I separate the objectives for transport, which it may be argued include redundancies, from the reasons that the objectives are “essential.” (Why are the system objectives essential?) Those reasons are to “protect” the interests of users and to “maintain the economic well-being and growth of Canada.” The means most likely to achieve the objectives is simply stated as “all modes of transport ... able to compete” under prescribed conditions. There are three key conditions. Each condition relates to the actions of government or public bodies. If their actions are not right, competition will not produce the low total cost transport system desired. The first deals with the working of regulation. It has two elements. The first element is to regulate transport so that there are no limits on intermodal competition. The second element is that constraints be placed on possible excessive market powers of firms in their use of differential pricing and servicing. The other two conditions are necessary if government subsidies or impositions, distorting competition, are to be avoided.

Exhibit 1.  
The structure of National Transportation Policy, 1966

*Objectives for transport:*

- Economic, efficient and adequate transportation system;
- Making best use of all available modes;
- Lowest total cost.

*Reasons for the objectives:*

- To protect users;
- To maintain the economic well-being and growth of Canada.

*Means to achieve the objectives:*

- All modes shall be able to compete under prescribed conditions

*Conditions needed for the objectives to be met:*

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<sup>6</sup> For example, the Western Transportation Advisory Council does not distinguish the objectives for transport from those for the economy, although the latter are the reasons for the transport policy. In a paper for the Panel, I believe that Professor Stanbury does not distinguish between the items that he lists as means and ends.

- All modes of transport are able to compete without limitations from regulation on intermodal competition;
- Government charges modes a fair share of resources, facilities and services provided at public expense;
- Government compensates modes, as far as practical, for costs of imposed public duties;
- Differential pricing and servicing allowed but constrained by the established standards of no “unfair disadvantage” or “undue obstacle.” (That is, some disadvantages and obstacles are to be expected!)

*Constraining factors:*

- National policy;
- Legal and constitutional requirements, including the jurisdiction of Parliament.

The evolution of some elements of the policy statement from Bill C231 to the *Act* deserves discussion.

*The objectives for transport policy:* Bill C-231 states that “an economic and efficient transportation system making the best use of all available modes of transportation at the lowest total cost is essential....” During discussion of the Bill, concerns were expressed that only commercially supportable facilities and services were envisioned by this terminology. It was argued by the Province of Manitoba, for example, that there seemed to be no place for socially desirable services or facilities, such as some unremunerative branch lines. The result was the addition of the word “adequate.” This addition was to cover services which can only be warranted by recognition of values that go beyond economic measurement. (This would not preclude economic analysis to measure the cost of achieving the non-economic goal in this or some other way.)

I am not aware of any definition being given in Canada for “economic and efficient.” However, the whole term “economic, efficient and adequate” was (and still may be) in the Australian Trade Practices Act, Part X. Charles Halton is believed to have “transported” it there when he emigrated from Ottawa to Canberra! In the first case raised under this legislation, the Trade Practices Tribunal sought an interpretation for the term so that it knew where its goalposts were. It interpreted “economic” to mean achieving the right allocation of resources, “efficient” as doing the right things well and “adequate” as a range of services appropriate for the trade. In Canada, we have not worried about the meaning of the objectives for our primary transport legislation. Perhaps, we are accustomed to goals that slip on the ice rather than the big posts stuck in the ground for “footie.”

*Reasons for the objectives:* Bill C-231 simply states that the transport system “is essential to the economic well-being and growth of Canada;...” In light of the considerable concerns expressed by shippers about the regulatory protection offered to them and the

need to recognize transport as a service industry, the phrase was reworded to read, “is essential to protect the interests of the users of transportation and to maintain the economic growth and well-being of Canada,…”

*Means to achieve the objectives:* Bill C-231 sets out that the objectives are most likely to be achieved “when all modes of transport are able to compete under conditions ensuring that, except where any mode of transport exercises a monopoly,…” prescribed conditions apply. As a result of the interest of shippers in more precise regulatory measures where competition was limited and concern about the interpretation of “monopoly,” the wording is different in the *Act*. It identifies competition among the modes as the means. All qualifications are spelled out later.

