The Canadian Board of Railway Commissioners: Regulation, Policy and Legal Process at the Turn-of-the-Century

Jamie Benidickson*

The Canadian Board of Railway Commissioners (B.R.C.), created in 1903, was the first Canadian national regulatory agency. It assumed responsibility for railway freight tariffs, at the time the subject of important confliets both on the economic and political fronts. The B.R.C. confronted fundamental issues such as independence and accountability of administrative tribunals, while exercising responsibilities that could be characterized as judicial, administrative and legislative. The author traces the early history of the B.R.C. and its members, and examines its choice as the mechanism for dealing with rate conflicts, while considering the problems it faced in justifying its existence in a parliamentary and federal system. Doing so, the author analyzes the relationship between the B.R.C. and the judiciary, Parliament, the executive, and the legal and business communities and the place of the B.R.C. in the wider context of administrative law.

Le Commission des chemins de fer pour le Canada (C.C.F.), créé en 1903, fut la première eommission réglementaire nationale au Canada. Elle était responsable de la détermination de tariffs de transport ferroviaire, un sujet qui, à l'époque, était l'objet de nombreux débats économiques et politiques. Le C.C.F. exercait des fonctions judiciaires, administratives et législatives tout en faisant face à des questions fondamentales d'indépendance et de responsabilité institutionnelle. L'auteur retrace l'histoire du C.C.F. et de ses membres, examine la décision d'octroyer à une commission le pouvoir de régler les conflits tarifaires et analyse les problèmes de légitimité d'une telle commission dans un système fédéral et parlementaire. Pour ce faire, l'auteur examine les diverses relations entre la commission et le Parlement, l'exécutif, la magistrature, les communautés juridiques et des affaires ainsi que le rôle du C.C.F. dans le contexte plus général du droit administratif.

*The author wishes to express his appreciation to Dick Risk who in 1981 supervised a directed research program for which this paper was originally written and to David Flaherty, Hudson Janisch and David Kettler for comments and advice on later versions of the text.

Synopsis

* * *

Introduction

For an earlier generation of Canadians, railway rate-making was a vital and contested process. Railway freight tariffs (and to a lesser extent passenger charges) dramatically presented the conflict of one city against another, farmer against manufacturer, shippers against consumers, large investors against small, Canada against the world, and of course everyone against the railways, including each other. Managing these conflicts between major economic enterprises and various sectors of the national community became an increasingly sensitive challenge for policy-makers as the nineteenth century drew to a close.

The choice of a regulatory commission to assume primary decision-making responsibility was not sudden; nor, however, was it a choice whose detailed consequences were fully appreciated at the outset. Initially the designers of the Board of Railway Commissioners (B.R.C.), and then those charged with making

it operational, confronted such fundamental issues as independence and accountability. By describing the formation and implementation of the B.R.C. this paper tells that story in the context of the early twentieth century legal environment.

Established in 1904, the B.R.C. was a significant response — if not necessarily a final solution — to widespread concern about the distributive impact of railway rates in late nineteenth century Canada and to the limitations of public supervision of railway operations and activities.[1] One consequence of what came to be known as "not only the oldest but by far the most important administrative board in Canada"[2] was the creation of a new forum for rate-related conflicts as well as persistent grievances between shippers and carriers, between other competing social interests and indeed between regions. Courts as well as the long-established Railway Committee of the Privy Council (both more or less equally discredited and maligned as forums for public recourse) were displaced by an institution largely unknown in Canada: the independent regulatory commission. Thus, at the same time that it assumed extensive decision-making authority (including powers over railway rates and later telephone and telegraph communications) the B.R.C. embarked on an uncharted course and faced the possibility of a potentially controversial debate about constitutional legitimacy.[3] In the United States, railway regulation by commission had been introduced earlier at the state and, with the creation of the Interstate Commerce Commission (I.C.C.) in 1887, at the federal levels.[4] The importance of the debate which accompanied the regulatory initiative is widely acknowledged.[5] Morton Horwitz accounts for the intensity of the reaction in his description of the conception of public or regulatory law in the late nineteenth century — something fundamentally different from the common law. Regulatory law, he writes, was seen as

---

[1]Various aspects of the B.R.C.'s development and significance have been described elsewhere. See K. Cruikshank, "The Transportation Revolution and Its Consequenees: The Railway Freight Controversy of the Late Nineteenth Century" (1987) Canadian Historical Association Historical Papers 112 [hereinafter "Transportation"]; A.W. Currie, "The Board of Transport Commissioners as an Administrative Body" (1945) 11 Can. J. Econ. & Pol. Sci. 342, reprinted in J.E. Hodgetts & D.C. Corbett, eds, *Canadian Public Administration* (Toronto: MacMillan, 1960) 222 [hereinafter cited to Hodgetts & Corbett, eds]; H. Darling, *The Politics of Freight Rates: The Railway Freight Rate Issue in Canada* (Toronto: McClelland & Stewart, 1980); H.N. Janisch, "The Role of the Indepeudent Regulatory Agency in Canada" (1978) 27 U.N.B. L.J. 83 [hereinafter "Independent Regulatory Agency"]; A.V. Wright, "An Examination of the Role of the Board of Transport Commissioners For Canada as a Regulatory Tribunal" (1963) Can. Public Admin. 349.

[2]Currie, *ibid.* at 223.

[3]See R.C.B. Risk, "Lawyers, Courts, and the Rise of the Regulatory State" (1984) 9 Dalhousie L.J. 31.

[4]R.L. Rabin, "Federal Regulation in Historical Perspective" (1986) 38 Stanford L. Rev. 1189 at 1207.

[5]H. Hovenkamp, "Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem" (1988) 97 Yale L.J. 1017; R. Maidment, "Law and Economic Policy in the United States: The Judicial Response to Governmental Regulation of the Economy" (1986) 7 J. Legal History 196.

"not only coercive," but was generally regarded as "expressing the illegitimate desires of popular legislatures to interfere with a natural and neutral economic system."[6]

The underlying validity of regulatory control over matters of public interest was acknowledged as a general principle in *Munn* v. *Illinois*[7] (a case actually concerned with grain elevator storage charges) where it was assumed that rate regulation was a traditional function of the legislature. Critics of regulation, however, soon shifted the focus of their concerns to "the competing claims of legislature, agency, and court in enunciating regulatory policy."[8] Legislative supremacy over rate-making — notwithstanding the English experience — was foreign to the American tradition of judicial review. Gradually both legislative and agency claims were circumscribed by the judiciary on two basic grounds. First, it was an inherently judicial function to determine the ultimate reasonableness of rates according to standards that protected property rights from arbitrary interference. Secondly, regulatory commissions — at least in their earliest manifestations — failed to satisfy due process considerations. By 1898 the U.S. Supreme Court was prepared to endorse *de novo* judicial review of rate schedules to ascertain that railways were receiving their entitlement: a "fair return" on the "fair value" of their property.[9]

The potential conflict even in Canada where English traditions were stronger, is apparent in descriptions of regulatory agencies such as the B.R.C. as "governments in miniature" or as "primary instruments of social, economic and political control."[10] Basically they placed in the hands of non-elected and non-judicial officials power not fully accountable in any conventional manner. Indeed stress is often placed on the independence of tribunals as a major factor contributing to their effectiveness. Whether tolerance or enthusiasm greeted the creation of the independent regulatory agency, it is aptly described as a "structural heretic"[11] in the parliamentary model: there has been persistent tension between independence as a key element in the effectiveness of an agency, on the one hand, and the importance of control or supervision, on the other.

---

[6]M.J. Horwitz, "The Changing Common Law" (1984) 9 Dalhousie L.J. 55 at 59.

[7]94 U.S. 113 (1877) at 126.

[8]Rabin, *supra*, note 4 at 1210.

[9]*Smyth* v. *Ames* 169 U.S. 466 (1898) at 480.

[10]R. Schultz, "Regulatory Agencies and the Canadian Administrative System" in K. Kernaghan, ed. *Public Administration in Canada*, 3d ed. (Toronto: Methuen, 1977) 333 at 334; J. Willis, "Administrative Decision and the Law: The Views of a Lawyer" (1958) 24 Can. J. Econ. & Pol. Sci. 502.

[11]J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government, 1867-1970* (Toronto: University of Toronto Press, 1973) at 138; H.N. Janisch, "Independence of Administrative Tribunals: In Praise of Structural Heretics" (1987-1988) 1 Can. J. Admin. L. & P. 1 [hereinafter "Independence"].

The diversity of tribunals in Canada is notorious, but the B.R.C. is of particular interest both because it was the institutional forerunner of so many similar bodies and because of what it did. The Board's responsibilities were wide-ranging, but regulating rates was an assignment of primary importance because of the perceived consequences of rates decisions. Rates were controversial in the late nineteenth and early twentieth century. Disputes arose about the relationship of rates to distance, weight or volume when similar or identical items were being shipped, and about the relationship between different types of items shipped over the same or comparable routes. The solutions offered included public ownership, specific legislative controls and regulatory supervision.[12]

For turn-of-the-century observers, the precise nature of rate regulation appeared to be a matter of uncertainty. From various perspectives, legal, political or technical economic questions were involved. To some observers the essence of rate-making was to be found in the lawful rights of transporters to establish charges for the use of their property and facilities. To others, rate-setting was a more or less scientific undertaking best left in the hands of specialists who possessed an appropriate understanding of the relevant data and its implications. Alternatively, because of the implications of rates for the well-being of competing industries and communities, and because railways could not operate without legislative authorization, the determination of rates was also seen as an act of political choice.

In legal circles these differing views of the nature of rate-making were assumed to involve different formal requirements for decision-making. Accordingly, the characteristics, qualifications and attributes of acceptable decision-makers would differ, and acceptable decision-making would differ too in terms of opportunities created for the representation of interests, for formal mechanisms of accountability and for the influence of expertise. Had it been agreed upon, a definitive or exclusive classification of the rate-making function as either legal, technical or political in nature would have signalled more clearly the characteristics of the forum most suited to decision-making about rates. But an inter-mixture of administrative, legislative and judicial considerations seemed inescapable. As Chris Armstrong and Viv Nelles have shown for several Canadian utilities,[13] the political, economic and ethical markets of the community are in constant tension. "Each of these economies," they write "has institutional and behaviourial norms that demarcate the shifting bounds of expected and acceptable conduct."[14] From this perspective, public regulation "was the means whereby powerful economic institutions participated in a legitimizing process and rendered themselves accountable to some judgment other than that

[12]C. Armstrong & H.V. Nelles, *Monopoly's Moment: The Organization and Regulation of Canadian Utilities, 1830-1930* (Philadelphia: Temple University Press, 1986).

[13]*Ibid.*

[14]*Ibid.* at 323.

of their owners."[15] It is worth noting that public regulation is not a uniform process, but one that is characterized by a good deal of diversity. Moreover, as powerful public institutions themselves, regulatory authorities are subject to on-going assessment within the community. The B.R.C., as the first and preeminent national regulator in a parliamentary and federal system, faced the challenge of promoting public and parliamentary acceptance of its operations and authority as it exercised responsibilities variously perceived to be judicial, administrative and legislative in nature. As a new institution, the B.R.C. faced the challenge of reconciling the political, economic and ethical or legal perspectives, in a manner that would consistently placate, if it could never fully satisfy, the range of constituencies who greeted its creation with divergent expectations.

I. Backgrouud: Railways, Rates and Reform Proposals, 1880-1898

In the final quarter of the nineteenth century, expansion and consolidation of the transportation system, together with technological changes and a growing sense of regional diversity, particularly in western Canada, prompted expressions of dissatisfaction about shipping rates and the power of the railways to determine them.[16]

In 1895, addressing one of a series of public inquiries into railway rates, Manitoba's Provincial Secretary articulated the underlying concern of westerners seeking rate relief:

> the prosperity of the province depends in a large measure upon their being charged the lowest possible rates on the carriage of products, produce and merchandise, into, out of, and from point to point in the province.[17]

Yet on the basis of comparisons of rates in Canada and the United States, the Commissioners rejected complaints of exorbitant and excessive rates.[18] Instead, reasoning offered in evidence by C.P.R. Vice President Shaughnessy was adopted to establish that the Railway and the western community had compatible interests:

> In view of the fact that the Canadian Pacific Railway Company hold about 18,000,000 acres of unsold lands and own upwards of three thousand miles of railway in the province of Manitoba and the North-west [*sic*] Territories it is obvious that their interests must be identical with those of their patrons, and it occurs to

---

[15]*Ibid.* at 322.

[16]See C.D. Baggaley, *The Emergence of the Regulatory State in Canada, 1867-1939* (Ottawa: Economic Council of Canada, 1981); K. Cruikshank, "'Law' versus 'Common Sense': Railways, Shippers and Judicial Regulation, 1850-1903" Canadian Law in History Conference, June 8-10, 1987, Carlton University, vol. II at 76 [unpublished] [hereinafter "'Law' versus 'Common Sense'"], and "Transportation," *supra*, note 1.

[17]Canada, Parliament, "Report of the Railway Rates Commission" No. 39 in *Sessional Papers* (1895) at 3.