*Conditions needed for the objectives to be met:* Three types of condition are identified. The first deals with avoidance of regulations that would inhibit intermodal competition. The second and third deal with subsidies and compensation by government to carriers. These requirements are entirely consistent with the principles set out by the MacPherson Commission.<sup>7</sup> The major modification from the statements in the Bill to those included in the *Act* is inclusion of the sections dealing with tolls and conditions. These reflect the ‘insistence’ of shippers that something be done to make the public interest clause more tangible while the Minister did not want to open the door to numerous appeals to the Commission. The inclusion in the public interest clause and in the NTP of the sections previously in the *Railway Act* dealing with the requirements for tolls and conditions of carriage was the way the conflict was met. As the unfair disadvantage and undue obstacle sections of the *Railway Act* had much jurisprudence behind them, they provided a level of continuity in the standards expected in rate discrimination cases under the public interest clause. However, their inclusion seems to have given shippers less assistance than might have been expected in jumping the hurdle of establishing the “public interest” when seeking redress under that clause. Shippers still approached the task by including the proverbial kitchen sink! I will say a little more on this in the last part of the paper.

The only particular comment here on the clauses from the *Railway Act* is that export trade is mentioned but not import trade. This is a common imbalance. It is an economically inappropriate one and, in today’s world, a politically less warranted imbalance. All trade through Canadian ports appears to be protected, however.

*Constraining factors:* Recognition that exceptions may be needed in the light of national policy considerations and legal and constitutional requirements, including the jurisdiction of Parliament, is present in similar but not identical fashions in the Bill and the *Act*.

## **4.2 The National Transportation Act, 1987**

If the NTP of 1966 is considered a trim youth ready to perform in competition, the version of 1987 shows signs of a mid-life crisis of direction and gained weight so that the

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<sup>7</sup> The Commission’s prescriptions for subsidies and compensation payments are set out in its report, Volume II, 1961, p. 143.

person would no longer be a effective in the arena of competition. The revision to the *National Transportations Act, 1996-67* was undertaken with a passion for making competitive markets work more effectively. Unfortunately, there was insufficient attention to the visionary structure of the policy statement, oriented as it was to the working of markets. Rather, the policy statement seems to have been treated as a place where statements of political value could be dumped. The resulting fat masks the shape and functioning of the muscles underneath.

## Exhibit 2.

### The emasculation of National Transportation Policy in 1987\*

#### *Objectives for transport:*

- Not satisfied with three words that lacked definition in Canada, three more are added, two of which (viable and effective) add confusion to those already there. The addition of “viable” may have been to placate railways that feared that their commercial interests were being ignored by government and not covered by “economic and efficient.” They wanted redress from the apparent priority given to regional development. They had unremunerative services in Atlantic Canada in mind. The addition of “safe” leaves uncertain why one dimension of an immediate none-economic dimension was added. What did adequate now cover? The adjectives now relate to the “services” and not the “system.”
- **Making best use of all available modes;**
- **Lowest total cost.**

#### *Reasons for the objectives:*

- “To protect users” becomes “to serve the needs of shippers and travellers;” as though they are not users;
- To maintain the economic well-being and growth of Canada; “and its regions” is tagged on, which somehow distinguishes Canada from the parts of which it is composed. This surreptitiously slips in one particular aspect of non-transport policy (regional matters) into the goals sought for transport policy. It ignores, that for some (local) regions, high cost transport may do more to protect local industry than low cost transport. It means that those concerned with other aspects of Canada, such as its environment, may feel that their interests are not relevant because they are ignored.

#### *Means to achieve the objectives:*

- All modes shall be able to compete within and among the various modes under prescribed conditions. The important and valuable conceptual change here is that competition among modes becomes competition within and among the modes. This is carried through in other sections of the NTP by reference to “carriers” as well as “modes.”