[18]*Ibid.*

> your commissioners that selfish motives alone would be ample and efficient safeguards on the action of the company in regulating its general policy.[19]

This was a period of particularly disruptive economic and technological change which had profound repercussions for the well-being of communities and industries across the country. To suggest that the authority of private railways to make rate and service decisions affecting the general interest might continue without serious challenge greatly under-estimated the strength and determination of numerous sectoral and regional interests. Yet the persistence of widespread unease and dissatisfaction with the apparent impact of railway rate policies by no means implied the existence — let alone the acceptability — of an obvious alternative.

In principle, rate grievances could be taken for review to the courts or to the Railway Committee of the Privy Council, a cabinet committee whose responsibilities had evolved from the time of its creation in the mid-century.[20] Neither institution was regarded as a satisfactory forum in which to redress shippers' complaints or to control the railways.

Judicial resolution of railway rate grievances through the assessment of charter powers, and the application of a common law test of reasonableness were subject to several procedural and doctrinal limitations. Unreasonableness and discrimination were both uncertain concepts and difficult to establish, and the railways, if they chose to do so, had the capacity to expose litigants to increased costs and delays through the processes of appeal. Individual complainants may well have despaired of their prospects in court, for the litigated cases were in fact rare in relation to the volume of complaints.[21]

The Railway Committee of the Privy Council, despite an expansion of its jurisdiction in 1888, was equally devoid of supporters. As the 1890s drew to a close the committee had failed in its mandate over rate review.[22] The Railway

---

[19]*Ibid.* at 15.

[20]Baggaley, *supra*, note 16 at 71 & 74.

[21]See, *e.g.*, *A.G.* v. *Ontario, Simcoe and Huron Railway* (1858), 6 Grant's Chancery 446; *Scott* v. *Midland Railway* (1873), 33 U.C.Q.B. 580. For discussion see "'Law' versus 'Common Sense,'" *supra*, note 16 and B.J. Hibbitts, "A Change of Mind: The Supreme Court of Canada and the Board of Railway Commissioners, 1903-1939" (LL.M. Thesis, University of Toronto, 1986) at 91-93. The deficiencies of the common law process were fully acknowledged in a public inquiry during the mid-1880s. See Canada, *Sessional Papers, 1888* No. 8A, "Report of the Royal Commission on Railways" at 16 [hereinafter "Royal Commission"].

[22]W.T. Jackman, *Economic Principles of Transportation* (Toronto: University of Toronto Press, 1935) at 647 states: "The few cases which came before the Railway Committee — 408 cases in the years 1889 to 1896 inclusive — attest to the fact that the committee did not command the confidence of the public." Only seven of these cases were related to rates. See, Canada, *Sessional Papers, 1902*, No. 20a, "Reports upon Railway Commissions, Railway Rate Grievances and Regulative Legislation" by S.J. McLean (Ottawa: S.E. Dawson, King's Printer, 1902). The 1902 Ses-

Committee was condemned absolutely by J.S. Willison in 1897. Following a tour of western Canada, he stated that

> in regulating rates, in preventing discriminations, in protecting the individual shipper, or the individual community against the calculated injustice or the insidious aggression of railway managers it is inert and impotent, a farce and a failure.[23]

Willison was shocked by the contrast between the massive investment of "public money" in the railways and toleration of "discriminations in favour of American shippers that operate very seriously against Canadian industries,"[24] perhaps even offsetting any advantages given domestic producers by tariff duties.

If the deficiencies of the available alternatives were generally recognized, agreement was nevertheless lacking as to appropriate modifications or a replacement. The proposal most frequently advanced after 1880 was regulation by commission. In 1882, D'Alton McCarthy introduced legislation to establish a "Court of Railway Commissioners" with authority over railway matters.[25] Later commentators assumed that McCarthy's initial suggestion was modelled on an English measure of 1873.[26] This and similar proposals in the succeeding years failed to attract widespread support, although by 1889, following the creation of the I.C.C., some measure of enthusiasm was apparent within the legal community. The *Canada Law Journal* described the American initiative as embodying "the only true way of settling such disputes."[27] But, other observers remained unpersuaded.

In 1888, an inquiry under the chairmanship of A.T. Galt had reported against the tribunal model, recommending instead an enlargement of the powers of the Railway Committee. Galt and his associates reviewed the alternatives fully. While acknowledging the need for public scrutiny of railways, the commissioners were ultimately unwilling to countenance an arrangement that would undermine ministerial responsibility by establishing a regulatory authority "beyond the direct criticism and control of Parliament."[28]

With a change of government and accelerating western expansion after 1896, tensions between railways and shippers were re-kindled. The concept of regulation by commission was revived in several settings, including Parliament where western M.P.s, bolstering their demands with favourable references to

---

sional Paper includes McLean's Reports of 10 February 1899 (*supra* at 3) and 17 January 1902 (*supra* at 41) [hereinafter McLean, 1899 and McLean, 1902] at 37.

[23]J.S. Willison, *The Railway Question in Canada* (Toronto: Warwick Bros. & Rutter, 1897) at 7.

[24]*Ibid.* at 65.

[25]Hibbitts, *supra*, note 21 at 15-17.

[26]S.J. McLean, "The Work of the Board of Transport Commissioners for Canada" in J. Willis, ed., *Canadian Boards at Work* (Toronto: MacMillan, 1941) 8.

[27]"Railway Commissions" (1889) 25 Can. L.J. 419 at 420.

[28]"Royal Commission," *supra*, note 21 at 20.

railway commissions in the United States, began to press for some basic reforms, and at a minimum the transfer to a commission of the existing jurisdiction of the Railway Committee of the Privy Council. A.G. Blair, a former premier of New Brunswick and then Laurier's Minister of Railways and Canals, expressed some sympathy for change. But Blair cautiously emphasized that the transportation question was not "one susceptible of easy treatment, or that a complete, or even a large, remedy is capable of being applied."[29] A few months later, the Prime Minister himself acknowledged that the issue of railway regulation "cannot be deferred much longer" although he still considered the idea of legislation to be "altogether premature."[30] Public feeling, though, continued to shift towards a new institution.[31]

All this discussion left two problems unresolved. The nature of rate-making remained in dispute and, as a consequence, there was no agreement on the second issue, that is, the institution that should be used to determine rates. The courts' historic experience in rate review provided some foundation for the view that the supervision of railway rates was a judicial function in which the legal community had a well-established interest and claim for continued involvement. Apprehension about a regulatory tribunal had emerged from the Galt inquiry and even early reactions to the original McCarthy proposals had provoked the *Monetary Times* to observe that "it would absorb many of the powers of the legislature and the judiciary and would certainly prove dangerous in the exercise and lead to evils far greater than the proposed commission could possibly remove."[32] Nevertheless, the existing arrangements — in part because they were thought to be overly judicialized — were unsatisfactory, and the search for a viable alternative was renewed.

II. The McLean Reports and the Creation of the Railway Board, 1899-1904

Simon J. McLean, an ambitious Canadian political economist at the University of Arkansas, provided Blair and Laurier with a suitable means of pursuing the regulatory initiative without deepening their commitment. With a letter of endorsement from Willison, McLean applied to work on the preparation of a railway bill but was commissioned instead to report upon railway regulation in other jurisdictions, and the applicability of their experience to Canada.[33] The Commission model had found a new champion.

---

[29]Canada, H.C., *Debates: Board of Railway Commissioners* at 1789 (14 March 1898).

[30]P.A.C., Laurier Papiers, Laurier to J.S. Willison, 2 November 1898.

[31]"Transportation," *supra*, note 1.

[32]*Monetary Times* (27 February 1880) quoted in Hibbitts, *supra*, note 21 at 15.

[33]P.A.C., Laurier Papers, J.S. Willison to Laurier, 31 October 1898. McLean's efforts to return to Canada also included correspondence with Professor James Mavor at the University of Toronto where McLean had previously studied (University of Toronto, Thomas Fisher Library, Mavor

Between the late fall of 1898 and early February 1899, McLean industriously produced his first response to the assignment. This survey of railway regulation in England and at the state and federal levels in the United States was based on McLean's accumulated knowledge: a consultant's document rather than the result of a public inquiry process. It was notable though, for a direct assault on the legacy of the 1895 parliamentary study which had, following Vice-President Shaughnessy of the C.P.R., affirmed the unity of interest between railways and the communities they served. McLean was adamant that "in practice some limitation must be made" on this theoretical "identity of interest."[34] As he explained and illustrated with examples,

> [a] railway may consider it advantageous to build up one community or one individual at the expense of another. What the railway wants is traffic. If it can obtain this in bulk amount from one community or one individual instead of from a number of scattered communities or individuals, then its interests are better advanced because it obtains the traffic and at the same time the cost of management and handling is lessened; the net profit is under such conditions greater.[35]

The initial effort was enough to produce a further assignment for McLean to prepare a more wide-ranging examination of rate grievances on Canadian railways accompanied by a critique of the current situation and an elaboration of proposals for legislation.

McLean's analysis of the Railway Committee's defects as a regulatory body largely ignored the policy dimension, stressing instead the technical dimension of the decision-making process. His list of the Railway Committee's deficiencies included the combination of political and administrative functions, the lack of continuity of tenure, the lack of the necessary technical training, and costs and travel distances which restricted complainants' access to justice.[36] These factors, particularly the first two, precluded efficient solutions to rate grievances:

> The attempt to regulate such matter through politically organized bodies has not succeeded. The regulation is essentially an administrative function; an intermingling of this with political duties leads to lack of harmony and efficiency. The regulation of the railroad question, in the public interest, demands technical training. It demands all the time of those engaged in such matters. They should be concerned, not only with the settlement of grievances when they arise, but also with

---

Papers, McLean to Mavor, 22 October 1899). McLean was also influenced by Frank J. Goodnow, author of a pioneering work *Comparative Administrative Law* (New York: Putnam's Sons, 1897), and Professor of Law and Political Science at the University of Chicago. For commentary on Goodnow's contribution, see W.C. Chase, *The American Law School and the Rise of Administrative Government* (Madison: University of Wisconsin Press, 1982) at 48-50.

[34]McLean, 1899, *supra*, note 22 at 4.

[35]*Ibid.*

[36]McLean, 1902, *supra*, note 22 at 75.

> an attempt to prevent grievances. The duties of political officials prevent the exercise of such functions.[37]

A further limitation of the old Railway Committee (and a factor which was seen to undermine its legitimacy) had actually been recognized when it was established. The Railway Committee's members could "scarcely be regarded by the public as absolutely removed from personal or political bias as independent members of a permanent tribunal."[38]

McLean interpreted the decision to remove regulation from Parliament to the control of a smaller body as reflecting "an appreciation of the necessity of a unified and coherent policy."[39] He evidently assumed the existence of such policy and that it could be reconciled with the "deliberative procedure"[40] of the commission he recommended. The separation of policy formation from application was desirable because "experience" had shown "that it is unwise to confuse political and administrative duties."[41]

McLean associated the concept of "administrative" duties with the idea of relevant expertise in any tribunal, the importance of full-time personnel, continuity and consistency. These attributes of the proposed commission are also in part the basis of his rejection of both the judicial and political processes as mechanisms for railway regulation. The criteria of expertise, time commitment and so on, seem more closely related to the effective working of what McLean regarded as an administrative process, rather than to an overwhelming preference for a technical response to railway supervision.

To explain what McLean intended when he described railway regulation as an administrative function, perhaps it is necessary to examine his perception of solutions to railway problems — especially rates — which might embody administrative characteristics. He emphasized the concepts of compromise, arbitration, and mediation as descriptions of the result of a rate grievance settlement. McLean's idea of compromise recognized the need to achieve workable, mutually acceptable results in the context of ongoing relationships between carriers and shippers. To produce such solutions, the decision-making authority itself must be flexible and adaptable in its approach, able to contemplate a range of possible outcomes in any given grievance situation and willing to make adjustments in the light of experience. Courts were understood to produce more rigid outcomes without regard (or at least without great sensitivity) to an on-going balance of diverse interests; and the political process, however

---

[37]McLean, 1899, *supra*, note 22 at 5.
[38]McLean, 1902, *supra*, note 22 at 75.
[39]*Ibid.*
[40]*Ibid.*
[41]*Ibid.*

accommodating it might be to the importance of compromise, was possibly too susceptible to the influence of special interests.[42]

McLean did not expect a commission to be immune from the influence of evolving debate and policy on railway regulation, but he seems to have assumed a sufficient degree of policy agreement at any given moment to avoid the need for extensive policy development in the context of particular grievances. If this was optimism, it soon proved to be unfounded. The problems of continuing relations between the new railway commission, the government, public policy, and affected parties became crucial issues in the development of the B.R.C. Accordingly, public acceptance of its authority was a continuing challenge for the board.

Under *The Railway Act, 1903*,[43] the Board of Railway Commissioners for Canada assumed the functions of its predecessor, the Railway Committee of the Privy Council, in a number of areas together with several additional responsibilities. The powers conferred on the three member board by the *Railway Act* included jurisdiction over a wide range of matters relating to most railways in Canada.[44] The authority of the Board not only included the power to make individual orders concerning particular disputes, but also to formulate regulations regarding a number of specified matters, including rates.[45] In addition, it was explicitly given the power to review, rescind, or alter its orders and regulations.[46] The B.R.C.'s flndings of fact were "binding and conclusive."[47] The various mechanisms for appeal to the Supreme Court were relatively circumscribed, but in principle the Cabinet had an extensive power of independent review.[48]

In the supervision of rates, according to the *Railway Act* the Board had extensive infiuence and authority respecting the approval of traffic charges and a range of associated considerations. The Board, for example, in fulfilling its responsibility regarding the statutory prohibition against discriminatory rates "under substantially similar circumstances and conditions" (s. 25(4)) was empowered to declare by regulation what was meant by "substantially similar

---

[42]*Ibid.* at 76-79.

[43]S.C. 1903, c. 58 [hereinafter *Railway Act*]. The fourth *Annual Report* of the Board of Railway Commissioners indicates that the drafting was done by A.S. White, K.C., a former Attorney General for New Brunswick with McLean's assistance. See Canada, Parliament, "Fourth Report of the Board of Railway Commissioners for Canada" No. 20c in *Sessional Papers* (1910) (at 40 of the paper). In correspondence with Laurier, however, Blair gives the impression that he was personally responsible for much of the statute's development. P.A.C. Laurier Papers, Blair to Laurier, 31 December 1903.

[44]*Railway Act, ibid.*, ss 3-7 & 23-25.

[45]*Ibid.*, s. 25. See also ss 253(2), 262(4), 275(2) & 284(2).

[46]*Ibid.*, s. 25(4).

[47]*Ibid.*, s. 42(3).

[48]*Ibid.*, s. 44.

circumstances and conditions" and other relevant standards (s. 254(2)). The legislation often conferred responsibility on the board using such phrases as "in the interests of the public" (s. 254(2)), or "as to it may seem expedient" (s. 255(2)) or "having due regard to all proper interests" (s. 255(2)).

Blair — still Minister of Railways and Canals and shortly to become Chairman of the B.R.C. — expressed the government's intention to create

> a railway commission composed of members independent of the government, independent of parliament in a practical sense, though not in the broadest sense, and capable ... by experience and ability, of making thoroughly effective the legislation we are now proposing to place on the statute book ... .[49]
>
> We are investing it with larger powers, we are giving it more executive authority, and we have in this respect perhaps gone beyond any legislation which has been passed in any country up to the present day.[50]

III. Reaction to Regulation: The Reception of the Railway Board

In announcing Blair's appointment as the first Chief Commissioner, the *Canada Law Journal* described this office as one of the most important public positions in the gift of the Dominion Government,[51] and remarked for the benefit of an appreciative audience, that the requirement that it be filled by a lawyer was "very properly"[52] made. Blair was described as "eminently fitted"[53] for the assignment, and in reference to his recent resignation from the cabinet because of a disagreement over federal railway policy, the *Journal* observed that this "indicate[d] an independence of thought and action which augurs well for his future usefulness in a position where such characteristics are so essential."[54]

The Board was explicitly described by law journals as a court whose members have "responsibility as holding a judicial position charged with very important duties."[55] By 1908 the Railway Board was even thought to be "perhaps, the most important Court, and possesses wider powers than any court in Canada, and that it is not a political shelf."[56] At the same time, the need to balance competing social forces was acknowledged in a manner that is difficult to reconcile with a purely judicial characterization of the Board. For example, the *Canada Law Journal* insisted that the commissioners

> will also have to stand between these gigantic and influential companies and the public, and will see the necessity of protecting the latter, and the individuals

---

[49]Canada, H.C., *Debates: The Railway Commission* (20 March 1903) at 245.

[50]*Ibid.* at 247.

[51]"The Board of Railway Commissioners" (1904) 40 Can. L.J. 449 at 449-50.

[52]*Ibid.*

[53]*Ibid.*

[54]*Ibid.*

[55]*Ibid.*

[56]"The Board of Railway Commissioners" (1908) 44 Canada L.J. 169 at 171; and *ibid.* See also (1904) Industrial Can. 369.

> therein, from the greed and overbearance too often characteristic of rich and powerful corporations.[57]

The railways were presented as "largely monopolies," "transparently alive to their own interests," and it was remembered that "those who deal with them have the greater need of protection."[58] The B.R.C. then, whose claim to independence was reinforced in the minds of some by a judicial aura, was simultaneously expected to assert its influence fairly systematically as a counterweight to concentrations of private power.

Louis A. Pouliot later took issue with the choice of a regulatory commission as the response to railway rate grievances.[59] Acknowledging that the public need for relief from oppression at the hands of the railways had been legitimate, he concluded "that our legislators have given a remedy too much in haste, without having taken time to consider it fully."[60] Concerned by the Board's "most extended and extraordinary powers,"[61] he objected to the combination of judicial and legislative authority and to what he regarded as "undue jurisdiction"[62] over purely civil matters. The Board's procedure, however, received his sharpest attack. By leaving "to the absolute discretion of the Board"[63] such issues as costs and legal advice for the parties, the Commission operated in a manner that was "vague, lax, and indefinite."[64] Pouliot conceded that as an advisor to parliament on Railway matters the B.R.C. could have contributed usefully, but he was ultimately unwilling to accept the basic legitimacy of independent regulatory authority: "Working as it is now, we humbly submit, that it disturbs, at least, the whole economy of our judicial system."[65]

Pouliot's criticism of the Railway Board was not universally accepted. Indeed, favourable commentaries urged the relevance of the B.R.C. as a model which might be more widely adopted:

> Why should not the simplicity in proceedings, the facilities for early hearing of cases, the absence of technicalities and formalities, the desire for fairness in reaching a decision and the practical finality of that decision, characteristic of the proceedings of the Board of Railway Commissioners, be equally characteristic of the Court of Law.[66]

---

[57]*Supra*, note 51 at 449.
[58]*Ibid.*
[59]L.A. Pouliot, "The Federal Railway Commission" (1911) 31 Can. L.T. 493.
[60]Pouliot, *ibid.* at 496.
[61]*Ibid.*
[62]*Ibid.*
[63]*Ibid.*
[64]*Ibid.*
[65]*Ibid.*
[66]A.T. Drummond, "Can Legal Practice be Remodelled?" (1912) 32 Can. L.T. 694 at 696.

The same author buttressed his sentiments with reference to fairness, "a leading principle which increasingly appeals to our better natures,"[67] and advocated the pattern of everyday life where "the methods we prefer to employ include the shortest and the least expensive road, and the constant application of common sense."[68]

One of the most substantial pre-World War I contributions to the Canadian debate on regulation and administrative tribunals was W.F. Chipman's analysis of "Government by Commission."[69] The writer, echoing the *Monetary Times*' earlier reservations,[70] regarded commissions in the regulatory field as "amphibious — half legislature, half court,"[71] and an essential distrust of the new form of decision-making was evident throughout the analysis. Citing the United States Supreme Court decision in *Munn* v. *Illinois*,[72] he considered the proposition that

> [o]ne who devotes his property to a use in which the public has an interest ... in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."[73]

Chipman formulated the problem of the limits of regulatory authority in a manner reflecting the intense arguments about the legitimacy of regulation which had been common in the United States:

> But where and by what rule the limit is to be drawn beyond which regulation amounts to a denial of the equal protection of the law, or to the taking of property without due process — it seems impossible to say.[74]

With parliamentary sovereignty, recent Canadian experience concerning "confiscatory" legislation, the Magna Carta and a brief reference to A.V. Dicey, Chipman then set the framework for a concluding review of the relationship between commissions and the courts.

The new commissions, both in Canada and the United States, were endowed with what Chipman regarded as a "judicial element,"[75] and some of them operated as courts of record. Had they been fully assimilated to the courts, Chipman would apparently have waived his objections. The case was otherwise, however:

---

[67]*Ibid.*

[68]*Ibid.*

[69](1911) 31 Can. L.T. 446. Warwick Fielding Chipman, who graduated from McGill in 1906, practised law in Montreal and taught civil law at McGill.

[70]*Supra*, note 32.

[71]*Supra*, note 69 at 447.

[72]*Supra*, note 7.

[73]*Supra*, note 69 at 448.

[74]*Ibid.*

[75]*Ibid.*

> The trouble is that these bodies do more than try issues. They create the issues to be tried, and the rules by which they shall be tried are entirely arbitrary, discretionary and exceptional. It is impossible not to recognize that neither one of the two characters of these bodies, judicial or executory, can be made complete without necessarily interfering with the other.[76]

Chipman reminded his readers that "[n]o such Boards can sit without modifying rights of property, rights of contract and freedom of trade"[77] and that the interests not only of monopolies but of the public as well would be affected. He articulated, in conclusion, the nature of the institutional trade-off at its most basic level and was more willing than most tribunal critics to acknowledge the potential costs in terms of functional efficiency that defenders of the rule of law must be prepared to accept:

> If efficiency in executive control be the highest good of a state, then undoubtedly it is stupid to maintain that the executory body is or should be a Court of law. But if liberty be more important than good management ... then it becomes of the utmost importance to insist upon the assimilation to courts of the public bodies we are examining, and upon their adherence or subjection to the ordinary laws of the land.[78]

As Chipman indicated, opinion basically divided between those favouring a formal judicial model and those favouring an administrative model of decision-making, with commissioners themselves often left to formulate acceptable procedural means of accommodating the tension.

Not all commissioners appreciated the possible significance of a balanced and moderate tone, while their new organizations settled into the changing landscape of public decision-making. For example, the Chairman of the Quebec Utilities Commission, who regarded his tribunal as comparable to the Ontario Railway and Municipal Board and the Board of Railway Commissioners, somewhat tactlessly remarked to a Toronto audience that to allow appeals from a commission decision on a question of fact would turn it into "a mere court of Justice."[79] The commissioner resented the prospect of having to gather material "in a precise, accurate and legal form which can be submitted to a court of Appeal."[80]

Chipman's 1911 critique of commission government had ended with the confident reflection, "[p]erhaps the law is secure enough, and sufficiently fundamental, to await serenely the return of the prodigals."[81] In striking contrast to the impatience expressed by the Quebec Utilities Commission Chair with the

---

[76]*Ibid.*
[77]*Ibid.*
[78]*Ibid.*
[79]*Ibid.* at 461.
[80]*Ibid.*
[81]*Ibid.*

judicial process, as constituting a serious hindrance to effective decision-making, is Viscount Finlay's later observation that "[t]he Railway Board is not a mere administrative body. It is a Court of Record ..."[82] Somewhere in the institutional landscape between "a mere court of Justice" and mere administrative bodies, early twentieth century Canadian regulators had to secure the foundations of their legitimacy, for, W.F. Chipman notwithstanding, the prodigal commissions were not anxious to return to the judicial fold.

Early twentieth century Canadian observers were not unfamiliar with a conceptual framework that distinguished between administrative, judicial and legislative functions. Indeed, Chief Justice Harrison had endorsed the separation of powers in 1876, one year after the creation by federal statute of the Supreme Court of Canada:

> In the reading of the British North America Act one cannot fail to observe the distribution of powers into the three great divisions of executive, legislative and judicial. To avoid conflict, the functions of each must, as far as practicable, be kept separate and distinct within its own sphere.[83]

Explanations for the influence of the separation of powers doctrine have included the suggestion that it is "an essential element in efficient government,"[84] "a necessary safeguard to the liberty of the citizen"[85] and "a practical differentiation of organs or of functions."[86]

The comparative subordination of the separation of powers in Canada was consistent with parliamentary government and legislative supremacy. Certain central assumptions of this tradition, as expressed by prominent early twentieth century Canadian commentator Adam Shortt, were important features of the environment in which the B.R.C. would seek to establish its credentials and authority:

> [T]he Canadian system of government belongs to the British type of responsible parliamentary government in which there is the most intimate connection between the legislative and executive functions, and in which also the constitution is a flexible combination of laws and usages, many of the latter more binding, and in some cases even more unalterable than the laws.[87]

"[T]he chief factor of success in the Canadian system of parliamentary government," he continued, "is the concentration of power and responsibility."[88] The

---

[82]*Toronto Railway* v. *Toronto*, [1920] A.C. 426 at 434.

[83]*Re Hamilton and North-Western Railway* (1876), 39 U.C.R. 93 at 112.

[84]J. Finkleman, "Separation of Powers: A Study in Administrative Law" (1936) 1 U.T.L.J. 313 at 319.

[85]*Ibid.*

[86]*Ibid.*

[87]A. Shortt, "The Relation between the Legislative and Executive Branches of the Canadian Government" (1913) 7 Am. Pol. Sci. Rev. 181 at 181.

[88]*Ibid.*

substitution of concentration for separation, and of usages for constitutional rights, presented early twentieth century Canadian regulators with a somewhat different set of norms to satisfy in establishing and maintaining their authority as decision-makers. The B.R.C., in particular, as the pre-eminent national regulator in a parliamentary and federal system, faced the challenge of promoting public acceptance of an integrated exercise of judicial, administrative and legislative responsibilities. If that combination was often welcomed by casual observers and the public, it was clear that within legal circles there would be scrutiny of the B.R.C.'s performance, especially where the exercise of discretion might occur. For, in the mind of some critics such powers were "repugnant to the responsibility of Parliament."[89]

Before examining the manner in which the legitimacy of the B.R.C. was confirmed, it is helpful to sample the decisions of the Board. This will establish a clear appreciation of the range and importance of the matters with which the new tribunal dealt, and will illustrate their policy implications.