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\* Text in bold refers to parts of the policy that have not been changed.

*Conditions needed for the objectives to be met:*

- The elaboration of the nature of regulation is pushed down to (c) and is reworded so that it conflicts fundamentally with the conceptual content of the NTP. This is elaborated below.
- In (a) the objective, “safe,” is added as a condition through the statement that the system “meets acceptable safety standards.” Why and how do objectives become conditions? What about other non-economic goals, such as sustainability?
- Selected other objectives appear in (b); again objectives in the conditions. There is repetition that “competition” and the addition of “market forces” are “whenever possible, the prime agents in providing viable and effective transportation services.” Why is there the repetition? Why do “market forces” appear; is “competition” not understood? Why are “viable” and “effective” singled out? Are “economic” and “efficient” to be achieved in some other ways?
- The changes in (c) are discussed below the Exhibit.
- In (d) it is stated that “transportation is recognized as a key to regional economic development” even though, except at the most base level, this is not true. It is, also, irrelevant as a condition for achieving the transport policy objectives.
- **Government charges carriers and modes a fair share of resources, facilities and services provided at public expense.**
- **Government compensates carriers and modes, as far as practical, for costs of imposed public duties;**
- **Differential pricing and servicing allowed by carriers but constrained by the established standards of no “unfair disadvantage” or “undue obstacle.”**
- Added is the requirement that there shall be no “undue obstacle to the mobility of persons including those persons who are disabled.” The previous wording only applied to freight.

*Constraining factors:*

- **National policy;**
- **Legal and constitutional requirements, including the jurisdiction of Parliament.**

The change in the prescription for regulation in (c) deserves special comment. The wording changed the meaning of “regulation” from 1966. Further, the wording causes a conflict in the NTP between the objectives for the transport policy and the reasons for those objectives.

The wording of (c) follows:

economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and such regulation will

not unfairly limit the ability of any carriers or mode of transportation to compete freely with any other carriers or mode of transportation,

The first part of the statement refers to “economic regulation.” This is continued in the second part by reference to “such regulation.” Previously, the test of ‘fairness’ was applied to the effects of any regulation on competitive relationships. But now, non-economic regulations may be unfair? I am not aware of any reason or intent to narrow the test of fairness of regulations.

The reference in the first part of the statement to the needs of shippers and travellers is confusing since serving their needs is to be attained through the efficiency etc of the transport services.

What the clause is doing, but imperfectly, is identifying where regulation may be needed to ensure the attainment of the objectives. The need is to ensure that in the pockets where competitive forces are limited, regulatory intervention occurs. What is needed is recognition of those areas in which economic regulation is advisable, based on the characteristics of those markets. (Bill C-231 had something equivalent to this when it recognized the special treatment required where a mode exercised a monopoly.)

To attain this, I suggest that those conditions associated with regulation be placed in sequence.

- a) Economic regulation of carriers and modes of transportation occurs only where competition is insufficient. (This presumes continuation of the current policy of no specific constraint in the transport legislation for predation.)
- b) Economic and other regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation.
- c) Each carrier and mode of transportation, as far as practical, carries traffic.....

This leaves to other parts of the legislation and to regulatory processes to deal with the details of the economic regulations and their administration.

#### **4.3 Towards senility in the *Canada Transportation Act, 1996***

From the middle age crisis of 1987, the NTP of 1996 shows the further signs of aging that are associated with mandatory retirement. It is flabby, indecisive, confused and lacks vision. The expectation of being able to compete was given up long ago. In the mid 1990s, the primary and effective thrust of the government was to put its own operational and promotional houses in order. Important regulatory changes were achieved in cross-border aviation, trucking deregulation and the relaxation of restrictions on the railways to give them more flexibility in controlling costs. Unfortunately, further degeneration of the NTP occurred.

Some further additions were made to the NTP. They seem to be responses to sensitivities of the moment. (Although, the environment, which I had expected to be added, did not

make it in!<sup>8</sup>) The additions make matters much worse rather than better. The changes introduced to NTP in 1996 are set out in Exhibit 3.

### Exhibit 3.

#### The senility of the National Transportation Policy in 1996

##### *Objectives for transport:*

- Six adjectives describing the desired attributes of the transportation services remain; “accessible to persons with disabilities” has been added.

##### *Reasons for the objectives:*

- As though the recognition of accessibility for the disabled was not enough in the statement of objectives, the description of travellers to be served now requires “including persons with disabilities” as though they might not otherwise be considered travellers. This is a long way from the “users” of 1966!

##### *Means to achieve the objectives:* (No change.)

##### *Conditions needed for the objectives to be met:*

- The only modification to the 1987 conditions is in (d). Pitfalls were recognized in the recognition of transportation as a key to regional economic development so that text was added which obfuscates a meaningful interpretation of the paragraph. The time required to interpret each of the conflicting positions stated is not worth the effort. It is the epitome of senility! But there are more!
- A new supposed condition has been added, one that is understandable for the aged who do not wish the world to change, too much! A condition is that “each mode of transportation is economically viable.” I cannot imagine how that is a condition for the effective working of competition to achieve the objectives set out for transport. Is it yet another attempt to let carriers know that Canada recognizes that viability is important to the efficiency of services?

##### *Constraining factors:*

- A new constraint is added to the conditions under which competition is most likely to achieve the desired objectives. It is due regard be given “to the advantages of harmonized federal and provincial regulatory approaches...” I have been active in the Transportation Association of Canada and know the effort that has been devoted to harmonizing provincial and federal regulations to achieve benefits in the performance of the transportation system. Those involved will be pleased to see the topic elevated to inclusion in the NTP. But, is it necessary and does it make sense in the way it is done? The answer surely is ‘no’ because the policy statement puts the cart before the horse.

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<sup>8</sup> Heaver, 1995, p. 5.

My interpretation of the constraints can be illustrated with reference to national policy. I understand that matters of national policy may make it impractical to proceed with measures that would enhance transport performance. This is understandable. But to forego competition of a type or level required to achieve the objectives of transport policy in the interest of advancing harmonized federal and provincial regulatory approaches makes harmonization a higher objective than transport performance. This surely is not what is meant to be said, is not what the Minister of Transport accepts and is not what carriers or users expect. I believe carriers and users would prefer more variations in regulation if the overall result were a more efficient transport system. Harmonization should not be elevated to an end itself.

When starting my life-cycle approach to the evolution of the statement of National Transportation Policy (NTP), I had not expected to use the word “senility” in any description of the current NTP. Now I find the word to be apt. I am shocked to find it so.

## **5. Advice for potential improvements**

Start again!

There was nothing wrong with the structure of the NTP of 1966. Somewhere along the way, understanding of the NTP has clearly been completely lost. The construct of the policy needs to be re-established.

With this in hand, the objective of the policy needs to be refocused. I recommend that two adjectives be used. They are efficient and adequate. These terms should be defined under the Interpretation section of the *Act*. The definition of “adequate” is the place to put to rest concerns that commercial criterion alone determine the existence of services.

The statement of “reasons” for the pursuit of efficient and adequate services should be simplified. Eliminate the reference to “regions.” What is wrong with “protect the interests of users?” It is not clear that explicit reference is needed in the NTP to persons with disabilities. (I appreciate that statement in some legislation may be necessary.) If such a reference is needed, how about, just once?

The existing statement of the means by which objectives are best achieved is fine. The introduction to the conditions required for competition to be relied upon needs to be reworded. A new treatment is needed, in a single sub-section, of all non-economic transport attributes that may be required of the industry, for example safety and environmental standards. (Whether “environment” in some form is better than “sustainable” is debatable. I would not want to be the one drafting the definition of “sustainable” for the Interpretation!) The non-economic requirements would most likely be best set down prior to dealing with regulation. I have previously suggested a regrouping of the regulatory provisions. I repeat them here. They cover the current (b),

(c) and (g). I set out the suggestion without investigation of the appropriateness of including the clauses as they are under the current (g).