IV. Policy Dimensions of the Rate Cases

The Board's decision-making authority regularly required the exercise of discretion, as its members were occasionally willing to acknowledge. Blair, for example, said that the rate-making power invests the commission "with a discretionary power, without appeal, of determining whether tolls for the carriage of merchandise are just, reasonable and free from discrimination."[90] The breadth of discretion provided opportunities for policy development, although, as Janisch has noted, this further consequence of the discretion was generally downplayed or denied:

> [A]s long as it was *felt* that the Board was not making policy decisions, there would not be awkward questions about the legitimacy of a non-elected body's making such decisions. Should the perception change and it be realized that regulatory agencies are not simply "judicial" bodies mechanically applying a clearcut policy mandate given them by parliament then the issue of political irresponsibility has to be confronted.[91]

In fact, during debate on a 1905 *Railway Act* amendment,[92] opposition spokesmen, W.F. McLean, emphasized the Board's legislative functions and their implications for accountability:

> Where you have legislative powers conferred on anybody [*sic*], ought not that body to be responsible? If this Railway Commission is vested with legislative powers and functions, it should be responsible to parliament.[93]

---

[89]*Ibid.*

[90]*Scobell* v. *The Kingston & Pembroke R.W. Co.* (1904), 3 C.R.C. 412 at 414 [hereinafter *Cedar Lumber Products*].

[91]Janisch, "Independent Regulatory Agency," *supra*, note 1.

[92]*Ibid.* at 91.

[93]Canada, H.C., *Debates: Railway Act Amendment* (23 February 1905) at 1599.

To minimize criticism of the B.R.C.'s legislative role, commission officials spoke in terms of applying the policy of the *Railway Act* to cases before it,[94] and emphasized jurisdictional limitations:

> Being a statutory tribunal, this Board must find in the Act constituting it, either in express terms or by necessary implication, the power to do what is being asked, otherwise the authority to do so is lacking.[95]

The Board was also prepared to re-direct the parties back to Parliament to remedy complaints outside its mandate:

> As I read the *Railway Act*, it does not fall within the scope of the Board's powers to reduce a rate because a removal of customs duty has created a keen competition. If the removal of duty creates the situation complained of, it is to another body that application must be made for relief.[96]

Despite these signals, matters brought before the Board and arguments made at its proceedings repeatedly demonstrated a public perception that the agency's authority to consider policy issues was very extensive. Chief Commissioner Drayton[97] was forced in the *International Paper* case to respond to this impression:

> Arguments have been advanced, practically on the line of conservation of the country's resources, on the proposition that it is much better for Canada that this pulpwood should be used in it, and the like. In my view, this Board has nothing to do with such considerations at all, and is not and should not be moved by any ulterior consideration or motive. If the rate is an improper rate, there is not reason in the world why it should be allowed to stand because an American mill absorbs the increase instead of the Canadian producer.[98]

Nevertheless the B.R.C. was regularly required to consider the public interest in the course of its deliberations. In the absence of policy guidelines, inquiries into the public interest became very wide ranging.

Only rarely, however, did the Board itself acknowledge the legislative nature of its activities;[99] Board members were generally inclined to downplay the significance of their powers. McLean, for example, after years of experience

---

[94]See *In Re Joint Freight and Passenger Tariffs* (1909), 10 C.R.C. 343 at 345.

[95]*Niagara, St. Catherines and Toronto Railway Company* v. *The Grand Trunk Railway Company* (1904), 3 C.R.C. 263 at 270 [hereinafter *Stamford Junction*].

[96]*Canadian Oil Cos.* v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.* (1911), 12 C.R.C. 350 at 357, McLean.

[97]Drayton, a former Crown Attorney, had been counsel for the City of Toronto, and a member of Ontario's Hydro Electric Power Commission before his appointment to the B.R.C. See "The Railway Commission" (1912) 48 Canada L.J. 473 at 474 and "The Chairman of the Dominion Railway Board" (1913) 49 Can. L.J. 318.

[98]*International Paper Co.* v. *Grand Trunk* (1913), 15 C.R.C. 111 at 116 [hereinafter *International Paper*].

[99]See *In re Daylight Savings Act* (1919), 24 C.R.C. 199 at 206.

with the B.R.C., seemed to express some puzzlement about the existence of law-making powers when he spoke to the Toronto Lawyer's Club:

> When you come across such a phrase as this, "The provisions of the *Railway Act* in so far as applicable and not inconsistent with the present Act shall apply," what is the answer? It looks as if you were putting the regulative tribunal very close to law-making functions.[100]

As the following section of the paper illustrates, the B.R.C.'s early rate-making decisions had important consequences for the well-being of industries and communities throughout Canada. These frequently involved policy choices of a legislative nature. Earnings, the Board's position regarding return on capital, and its elaboration of the public interest provide some indication of the B.R.C.'s attitude to the railway industry. The Board's discussion of these matters also illustrates the intimate relationship between policy choices and rate review in individual cases.

A. Fair Return and the Railway Industry

"Railway companies," stated Chief Commissioner J.P. Mabee in 1911, "are entitled to enjoy fair and remunerative rates" subject, of course, to the reasonableness of tolls.[101] If the agency regarded its rate-making powers as limited by these considerations, there was nevertheless a good deal of sensitivity to the position of investors. "No controlling commission has got, it seems to us, the right or the jurisdiction to make an order that would have the effect of destroying the earning power of the capital that honestly went into the facility."[102] Pre-war critics of commissions and of legislatures who feared arbitrary confiscation or expropriation should have found relief in such sentiments. Even more so when the Board concluded in a rate-reduction case that "sufficient has been said to make it clear that the reduction in rates then directed would be an outrage upon the stockholders in these railways."[103] Some years later these sentiments were elevated into "the duty of the Board to allow fair and just rates to carriers for the service they perform."[104]

Acknowledgement of the shareholder interest had important implications for the manner in which the commissioners would participate in the rate-setting process. In *Winnipeg Jobbers' Association* v. *Canadian Pacific*, the Chief Commissioner reminded participants that the statute gives the railway company rather than the Board or the public the right to frame tariffs. "The legislation,"

---

[100]S.J. McLean, "The *Railway Act* of Canada" (1928) 6 Can. Bar Rev. 415 at 427.

[101]*Canadian Oil Co.* v. *Grand Trunk and Canadian Pacific Ry. Cos.* (1911), 12 C.R.C. 334 at 345.

[102]*Dawson Board of Trade* v. *White Pass and Yukon Ry. Co.* (1912), 13 C.R.C. 527 at 532.

[103]*Ibid.* at 533.

[104]*In re Increase in Passenger and Freight Tolls* (1917), 22 C.R.C. 49 at 63.

he continued, "does not by any means put the Board in the position of being able to in all cases control the carrier in the fixing of his tolls."[105]

Even where challenged tariffs were disallowed, the Board was reluctant to substitute new rates because of the detailed inquiry that would be required.[106] Actual practice thus confirms the observation that "a regulatory body operating still within the economic philosophy of laissez-faire would be given and would assume very modest powers to intervene in the business of operating a railway."[107]

The B.R.C.'s reluctance to intervene reflected some sensitivity about the limits of its own competence and perhaps some measure of confidence in the railways' responsiveness to market conditions and competition. On the one hand, Blair remarked in 1904 that "when properly influenced by unobjectionable motives," the railways "should be better able to judge than this Board can be, as to what course will tend to best promote the common interest of carrier and shipper."[108] This echo of the 1894-95 parliamentary inquiry[109] does not seem to have been so candidly expressed in future cases but presumptions applied to rates in conditions of competition contribute to a similar result:

> Where a railway chooses to meet water competition it is to be presumed, unless the contrary is established, that it does so because there is effective competition in regard to traffic important in amount.[110]

That analysis protected railways from shippers' claims that rates in competitive circumstances were relevant to the determination of reasonableness or the existence of undue discrimination in other situations where competition did not operate. The Board's willingness to leave the basic rate-setting function to the judgment of railway management could be explained by this assumption of effective competition and acceptance of the need for profitable routes to support other lines. Thus, it asserted "when competition is less effective the railway may bring its rates up more closely to its normal basis,"[111] and "if the whole line of the Canadian Pacific produced no better results than the Pacific division, it would become insolvent."[112] Accordingly, after offering low rates to the Pacific coast in order to compete successfully for traffic, the company may "recoup its losses by means of the rates it may impose to the interior points."[113] Overall, a

---

[105](1908), 8 C.R.C. 175 at 178 [hereinafter *Winnipeg Jobbers' Association*].

[106]*Ibid.* at 183.

[107]Darling, *supra*, note 1 at 33.

[108]*The United Factories* v. *Grand Trunk* (1904), 3 C.R.C. 424 at 426.

[109]*Supra*, note 17.

[110]*Plain and Company* v. *Canadian Pacific Ry. Co.* (1909), 9 C.R.C. 222 at 223.

[111]*Dominion Millers' Association* v. *Grand Trunk* (1911), 12 C.R.C. 363 at 368.

[112]*British Columbia Pacific Coast Cities* v. *Canadian Pacific Ry. Co.* (1906), 7 C.R.C. 125 at 130 [hereinafter *B.C. Pacific*].

[113]*Ibid.*

loosely-defined fair return was expected to result from the full range of managerial decisions whose inter-relationships the Board considered itself unsuited to assess.[114]

Assumptions about risk and uncertainty also inhibited more active interference by the commissioners. In *Dawson Board of Trade* v. *White Pass and Yukon Ry. Co.*,[115] the applicants urged that lower rates would actually assist the railway business by attracting additional traffic to the route, developing the surrounding country and inducing investments. The Board considered these predictions seriously but weighed them against the consequences if traffic failed to develop from lower rates: "the Board would have wrecked the capital invested, forced the companies into receiverships, and probably done the country and people irreparable harm."[116] The Chief Commissioner was unwilling to accept responsibility for the risk and decided against intervention by saying "it is much easier to advance arguments of this kind than to take the responsibility of putting these claims in the form of a concrete order."[117]

Protection of the railway investment was evidently a significant concern for the regulators, although the range of protectable interests did vary. For example, in an early application by the Grand Trunk for exemption from the *Lord's Day Act*,[118] the Board heard evidence about the likelihood of shippers seeking continuous service on American carriers if the interruption of Canadian grain carriage on Sundays was not eliminated. The judgment carefully introduces a wide range of public considerations, but its primary consequence is to maintain the competitive position of the Canadian rail line:

> While the mere money loss to a corporation not allowed to work its employees on the Sabbath may be of no moment, it seems to me the pecuniary loss to the Grand Trunk by not being able to carry this grain is not the only thing for consideration. If it were, I should regard the evidence as of little value. If this grain cannot be carried by Canadian lines it will go through American channels, and others will benefit at the expense of the country whose every effort has been put forth to acquire and hold this carrying trade; and so, instead of merely the Grand Trunk interests being involved, it is the larger question of the commerce of the country being at stake, and while I am not at all of the opinion that this is a reason for making a week-day of the Sabbath, I do think that some modification of the Act may be made so that this traffic may be retained, and yet that the minimum of Sunday work be permitted.[119]

---

[114]"Transportation," *supra*, note 1 at 119-20. Cruikshank describes the imprecise nature of rate-setting and observes:

> With one eye on regular year-over-year comparisons of revenues and expenses, freight agents and traffic officials relied on instinct, precedent and experience in setting rates, responding as best they could to commercial and competitive pressures (*supra* at 120).

[115]*Supra*, note 102.

[116]*Ibid.* at 540.

[117]*Ibid.*

[118]*Re Lord's Day Act and Grand Trunk Ry. Co.* (1908), 8 C.R.C. 23.

[119] *Ibid.* at 28-29.

The Board's policy on traffic diversion in *Great Northern* v. *Canadian Northern*[120] also reflected a sensitivity to the capital commitments of the railway companies in Canada, in the absence of some overriding public interest. The Great Northern, with track from Duluth, Minnesota, to Emerson, Manitoba, sought to reduce its existing joint tariff with the Canadian Northern on coal on the Duluth-Emerson-Winnipeg route from $3.00 to $2.50, the same rate that the Canadian Northern charged for the all-Canadian shipment of coal from the Lakehead to Winnipeg. This would have resulted in some diversion of traffic to the southern route with the Canadian Northern then earning its 75¢ portion of the joint tariff instead of the full $2.50 for performing the delivery entirely on its own line. The Canadian Northern was joined in opposition to the application by the cities of Fort William and Port Arthur which discussed the coal handling facilities of the port:

> Large sums in wages are paid at both these points to workmen engaged in this work; and it was clearly demonstrated that if this trade was taken away from these cities, it would seriously injure them.[121]

Ambiguously observing that these considerations "may or may not have any bearing upon the case,"[122] the Board denied the application on the grounds that it could find no benefit to shippers or consumers in the arrangement proposed by the Great Northern. In a similar case involving passenger traffic, the Board again found no public benefit in a proposed diversion and asked:

> Is it fair that the applicant should be permitted to make use of the Act to divert from the lines of the Grand Trunk and Canadian Pacific Railways at Toronto the tourist traffic that the last mentioned railways have spent years in developing?[123]

Promotional effort and investment were evidently worthy of some protection.

Despite some limitations on the protection of railway capital where an important public interest was seen to arise, and despite restrictions on the manner in which railway companies might earn their profits, the foundations of the system rested on policy judgments about the long-term nature of national development:

> Railway construction in Canada depends entirely upon outside capital; thousands of millions must be borrowed within the next generation or two. We have in Canada less than thirty thousand miles of railway as against more than 235,000 miles in the United States. Within fifty years Canada will require a greater railway mileage than now exists in the United States; the money for the construction of this must, for many years at least, largely come from abroad, and how long would

---

[120](1907), 11 C.R.C. 424.

[121]*Ibid.* at 428.

[122]*Ibid.*

[123]*Canadian Northern Ontario Ry. Co.* v. *Grand Trunk and Canadian Pacific Ry. Cos.* (1908), 7 C.R.C. 289 at 293 (the *Muskoka Rates* case).

> these investments continue if it were known that their earning power might, at any moment, be terminated by the intervention of this Board? While our duty to interfere and reduce rates in all proper cases is plain, surely it is equally clear that we should not require a reduction where the effect would be to prevent the investment earning a fair return.[124]

The background debate about arbitrary government, agency interference or confiscation reinforced the sensitivity to rights of property. This sensitivity helped to sustain, if it did not create, an aversion to managerial involvement by commissions in railway operations with regard to service level controls, systems development, investment decisions and rate setting. The B.R.C.'s initial reluctance to substitute its judgment for managerial decisions contributed to a bias against examining cost control measures and other internal operations and in favour of profit control which was more easily understood and apparently judged to be of greater significance to the public.

B. Reasonable Rates and Industrial Policy

The Board was regularly confronted with claims from shippers who were anxious to establish or to restore some competitive advantage or to generally promote industrial development. A few examples seem to illustrate a distinction between the treatment given these cases by Blair, the former politician, and the treatment of similar problems by his successors. The first Chief Commissioner's willingness to seek industrial benefits for Canada through rate regulation appears to contrast with his successors' unwillingness to consider the competitive position of Canadian shippers as a factor affecting the reasonableness of railway rates.

The Sydenham Glass Company Case,[125] decided within months of the B.R.C.'s creation, is typical of the first cluster of cases. Special arrangements between the Canadian glass company and the C.P.R. prior to the *Railway Act* had provided some assistance in meeting competition from the United States and Germany. Following the 1903 legislation, the railway expressed doubt about the legality of the established rates and introduced an increase from which the manufacturer sought relief. Chief Commissioner Blair noted the advantage enjoyed by American industry with regard to raw materials, and ordered lower rates with only the thought that "the Board ha[d] to be reasonable."[126] The reported result was explained on the basis that "at the present rates the Sydenham Glass Company cannot maintain its position in the home market with the goods it manufactures, in competition with importations from abroad."[127] In

---

[124]*Supra*, note 102 at 534-35.
[125](1904), 3 C.R.C. 409.
[126]*Ibid.* at 411.
[127]*Ibid.*

another early decision a rate reduction order was related to "the fact that the export of cooperage has materially fallen off since the increased rates have prevailed."[128] The full extent to which Blair was prepared to exert the Board's authority so as to restrict the railways' managerial discretion in the interests of industrial development was shown later in the year, when the Pea Millers' Association complained about the loss of the British market and that producers were operating below capacity as a result of a rate advance introduced by the railways late in 1902. Blair concluded that higher export freight rates were probably "the finishing and not the sole cause" of the lost markets.[129] Nevertheless he restored the former rates as follows:

> Perhaps the Railways have compared the value of the business to them at the higher basis of rate, and at the former lower one, and may possibly prefer the present restricted volume of traffic in this product to the augmented output which the millers predict would follow a restoration of the old basis. If this be the case, it is doubtful whether they should be permitted to continue a policy which, while financially preferable to them, does an injury to an important Canadian industry.[130]

These early cases, however, are isolated evidence of the original potential of the B.R.C. to channel the behaviour of railway management in the interests of the domestic economy generally.

An unmistakable indication that outcomes would differ after Blair resigned from the B.R.C. is given in Chief Commissioner Killam's approach to *Brant Milling Co.* v. *Grand Trunk Railway Co.*[131] Here, a family milling operation in the Brantford area grew up and expanded, at least in part, with the support of a cartage allowance provided by the railway. The allowance, which permitted a company distant from the railway to escape the cost of cartage to the rail line, had not been given for any particular time period, and was withdrawn by the Grand Trunk which believed it to be contrary to the *Railway Act*. The milling company gave evidence to show that the withdrawal of the cartage allowance would render its business unprofitable and destroy the value of the investment. On the basis of a comparative review of the English, American and Canadian legislation, and reference to cases from British courts and the I.C.C., Killam, who had left the Supreme Court of Canada for the Railway Board, found it entirely unnecessary to deal with these consequences. The general rule dealing with the "equality" clause in the *Railway Act* and the Board's response to the use of rates to provide industrial assistance came from Commissioner McLean in 1909. He confined the notion of "similar circumstances and conditions"

---

[128]*The Sutherland-Innes Company and the Wallaceburg Cooperage Co.* v. *Père Marquette Ry. Co.* (1904), 3 C.R.C. 421 at 423.

[129]*Pea Millers' Association* v. *Canadian Railway Companies* (1904), 3 C.R.C. 433 at 434.

[130]*Ibid.* at 436-37.

[131](1905), 4 C.R.C. 259.

(s. 25(4)), which was the basis for determining whether discrimination in rates was or was not unjust, to the realm of traffic conditions:

> [A]llegations regarding "similar factories" are of no value unless the "similar factories" are, under similar circumstances and conditions of traffic, accorded more favourable treatment.[132]

He further stated, in the sentence which came to represent Board doctrine on the subject, that "[i]t is no part of the obligations of the Railways, under the *Railway Act*, to equalize costs of production through lowered rates so that all may compete on an even keel in the same market."[133] Yet, it was precisely this sort of contribution to regional development in Canada that sectoral interests frequently expected railways to make.

In later cases the Board sought to avoid responsibility for matters of this kind, asserting, for example, that "[i]t is not for the Board to attempt to direct trade development"[134] or that the commission "is nowhere authorized by Parliament to be an arbiter of industrial policy."[135] In so far as the international competitive position of Canadian industry was concerned, although Board members often indicated sympathy for the "territorial sectarianism which desires industries to be established in one's own country in preference to a foreign country,"[136] they tried to separate their personal views from their official powers:

> While members of the Board may and do, as Canadians, sympathize with policies of economic development which may through increasing diversity lead to greater economic solidarity, it is not their general opinions but the powers conferred on them by the *Railway Act* which determine what they can do.[137]

The contrast between this statement minimizing the Board's obligation to industry, and its previously remarks on the need for railway development and expansion,[138] is an indication of the different sympathy level or reaction that manufacturing and railway interests might expect from the regulators.

C. The Public Interest

In a number of rate-making decisions the "public interest" actually appeared as the determining factor. On occasion, for example, the Board

---

[132]*Canadian Portland Cement Co.* v. *Grand Trunk* (1909), 9 C.R.C. 209 at 210-11.

[133]*Ibid* at 211.

[134]*Kemp Manufacturing & Metal and Winnipeg Ceiling & Roofing Cos.* v. *Canadian Pacific Ry. Co.* (1909), 10 C.R.C. 161 at 168 [hereinafter *Kemp Manufacturing*].

[135]*National Dairy Council* v. *Canadian Pacific Ry. Co. & Canadian National Rys.* (1922), 28 C.R.C. 75 at 82.

[136]*Canadian Oil Cos.* v. *Grand Trunk*, *supra*, note 96 at 358; see also *Canadian China Clay Co.* v. *Grand Trunk* (1915), 18 C.R.C. 347.

[137]*Supra*, note 135 at 83.

[138]*Supra*, notes 125-30 and accompanying text.

expressed outrage at the prospect of railway actions distorting normal market operations and thus defeating the reasonable commercial expectations of business interests dependant on the railways. This subordination of certain railway interests to the general needs of commerce was illustrated in the *Cedar Lumber Products* case,[139] where Blair condemned the railway's attitude as

> oppression in the severest form. It is an interference with the freedom and personal rights of the individual. It denies to a man the privilege of selling his goods when, where, and to whom he wishes.[140]

Equally fundamental concerns seemed to arise in *British American Oil Co.* v. *Grand Trunk Ry. Co.*,[141] where a Canadian carrier disputed an international joint tariff arrangement with an American railway and attempted to charge the shipper above the published rate. The Chief Commissioner forcefully rejected the railway's claims:

> These tariffs are intended for the guidance of shippers, and they are supposed to be able to ascertain from them what the lawful tolls are. Here we have a case of the applicant company making expenditures and entering into contracts upon the faith of the interpretation put upon the tariff by the initial carrier, traffic moving under the tariff as construed, and such construction adopted by the participating carrier, and then an attempt by the latter to set up an entirely different interpretation at the expense and possible ruination of the industry that attempted to use the tariff promulgated by these carriers.[142]

Stability of rates or proper notice had been regarded as an important component of the public interest since at least the time of McLean's reports,[143] and as commissioner he re-stated the position in 1909 with reference to the unfair advantages large shippers might gain from better information.[144]

A series of rate cases involving consumer products illustrates the willingness of Commissioners Mills and McLean to offer assessments of the actual results that might be expected from proposed tariff changes. In *Cut Glassware Importers* v. *Canadian Freight Association*,[145] the plaintiff sought a tariff reduction from "double first class" to "first class" rate charged on china-ware on the grounds of cost savings to the consumer. McLean was unconvinced. He concluded:

> It is hardly to be expected that the self-interest of the producer would cause him to share the reduction with the consumer, since the demand for cut glass is relatively inelastic, *i.e.* the demand for it is independent of fractional variations in price.[146]

---

[139]*Supra,* note 90.
[140]*Ibid.* at 414-15.
[141](1909), 9 C.R.C. 178.
[142]*Ibid.* at 189.
[143]See McLean, 1902, *supra,* note 22 at 66.
[144]*Supra,* note 94 at 346.
[145](1911), 12 C.R.C. 10.
[146]*Ibid.* at 11.

In *Canadian Freight Association* v. *Tobacco Merchants*,[147] after examining the distribution network, McLean rejected the Canadian Freight Association's application to raise rates on cut and plug tobacco. The re-classification of tobacco would apparently have produced disruption in the wholesale grocery trade, where mixed carloads of grocery items including tobacco were common. "In view of the dislocation in the established method of distribution which the proposed increased ratings would cause, it would be necessary for the railways to make out a strong affirmative case."[148] Mills later remarked that the consumer interest was regularly invoked in shipper applications for freight rate revisions, and he declared that consumers — "the end of the distributive process, and the silent partner"[149] — should share any benefits resulting from a lowering of unreasonable rates. He was doubtful, however, that this result was actually achieved.

Consumer protection also appeared as a factor in *Great Northern Ry. Co.* v. *Canadian Northern Ry. Co.*,[150] an application proposing the diversion of coal traffic from one railway to the other at the existing rate. The Board asked: "In whose interests would all this be? ... How would the Winnipeg coal consumer be benefited? Would he be getting coal by a shorter route or at a lower freight rate?"[151] The significance of these reflections was emphasized when Chief Commissioner Mabee continued:

> This case is not to be considered as if the application came from the people of Winnipeg, supported by satisfactory evidence that the railways were defaulting in furnishing a sufficient coal supply via Fort William and Port Arthur.[152]

The B.R.C.'s decisions did not reflect a uniformly applied policy to require a demonstrated consumer benefit. They did, though, provide notice to the transportation sector through the Canadian Freight Association that the public interest could involve a wider range of considerations than the parties alone were usually able to demonstrate. This expression of independent concern for the distributive impact of rate decisions of the unrepresented consumer was noteworthy, for it introduced decision-making criteria that would not ordinarily have appeared in formally adjudicative proceedings.

The B.R.C.'s most explicit invocation of the concept of a public interest is found in a series of decisions on interswitching arrangements, that is, the service which permitted a carrier located on the tracks of one railway to transfer locally to the tracks of another in order to send or receive goods. In the *London Inter-*

---

[147](1911), 12 C.R.C. 299.
[148]*Ibid.* at 302-303.
[149]*Berliner Gramophone Co.* v. *Canadian Freight Association* (1912), 14 C.R.C. 175 at 181.
[150](1911), 11 C.R.C. 424.
[151]*Ibid.* at 428-29.
[152]*Ibid.* at 429.

change Case,[153] the B.R.C. declared emphatically that the *Railway Act*'s provisions regarding interchange at connecting points were intended "not for the purpose of benefitting one railway company at the expense of another, but solely in the interest of the public."[154] Accordingly, Chief Commissioner Killam ordered the Grand Trunk to provide interchange services to the Canadian Pacific, and rejected the former railway's claim to compensation for loss of good will and payment on the basis of its comparative loss relative to the C.P.R.'s gain. Instead, the joint rates for interchanging were to be divided on the principle of reasonable compensation for services and facilities utilized by the particular traffic interchanged. The decision is more remarkable, though, for Killam's ruminations on the law and economic development:

> With the progress of invention, new enterprises are continually supplanting or injuring old ones to the ruin or loss of those interested in the former. Railways have not only directly affected in this way former modes of transportation, but they have also been instrumental in building up particular localities or enterprises at the expense of others. It has never been the policy of the law to afford compensation for losses thus occasioned. When the legislature authorizes the construction of new lines of railway in competition with those formerly existing, this is not done with a view to benefit the promoters of the new lines or to injure those interested in the old ones, but solely for the public good.[155]

When this decision reached the Supreme Court, a jurisdictional challenge had already been resolved by Parliament in favour of the Railway Board. Justice Idington, the only judge to discuss the appeal, recognized the Grand Trunk's protests about partial expropriation and unfair competition, but he saw no statutory basis to ameliorate the result:

> The purpose of the Act is that the public must be served. The whole purpose of the Act is to give effect to that purpose. Both contending railway companies are but the creation for a like purpose. Beneficent as each has been in a wide sense, some hamlets and towns have decayed as the result of the creation of either.
>
> The suffering in this case or any other of the like kind, is but an incident like the growing pains of the boy.[156]

A comparison between the Railway Board's fairly broad conception of the public interest and the attitudes of Canadian courts to the same matter is of considerable interest. At this stage, only fragmentary documentation is available to support the view that the approaches taken in the two institutions differed significantly.[157] In *G.T.R.* v. *Perrault*, Davies J. remarked on the apparent differences and offered a tentative explanation:

---

[153]*Grand Trunk Railway Co.* v. *Canadian Pacific Railway Co. and City of London* (1905), 6 C.R.C. 327.