- Economic regulation of carriers and modes of transportation occurs only where competition is insufficient. (This presumes continuation of the current policy of no specific constraint in the transport legislation for predation.)
- Economic and other regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation.
- Each carrier and mode of transportation, as far as practical, carries traffic.....

There is no need to change the text in the current (e) and (f).

The sections (d) and (h) and the reference to harmonized policies in the current NTP should be deleted.

I hope that a trimmed down NTP and one more clearly structured than we have had before would make the statement more relevant and useful and make it less susceptible to inappropriate revisions in the future. I am afraid that without a major careful revision to the NTP to restore its intellectual rigour, frequent mindless changes will be continue to be made. To stay in keeping with this theme I have added a short endpiece!

## **6. National Transportation Policy and the public interest**

The statement of National Transportation Policy lies at the heart of good governance. It is the foundation for building measures of performance. It is excellent to see that the Government put into the *Act, 1996* the requirement to monitor the extent to which the compensation and subsidy provisions of the NTP are met. It does need to monitor that it abides by its own rules! More generally than that, the NTP should provide the platform for the very specific and critical examination of policies, especially when they are inconsistent with the NTP. The continued unique treatment of liner shipping under the Shipping Conference Exemption Act is a current example.

The use of the policy statement as a yardstick against which to judge varied policies is one way that it contributes to the public interest. However, the public interest had a different and particular meaning in transport until the public interest clause was removed from the *Act* in 1996. I add comments on this in the belief that some observations along these lines are expected from me.

For me, the “public interest” does not necessarily involve large cases affecting plants and many employees. They may only account for many “privates,” that is a collection of self-interests. The reality is that when effects become large enough **community interests** are affected. But that was never effective in helping a shipper win his case. After the kitchen sink of community effects were dredged up, the case rested on the transportation conditions and tests of rate or service reasonableness. The issue in those cases was how

do the events compare with what is consistent with the regulatory rules of the game of which the principles of the NTP should be (have been) an important part – as the Australians recognised. The public interest should be about protecting those principles whether the potential abuse involves a massive shipper or a tiny shipper.

The argument may sound academic. However, I have used it successfully to instigate effective negotiation with the railways in the 1970s when others had failed and lawyers said ‘no way.’ I also used it as a basis for gaining the right to take a position in the “Rate Parity Case.” (That was a well known case when shippers were using old regulatory protections at the time they were vehemently support Freedom to Move.) So much self-interest was being presented by both sides that I sought to intervene to present “the public interest” which lay in the principles of the case. I was allowed to present my views with their admissibility resting in limbo. The consequence was rather like a dog running onto a sports field but departing quickly without leaving any physical evidence, so that the game can go on as before. However, not all such interventions may be so inconsequential.<sup>9</sup> The Panel should consider whether *amicus curiae* briefs have a place in the procedures of the Canadian Transportation Agency.

## Endpiece

In Alice in Wonderland, Lewis Carroll has a well-known poem, the first two verses of which have some relevance here. I quote them in fear that without remedying the absence of logic (read “brain”) in the National Transportation Policy, we will continue to turn the policy upside down. (The remaining four verses of the poem can be found at [www.ingeb.org/songs/youareol.html](http://www.ingeb.org/songs/youareol.html) )

You are old, Father William," the young man said,  
"And your hair has become very white;  
And yet you incessantly stand on your head  
Do you think, at your age, it is right?"

"In my youth," Father William replied to his son,  
"I feared it might injure the brain;  
But now that I'm perfectly sure I have none,  
Why, I do it again and again."

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<sup>9</sup> The problems that the WTO found itself in are reported in “WTO, Briefs in a twist,” *The Economist*, Dec. 9 2000, p. 85.