[154]*Ibid.* at 331.

[155]*Ibid.*

[156]*Ibid.* at 342-43.

[157]See Hibbitts, *supra*, note 21.

> Many considerations have to be weighed in reaching a conclusion under this section, [*Railway Act*, s. 198] and some of them relating to the "public interest" may be quite apart from the immediate surroundings. What weight, if an ordinary court was considering the question, would they give or have a right to give to the "public interest"? The special Board of Commissioners is enjoined to consider what would be safe in the public interest. The ordinary court is not so enjoined, and I know not on what ground but one of statutory injunction they would be justified in such a matter as farm crossings in considering the safety of the general public. These considerations on which alone its judgment would be based would, I should imagine, be limited to the rights and interests of the land-owner on the one side and the railway company on the other.[158]

Market maintenance, consumer benefits and economic progress, merely illustrate the range of values the Railway Commission was prepared to invoke in support of rulings made under the rubric of the public interest. To identify the public interest, the Board in these cases made reference to what it considered to be fundamental principles, the rules of macroeconomics and the policy of the law. In other cases, the public interest was considered in light of English and American precedents discussing the same concept.[159]

To summarize the analysis to this point, it will be recalled that at the time of its creation, observers of the B.R.C. were far from unanimous in their understanding of the nature of regulation and its relationship to familiar institutional norms in Canada. It is clear from the immediately preceding discussion, however, that in the course of its operations the B.R.C. was frequently called upon to exercise a measure of independent discretion, and that it engaged in some forms of political and economic calculus for this purpose. Simultaneously, the board sought to perform technical and administrative services, and to offer a judicial atmosphere for the resolution of disputes. Before surveying the institutional design of the board, it is important to consider why the search for agency legitimacy involved a continuing need to promote acceptability for a workable synthesis of legislative, administrative and judicial responsibilities. The B.R.C.'s objective — as first explained by McLean — was to build legitimacy for regulation in an environment where the constitutional position of the commission was somewhat doubtful and where the nature of its assignment was not the subject of consensus.[160]

V. Structuring Independence and Acceptability

A. Composition of the Board of Railway Commissioners

The selection of B.R.C. commissioners was important because of three simultaneous objectives of the federal regulatory process in Canada: political

---

[158]*The Grand Trunk R.W. Co.* v. *Perrault* (1904), 5 C.R.C. 293 at 299.

[159]*Algoma Central & Hudson Bay Ry. Co.* v. *Grand Trunk Ry. Co.* (1908), 8 C.R.C. 46; *Grand Trunk Ry. Co.* v. *Canadian Pacific Ry. Co. and City of London*, *supra*, note 153.

[160]McLean's views on the mediatorial role of the commission are set out in McLean, 1899, *supra* note 22 at 39.

responsiveness, efficient results and respect for rights. McLean (and others before him) had advocated a three member commission consisting of a railway man, a businessman and a lawyer — a common pattern on the United States commissions. The *Railway Act* simply provided for three members to be appointed by Governor in Council,[161] a process which resulted in the submission of a good deal of political advice to the Prime Minister. The Board was soon expanded to six members.

Without always fully articulating their rationale in terms of the representation of affected interests, numerous commentators ventured opinions about the proper composition of the Board. Which interests would be officially involved in the determinations of the new commission was of concern because representation had implications for the manner in which interest groups would regard the Board, and perhaps for the quality and substance of the results as well. These issues were intimately associated with the authority or legitimacy of the new decision-making forum. That authority and stature, in turn, would influence the extent and manner of participation in the regulatory process, the acceptability of B.R.C. decisions, and the likelihood that rate-regulation would continue to trouble politicians.

One correspondent, who replied to a report that Blair as Minister of Railways opposed the selection of a farmer for the commission, protested that he was

> not in agreement with the Minister of Railways when he intimates that no farmers need apply and that merchants, manufacturers and professional men only are to be chosen to fill all the positions of honour and trust in the gift of governments.[162]

The repeated claims of farmers bore fruit in the appointment of James Mills, a former president of the Ontario Agricultural College. Mills himself later urged the Prime Minister "to select some bright, fairly well educated, farmer of middle age and good standing ..."[163] Mills supported this advice with the argument that "the country has a right to have a man who understands farm life, farm work, the problems which arise in connection with grain elevators, farm crossings over railways, etc., and the rights of the shippers viewed from the farmer's standpoint."[164]

Perhaps Mills was also concerned about the credibility of the B.R.C. in the eyes of an important section of the national community. There was apparently good reason for such a concern, for in 1908 Manitoba Grain Growers asked that in new appointments "preference be given to western men, farmers or business

---

[161]*Railway Act*, s. 8.

[162]P.A.C., Laurier Papers, J. Lockie Wilson to Laurier, 17 March 1903.

[163]*Ibid.*

[164]P.A.C., Laurier Papers, James Mills to Laurier, 31 October 1908.

men conversant with conditions in this country."[165] In considering the appointment of former Manitoba Premier Thomas Greenway, Laurier noted that he was strongly supported in the West and that "the farmers would feel in him an absolute sense of security,"[166] while the *Canada Law Journal* somewhat churlishly remarked that "[i]f it is necessary that the farmers should be represented, Mr. Greenway will no doubt fulfill the expectations of his friends."[167] Greenway, appointed in 1908, died suddenly a few months later.

Mixed with the claims of farm groups were the general demands of western Canada for representation. It was rumoured during a debate about a possible membership increase in 1908 that Clifford Sifton would propose division of the Commission so that one half would sit in the West.[168] In 1909 the House of Commons expressed support for the appointment of one "who is acquainted with western railway conditions."[169] Claims for appointments were also made on behalf of the Irish Catholic community and by provinces which felt unfavorably treated in the general distribution of patronage.[170] Pressures of this kind concerning the composition of the tribunal illustrate some of the constraints affecting the judgments of those responsible for appointments. Possibly they are also early evidence of an approach to regulation that attempts somehow to enhance agency acceptability through a rudimentary form of constituency or interest group accountability.[171]

Despite the frequency with which claims were made for one or another approach to representation on the commission, the comments offer little indication of the impact of appointments on either the B.R.C.'s process or the expected results of its work. The different patterns of selection available may have had implications for the style of decision-making or the general function of the regulatory process, but early observers rarely recognized this explicitly. Even Dawson, who thought it was "very necessary"[172] for two members to have legal training, gave no reasons when he argued that "it is also advisable to have a business man and a railway man on the Board."[173] He seems to have recognized exceptional conditions as the basis for special representation but denied that western Canada satisfied the standard: "All restrictions upon the choice of

---

[165]P.A.C., Laurier Papers, John R. Dutton to Laurier, 11 March 1908.

[166]P.A.C., Laurier Papers, to Sir Richard Cartwright, 9 September 1908.

[167](1908) 44 Can. L.J. 600.

[168]P.A.C., Laurier Papers, G.P. Graham to Laurier, 20 March 1908.

[169]R.M. Dawson, *The Principle of Official Independence with Particular Reference to Political History of Canada* (London: P.S. King, 1922) at 120.

[170]P.A.C., Laurier Papers, Charles Murphy to Laurier, 1 March 1908; William Pugsley to Laurier, 28 April 1908 and Laurier's reply of 1 May; E.L. Cash *et al.* to Laurier, 1 May 1909.

[171]R.B. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harvard L. Rev. 1667 at 1760 discusses an interest group representation model of administrative law.

[172]*Supra*, note 169.

[173]*Ibid.*

personnel are prima facie bad, and they should be avoided except where some very material advantage is to be gained."[174]

The status and contribution of lawyers aroused strong expressions of opinion. Though he wanted a lawyer on the Canadian Board, McLean regarded the over-representation of lawyers as an "essential defect" in the organization of the I.C.C.: "While questions of legal interpretation arise, the matters to be determined require technical knowledge of railway administration."[175] Predictably, the *Canada Law Journal* regretted an early shortage of legally-trained board members.[176] Lawyers did become more prominently represented on the B.R.C. quite early in the agency's history when Justice Killam of the Supreme Court of Canada, a person of respectable western credentials, was appointed as Chief Commissioner in 1905.[177] Subsequently, with an expansion of the board to six members, legal representation increased. Prime Minister Laurier acknowledged Killam's influence when he responded to one critic of the growing legal strength on the Railway Board by saying:

> I was of the same opinion as yourself that one lawyer on the Commission was enough, but the late Chairman, Mr. Killam, whose competency was beyond question, had different views, and for my part I agreed with him. I think you should do the same.[178]

Justice Killam's appointment to the B.R.C. was even more significant in fundamental constitutional terms, for the Supreme Court Justice's nomination occasioned the sharpest parliamentary clash of principle on the issue of agency independence when the government introduced legislation to alter the tenure provisions applicable to his service as chief commissioner. Although the McLean reports had recommended that commissioners should have the same tenure regime as judges, this suggestion was rejected. The *Railway Act*, s. 8 provided for ten year renewable appointments subject to removal for cause on the decision of the Governor in Council.

The Killam amendment involved special provision to maintain the tenure and pension entitlement of any judge who was appointed chief commissioner. Justice Minister Fitzpatrick valiantly insisted that the innovation was a limited one and that the general tenure regime would remain unaltered. But parliamentary critics were not deterred.[179] Opposition spokesmen saw the thin edge of the

---

[174]*Ibid.*

[175]McLean, 1902, *supra*, note 22 at 77.

[176]*Supra*, note 167.

[177]"Hon. Mr. Justice Killam" (1908) 44 Can. L.J. 129.

[178]P.A.C., Laurier Papers, Laurier to D. Gordon, 3 March 1908. The *Canada Law Journal* expressed its enthusiasm for more legally-trained commissioners in "The Board of Railway Commissioners" (1908) 44 Canada L.J. 169 at 169ff.

[179]The amended tenure and pension provisions associated with Killam's appointment are in S.C. 1905, c. 35. Strong criticisms were voiced in the House of Commons *Debates* for 23 February

wedge, representing an explicit erosion of Parliament's ability to control the tribunal and a threat to responsible government. Several considered the amendment to be a fundamental departure from the understanding of 1903, and they predicted that in time either the appointment of more judges or an extension of judicial tenure to commissioners generally would insulate the B.R.C. from legislative supervision. The Prime Minister forthrightly acknowledged the importance of Killam's new status as Chief Commissioner. He will be, Laurier explained "more secure, more independent of the government, more independent of everybody, and more directly liable only to his own conscience than before."[180] After 1919 no commissioner could be removed without a joint address of the Senate and House of Commons and the tenure provisions on which tribunal independence rested were in place. The amendment passed virtually without comment.

B. External Supervision and Review

The *Railway Act* has been characterized as an attempt to "judicialize" railway rate regulation.[181] Various court-like attributes of the B.R.C., its designation as a Court of Record, and the eventual appointment of judges and lawyers to sit on it, appear to support this view. Although he bears considerable responsibility for the judicial view of the B.R.C., as Minister of Railways and Canals, Blair cautioned against over-emphasizing the significance of the formal designation and powers:

> The fact that we are constituting this commission a court of record is not tantamount to setting up a judicial tribunal in the ordinary sense. We are simply giving authority to the decrees they may pass.[182]

On the other hand, shortly after he replaced Blair, Chief Commissioner Killam remarked that in making the B.R.C. a court of record,

> Parliament probably intended both to render more effective the exercise of its powers and to mark the transfer of the authority formerly exercised by the Railway Committee to a judicial body.[183]

The Board's judicial attributes, as Blair was fully aware, enhanced its claims for independence and autonomy while the policy-oriented implications of rate regulation and more explicit law-making responsibilities confirmed for many

---

1905, *supra*, note 93, by Lennox at 1603, Haggart and MacLean at 1612. Justice Minister Fitzpatrick argued that the changes applied only to judges serving as chief commissioners and that general tenure provisions for other commissioners were unmodified. He also expressed the view that the independence of the Board of Railway Commissioners was established by the original legislation in 1903.

[180]Canada, H.C., *Debates: Board of Railway Commissioners* (3 February 1905) at 515.

[181]"Independent Regulatory Agency," *supra*, note 1 at 90.

[182]*Supra*, note 49 at 263.

[183]*Duthie* v. *Grand Trunk Railway Co.* (1905), 4 C.R.C. 304 at 312 [hereinafter *Duthie*].

observers the need for political accountability. In the end, several supervisory mechanisms were included in the *Railway Act.*

1. Supreme Court Appeals

Although the *Railway Act* conferred a comprehensive authority regarding matters of law and fact upon the B.R.C., including conclusive authority to determine any question of fact within its jurisdiction,[184] the legislation did provide several possible avenues of recourse to the Supreme Court of Canada. Jurisdictional questions were subject to appeal with leave of a Supreme Court judge, while on questions of law so classified by the B.R.C., an appeal to the Supreme Court required leave from the Board itself.[185] The Board was also authorized, either on its own motion or upon application by a party, to seek the opinion of the court by means of a stated case on a question of law.[186] The incorporation of these various mechanisms for judicial supervision of the new railway commission into the 1903 legislation was a victory of sorts for railway interests which wanted wide access to the courts despite vigourous contemporary criticism of the influence of judges on regulatory matters.

McLean had criticized the reaction of English and American courts to railway tribunals. He reported that in these jurisdictions courts looking at rate regulations on appeal "have dealt with the matter from the standpoint of technical legal interpretation," and "have for the most part been oblivious" to the policy questions involved.[187] The Canadian practice of appeals from the Railway Committee to the Governor in Council was felt to provide sufficient review and prevent "the matter [from] being looked at from a purely legal standpoint."[188] Blair, as Minister, echoed this view with reference to "the lack of hearty co-operation on the part of the judiciary" in the United States and England.[189] It was also observed that the appeals to the courts in the United States undermined the administrative process from the outset. Railways withheld evidence from the regulatory process in order to hamper the effectiveness of tribunals and to inhibit applicants who would be apprehensive about the financial burden of proceeding through several forums.[190]

With the drift of political momentum towards regulation, outright hostility to the creation of a commission had become an unrealistic stance for Canadian railways by the time of the legislative debate on the *Railway Act.* However, they actively resisted limitations on access to the courts, as had their English coun-

---

[184]*Railway Act*, s. 42(3).
[185]*Ibid.*, s. 44(3).
[186]*Ibid.*, s. 43.
[187]McLean, 1902, *supra*, note 22 at 77.
[188]*Ibid.*
[189]*Supra*, note 49 at 246.
[190]Currie, *supra*, note 1 at 227.

terparts,[191] and were successful in promoting a Senate amendment which would have allowed appeals on questions of law with leave of the court as well as leave of the Board. In the course of further proceedings leading to the passage of the legislation, this particular provision was abandoned.[192]

2. The Function and Practice of Cabinet Review

On the assumption that courts might lack sympathy for the work of administrative agencies, particularly when threats to the interests of property holders and investors were involved, railway interests pressed for wider rights of judicial appeal. Others were more inclined towards alternative supervisory mechanisms such as the Cabinet. The possibility of review by the Governor in Council might also serve to alleviate the concerns of those who could view the creation of an independent regulatory commission as a questionable departure from the traditions of parliamentary control. In 1888, for example, the Royal Commission on Railways presented an analysis focused on parliamentary tradition:

> The political constitution of Canada recognizes direct ministerial responsibility to Parliament, much more than in the United States, and, therefore, as a Railway Tribunal is necessarily tentative, it seems ... undesirable to remove its operation, in its inception, beyond the direct criticism and control of Parliament.[193]

McLean echoed these sentiments in his second report, quoting the 1888 Royal Commission and adding that "[t]he caution here expressed is essential."[194] McLean claimed to find a precedent in English railway regulation, where the Board of Trade was given supervisory control over the commission. He felt the principle of responsibility would be satisfied in Canada by providing for review by the Governor in Council on appeal, or on its own motion. In 1905, during an exchange in the House of Commons, Justice Minister Fitzpatrick was hard-pressed to satisfy traditional critics. He argued on the one hand, that you could "realize at a glance that the whole principle of the *Railway Act* under

---

[191]H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 134, n. 11.

[192]Speaking in favour of the broader right of appeal on questions of law, Senator Scott stated:

> There is only one court in the empire, from which there is no appeal, the Judicial Committee of the Privy Council in England. From all other courts in the empire there are appeals, and therefore it did not seem quite proper that this arbitrary power should be placed in the hands of the board (Canada, Senate, *Debates* at 1679 (20 October 1903)).

In fairly short order, however, the Supreme Court circumscribed its own powers of jurisdictional review:

> In granting leave to appeal — a judge of this court should be satisfied, not only that a question of jurisdiction of the Railway Board is involved, but also there is some reasonable doubt as to the soundness of the decision which it is sought to impugn (*Halifax Board of Trade* v. *G.T.R.*, [1911] 44 S.C.R. 298 at 299, Anglin J.)

[193]"Royal Commission," *supra*, note 21 at 20.

[194]McLean, 1902, *supra*, note 22 at 78.

which the board was created is a departure from that principle" (ministerial responsibility), and simultaneously asserted that "the best control you have over any ruling or any decision given by the board is the fact that the same Governor in Council can, on appeal, set any one of these rulings aside."[195]

As a supervisory body, Cabinet had several attractive features, including the experience accumulated while the Goveruor in Council functioned as an appeal body for decisions of the Railway Committee. In this regard, a remark from the B.R.C.'s decision in *Duthie*[196] on the operation of the old Railway Committee is noteworthy for the confidence it suggests in the committee's capacity to set aside political concerns as the occasion required:

> In discharging its functions, that body had frequently to decide between conflicting rights or interests, in doing which it was naturally its duty to act in a judicial spirit; but it was at the same time a branch of the Executive.[197]

There is little evidence of concern in 1903 for the procedure selected for the cabinet appeal apart from a brief exchange between Robert Borden and the Minister. In reply to Borden's question, "[i]s it to be in the nature of an appeal pure and simple or in the nature of a re-hearing?" the Minister stated that the Governor in Council would have complete authority to revise any decision of the Board. He addressed the process question by recounting the previous experience:

> We have hitherto had, I think, only one instance in which an appeal was carried to the Governor in Council, and in that instance we forwarded from the Railway Committee of the Privy Council the shorthand notes, which contained a statement of everything that had been said, the arguments addressed to the committee and the evidenee taken; and I think some of the gentlemen wished to supplement that evidence, and they were permitted to do so. The same thing would be done in the case of an appeal from a decision of this board.[198]

A further indication of cabinet appeal procedure, and one that is consistent with the perception of this supervisory function as judicial, is found in reported judgments of the Governor in Council.[199] Practice reflects considerable deference to the expertise and experience of the B.R.C. For example, a 1923 Order in Council cited earlier decisions on cabinet appeals to the effect that

> the intent of the legislation is to invest His Excellency in Council with judicial powers by which he may in his discretion aid in securing and enforcing the provisions of the *Railway Act*, having due regard to the method of railway rate regulation by an independent commission which was the outstanding innovation in

---

[195] *Supra*, note 93 at 1606.
[196] *Supra*, note 183.
[197] *Ibid.* at 312.
[198] *Supra*, note 49 at 259.
[199] *Manitoba and Saskatchewan* v. *Railway Association of Canada* (1920), 26 C.R.C. 147.

> the *Railway Act* of 1903 and which has been preserved throughout succeeding revisions of the Act to the present time.[200]

The cabinet appeal process was formal in nature, and not simply "political." Written presentations were prepared as a basis for oral argument by counsel before a cabinet committee:

> Counsel and representatives of the various petitioners have been heard and, as well, counsel for the railways affected. Consideration has been given to the various cases cited and exhibits filed.[201]

All this supported a contemporary impression that in exercising supervisory responsibilities Cabinet might be expected to satisfy existing procedural norms. The initial period of experience with cabinet appeals bears out that expectation.

Only "for extraordinary cause" was it considered appropriate for the Governor in Council to review a B.R.C. decision by substituting its judgment for that of the Board on a question of fact in issue. To do so "would defeat the purpose for which the Board of Railway Commissioners was created and would in the end be highly prejudicial to the public interest."[202] Arthur Meighen, not yet Prime Minister, but already an experienced member of Cabinet, described the Cabinet's general approach to appeals from B.R.C. decisions in 1919:

> The Governor in Council has followed about this rule ... they would not interfere with a judgment of the Railway Commission unless it appeared that certain elemental and relevant facts had not been taken into consideration; in which case — so far as I am aware, always, but I know, very generally — they referred the case back for the renewed consideration of the Railway Commission.[203]

The mere existence of appeal to Cabinet rather than its actual use was intended to satisfy the requirements for political supervision of the new agency. Or, as Dawson later put the matter, "[t]he chief power of political responsibility lies in its imminence rather than its actual use."[204] Appeals to Cabinet were never expected to be regular occurrences. Twenty-three cabinet appeals arose between 1904 and December 1918. Of these, fourteen were dismissed, one was withdrawn, two were referred back to the Board and one allowed.[205] This was hardly a record to encourage further business. Five were pending at the time of Dawson's writing. Even where Cabinet returned a question to the B.R.C. with strong guidance, the agency retained considerable independence of judgment. Thus, in *National Dairy Council of Canada* v. *Express Traffic Association*,[206] Chief Commissioner Carvell stated that the Order in Council "expressed a very

---

[200]Quoted in *Re Railway Freight Rates in Canada* (1933), 40 C.R.C. 97 at 100.
[201]*Supra*, note 199 at 148.
[202]*Ibid.* at 150.
[203]Canada, H.C., *Debates: Board of Commerce Act, 1919* (4 July 1919) at 4563.
[204]*Supra*, note 169 at 4.
[205]*Ibid.* at 123.
[206](1921), 27 C.R.C. 209.

strong desire that the rates on cream as well as the other commodities therein mentioned should be reduced, if possible, in view 'of the material fall off in the market value.'"[207]

Carvell argued, however, that if the principle in the Order in Council were adopted, then "every time the value of a commodity increased or decreased, there would have to be a corresponding increase or decrease in the freight or express rate."[208] This notion of the shipper's needs determining the reasonableness of rates had never been an overriding principle in the Board's decisions; it would have to be weighed alongside "the cost to the transportation company for adequately performing the service."[209] Referring directly to the cream rate which was under review, the Chief Commissioner finessed the Order in Council:

> It would be physically impossible to carry cream absolutely free, but I cannot imagine His Excellency wished to convey any such idea, and, therefore, I must construe that sentence ["and the Committee of the Privy Council is of opinion that in view of the material fall off in the market value of cream a corresponding reduction, if possible, should be made in the express freight rates"] to mean *if possible following any well recognized principle of rate regulation ...*[210]

Applied in this way, the Order did not alter the Board's original decision.

This brief account of the perception and use of the Cabinet's supervisory power in this area does not conclusively reveal it to be either a political or a judicial safeguard. It seems though, that greater weight should be given to the possibility that the power was seen to be judicial in nature, at least where it was invoked for appeal purposes rather than for review. Alternatively, one might see s. 44 as conferring on the Governor in Council two unique functions — judicial and political — each of which might have its own distinctive procedural expectations. To distance itself from ongoing responsibility for rate grievances, Cabinet, in practice, circumscribed its own authority in favour of the B.R.C.

C. The Administrative Process, Participation and Procedure

Improved access to justice was one expectation when the B.R.C. was formed, and the new commissioners were authorized to conduct their sittings "in such manner as may seem to them most convenient for the speedy dispatch of business"[211] subject to the requirement that any party to a complaint might apply for the matter to be heard and determined in open court.[212] Rules of prac-

---

[207] *Ibid.* at 213.
[208] *Ibid.* at 214.
[209] *Ibid.*
[210] *Ibid.* at 218.
[211] *Railway Act*, s. 40.
[212] *Ibid.*

tice and procedure not inconsistent with this and other express provisions of the *Railway Act* were in the Board's hands.

The B.R.C. explicitly encouraged disputants to resolve their differences informally by negotiation, or if this was not possible, then with a minimum of administrative cost and inconvenience. The Board emphasized in *Galbraith Coal* v. *Canadian Pacific Ry. Co.*:

> Where complaints arise it stands to reason that in common fairness they should first be brought to the attention of the railway and not precipitated on the Board without a preliminary attempt having been made by the parties to settle the matter.[213]

As Currie observed, the Railway Board "can deal quickly and cheaply with small complaints which may be critical to one person but too insignificant socially to justify the elaborate machinery of the courts."[214] File hearings and delayed decisions were other ways of reaching acceptable solutions without consuming excessive regulatory effort and in effect making railways and shippers institutionally dependent on the Commission to resolve all their conflicts.

Delayed decisions may not always have been a deliberate technique to promote settlement, but where the Commission declined to judge a rate grievance promptly, the result was to compel parties in an ongoing shipper-carrier relationship to renew or continue negotiations on their own. On occasion, Board judgments merely acknowledged agreements worked out by the parties after a hearing or file evidence. Much of this activity was consistent with the McLean Reports' expectations that the Board's functions would often be mediatorial.

The Board also appeared reluctant to exercise its full authority in formulating solutions. Sometimes if the Board felt a hearing had clarified the issues, it was prepared to see the railways themselves offer appropriate remedial action. In one case where railway ownership had recently changed hands, the Board left a complaint about deficient car service and passenger facilities in abeyance "so that an opportunity may be given for improvement by the management."[215] Then, if the complaints were renewed, one of the Board's operating officials would be dispatched to direct reasonable changes and improvements. In *Winnipeg Jobbers' Association* no formal order was issued on the first complaint although the Board did indicate its views to the railway. On rehearing, the Board again declined to specify the rates to be substituted, but expressed a willingness to hear further complaints if they arose.[216]

---

[213](1910), 10 C.R.C. 325 at 332.

[214]*Supra*, note 1 at 225.

[215]*Cardston Board of Trade* v. *Alberta Railway and Irrigation Co.* (1908), 9 C.R.C. 214 at 219-20.

[216]*Supra*, note 105 at 183.

Initially, compliance procedures were not well developed, so a considerable burden fell upon aggrieved shippers to renew their complaints if a railway failed to respond appropriately to orders of the Board. Producers' organizations with some administrative continuity and monitoring capacity were best suited for this sort of ongoing involvement in rate regulation. But when the Canadian Lumbermen's Association complained that export tariffs filed by the railways did not conform to the B.R.C.'s earlier order that the railways should set rates on lumber sent to Montreal for export "which in general shall be lower than the rates on lumber to Montreal," the Assistant Chief Commissioner replied that the words "in general" had been deliberately used to preserve flexibility. The B.R.C. stressed the need for flexibility and so "could not fairly require the railways to have the export rate so many points lower than the domestic rate in every case."[217] The apparent setback for the lumber interests did not prevent Cox and Co. from applying successfully for a rate reduction using the general principle in its own particular case.[218] The Board retained its discretion over particular results, but channeled the parties' behaviour and expectations using general guidelines.

The B.R.C. felt that premature tinkering, as much as rigidity, was a hazard to effective regulation. Shortly after the Canadian car service rules on demurrage were put into effect, a proposal for alterations was put forward by the Wallaceburg Sugar Co. on behalf of Canadian sugar refiners.[219] The Board did consider the merits and principles of the application, but as an additional basis for denial, the Assistant Chief Commissioner expressed the view that it would not be advisable "at this early date to start making exception to the general principles laid down in the car service order, which has not yet been in effect for three years."[220] In another application dealing with classifications, it was admitted that the aspect of the current arrangements which was in question was a compromise and possibly "a somewhat illogical one."[221] Yet, the Board declined to authorize any alterations because there was "less dislocation of business and discontent among shippers than would arise from an attempt to follow a rigid principle."[222] This ruling did not preclude change entirely: "The existing arrangement should not be disturbed, except on a wider basis of fact than is at present before the Board."[223] In other contexts as well, an apparently desirable suggestion was not implemented where it was "of the nature of a rapid fire solution to create other and more important difficulties."[224]

---

[217]*Canadian Lumbermen's Association* v. *Grand Trunk* (1910), 11 C.R.C. 344 at 346.
[218]*Cox & Co.* v. *Canadian Pacific Ry. Co.* (1911), 13 C.R.C. 20.
[219]See *Wallaceburg Sugar Co.* v. *Canadian Car Service Bureau* (1909), 8 C.R.C. 332.
[220]*Ibid.* at 336.
[221]*Lamontagne* v. *Canadian Freight Association* (1911), 12 C.R.C. 291 at 292.
[222]*Ibid.*
[223]*Ibid.*
[224]*Supra*, note 94 at 344-45.

All of these decisions reflect an appreciation of the dynamic nature of a decision-making process in which there was some workable but evolving mix between generally applicable arrangements and exceptions. But it was not always clear that the Board was sufficiently responsive to new concerns that came before it. The B.R.C.'s basic commitment to stability might be seen as a means to enhance the authority of its decisions with an aura of at least semi-permanence, but it can also be viewed as a preference for passivity with conservative implications.

Concern about premature intervention may be seen as evidence of a tension between adjudication and rule-making with which the B.R.C. was confronted in its early years, though not necessarily by that name. The location of responsibility for initiating issues was an important concern for the new agency. Would the Board actively define its own program and exercise its regulation-making power, or would it be largely responsive to complaints and applications from railways and the public? The Board's attitude seems to have varied according to the particular issue to be addressed; though it took a good deal of initiative in formulating speed and safety standards, it appears to have relied more heavily on individual applications to guide its approach to rate questions. A partial explanation may lie in the widespread perception that the Railway Committee of the Privy Council had not been sufficiently accessible to complaints in rate cases, and that one of the new agency's primary functions was to provide a forum for these.

Another major issue faced by the Board was whether rulings would apply to the parties alone or have some precedential weight for future decisions. In its first years of operation the Board envisaged a distinction between general and specific orders. It was often unclear, however, whether a particular ruling enunciated a general principle. In the *Cedar Lumber Products* case a claim was made against the railway for discriminating against cedar through the use of special contracts fixing prohibitory rates. The railway acknowledged the practice but attempted to justify its behaviour on the grounds that

> all railways had raised their rates upon certain products in order to retard the shipment thereof, that the companies require these commodities largely for their own use, and that the object of the companies is to restrict the output so as to make sure that their future needs and requirements may be supplied.[225]

Chief Commissioner Blair, after specifically condemning the Kingston and Pembroke line, broadened the impact of his ruling to include other railways: "Inasmuch as we are led to believe that on other railways a system of varying rates and discrimination as against cedar and cedar products is in operation," he said, the Order should be made a General Order to all railways under the juris diction of the B.R.C.[226] Extension of the decision to cover like parties engaged

---

[225]*Supra*, note 90 at 413-14.
[226]*Ibid.* at 416.

in similar practices could be understood from the perspective of consistency, although proof that the offending practice was widespread had not really involved industry participation. On the other hand, when shippers later sought to rely on a major decision, the *Interswitching Rates* case,[227] Commissioner McLean rejected the suggestion that the case was of any relevance. The law on interswitching was in an "inchoate condition;"[228] the previous case was confined to its specific facts. The Board, according to McLean, "refused to deal in a general way with the question of interswitching rates in reference to all the points in Canada where the railways of the two companies concerned connected."[229]

The Board was reluctant in this instance to acknowledge the reliance of applicants on its previous decisions. Nevertheless, shipping interests often pressed for generalization, greater certainty and increased predictability. In a case about commuter rates between Toronto and Brampton, the applicants wanted the B.R.C. to decide upon a radius within which commuter rates should be reviewed. As evidence of unjust discrimination against them, they pointed to the fact that some communities located near Montreal and Ottawa enjoyed the advantages of commuter fares. The Board's impatient response was delivered in a sarcastic tone:

> We are not of the opinion that because a railway company or railway companies operating into and out of Montreal give commutation rates, therefore they are compelled to give them into and out of Toronto. Why particularly Toronto? Why not Hamilton, why not London, why not Kingston, why not Winnipeg and every other city throughout the whole Dominion? And why stop at cities? Why let the cities discriminate against the towns? ... And why, forsooth, stop at towns? Why not the villages? ... It must get back to what is fair or what is unfair; what is just or what is unjust.[230]

Ample grounds for frustration of future applicants are found in the concluding remarks of the decision. In regard to the B.R.C.'s powers to make general regulations concerning the meaning of "substantially similar circumstances and conditions"[231] for the purpose of identifying unjust discrimination, the Chief Commissioner allowed that:

> It will probably be our duty, not so much in connection with this application, but as a matter of general policy, if we are able, to try and define what Parliament means by 'substantially similar circumstances and conditions.'[232]

Then, in a few lines, the B.R.C. excused itself from the difficult task, identified the precise policy issue the towns were concerned about, expressed a

---

[227] *Canadian Manufacturers' Association* v. *Canadian Freight Association* (1907), 7 C.R.C. 302.
[228] *Ibid.* at 318.
[229] *Laidlaw Lumber Co.* v. *Grand Trunk Ry. Co.* (1909), 8 C.R.C. 192 at 193.
[230] *City of Toronto and Town of Brampton* v. *Grand Trunk Ry. Co.* (1910), 11 C.R.C. 370 at 377.
[231] *Ibid.* at 379.
[232] *Ibid.*

preference for the outcome, and abdicated all control to the management of the railways:

> I suppose that commutation rates are the forerunner of a suburban service. It is eminently in the interests of cities and their people that there should be suburban services and that people should have an opportunity of getting into the rural districts adjacent to cities expeditiously and economically. But after all it must be left largely to the good sense of those who are in the control of the railway facilities as to what services can be afforded and, within reason, what the tolls shall be.[233]

There is no evidence that a policy-oriented inquiry was considered at this time to deal with the commutation rates question, although future proceedings demonstrated how useful this might have been. In the more traditional aspects of rate regulation, though, the Board had already introduced investigative procedures and was prepared to recognize their effect on both particularized adjudication and rule-making. Accordingly, when the British Columbia Sugar Refining Company approached the Board concerning rate reductions, the Board chose not to deal with the matter on the grounds that it was subsumed in the then pending Western Rate Investigation.[234] This was at the very least an indication of the B.R.C.'s desire to achieve some degree of consistency in its decisions.

In another judgment later in the same year, the scope and function of general investigations was extensively discussed. Using its own previous investigation of express rates as an example, the Board emphasized that the general principles laid down in the inquiry "do not exhaust the scope of regulative power."[235] As the express companies had come under regulation more recently than the railways, the general investigation was "of necessity concerned with the blocking out of general reforms" and the regulator's work, "instead of having been completed by the Express judgment was simply begun by it."[236] Further complaints were certainly expected, whether they arose from new conditions not apparent at the time of the investigation, or "from conditions which were imperfectly set before us."[237] The Board then indicated that

> some time must elapse before a complete body of regulative experience in regard to express rates in Canada is developed, and this will be developed when dealing from time to time with complaints, both general and special, as they arise.[238]

This remark suggests a tendency to prefer the elaboration of principles through adjudication.

---

[233]*Ibid.*

[234]*British Columbia Sugar Refining Co.* v. *Canadian Pacific Ry. Co.* (1913), 14 C.R.C. 354.

[235]*Manitoba Dairymen's Association* v. *Dominion and Canadian Northern Express Cos.* (1913), 14 C.R.C. 142 at 173.

[236]*Ibid.*

[237]*Ibid.*

[238]*Ibid.*

There were, nevertheless, also important examples of what we would now recognize as notice and comment rule-making. This process was adopted in 1914 in connection with the revision of the Canadian freight classification system:

> Committees, composed of the shippers and of the railways, were appointed for western Canada and for eastern Canada. Approximately 150 days were taken up in meetings. A large number of shippers' representatives attended these meetings and discussed matters in which they were interested. Through the use of round-table methods of discussion, satisfactory conclusions were arrived at in many cases. After these discussions had taken place, the proposed classification was filed with the Board. Copies were mailed to a representative list of trade interests. Thereafter the matter was set down to be discussed in respect to matters on which agreements had not been obtained in conference. Eventually the record was considered and decision rendered.[239]

Some Board decisions were circulated to affected parties.[240] On one occasion Commissioner Mills, in dissent, urged the Board to decide on the basis of evidence then available, send the result to other interests, and make the result a general rule unless objections were received in which case an investigation should be undertaken.[241]

Despite this kind of initiative obviously intended to open up debate and participation in decision-making, some groups were unwilling to recognize the Board as a suitable forum for a general inquiry. In 1915, for example, *Industrial Canada* argued that solution of "the transportation situation"[242] was hampered by inadequate information and a misunderstanding of the issues. The Canadian Manufacturer's Association wanted a comprehensive investigation leading to reports and recommendations, but for this purpose preferred a specially appointed commission rather than the B.R.C. as the latter was "a judicial body rather than an investigating board."[243]

The *Railway Act* provided for the appointment by the Governor in Council of "one or more experts, or persons having technical or special knowledge" concerning matters before the Board in order to "assist in an advisory capacity" (s. 21). At the outset, Blair took the view that expertise in the tariff field could be acquired by appointing an experienced traffic officer to the Board with the two-fold advantage of saving the salary of an additional employee and gaining the increased sense of responsibility that would flow from Board membership. The

---

[239]J. Willis, ed., *Canadian Boards at Work* (Toronto: Macmillan, 1941) at 20.

[240]*Galbraith Coal* v. *Canadian Pacific Ry. Co.*, *supra*, note 213. In the *Cedar Lumber Products* case, *supra*, note 90, Blair was willing to make a General Order on the basis of assumptions in a specific dispute. In later cases, commissioners were more inclined to call for "a wider basis of fact" before altering existing arrangements: *Lamontagne*, *supra*, note 221 at 292.

[241]*Lamontagne*, *ibid.*

[242]"The Transportation Commission" (1915) 16 Ind. Can. 471.

[243]*Ibid.*

first Chief Commissioner's objective in the tariff area was that the Board "should be as competent to pass judgment upon them as the officials of the roads were to adopt them."[244] But such an appointment might well have aroused the suspicion of shipping interests while proceeding too far in the direction of endowing the B.R.C. with a rate-setting, rather than a rate-review capacity.

When it became necessary to appoint a traffic officer, a brief struggle ensued among members of the Board concerning the nature of the position. Commissioner Mills expected railways to present their side of the case to "the best possible advantage."[245] As a counterweight, the Board's traffic officer should be "a public counsel to present to us the public side of every case, that, having heard both sides, we may reach wise conclusions on the cases submitted from day to day."[246] If this suggestion was intended to enhance the image of the B.R.C. as a diligent advocate of a public view different from the interests of railways, and simultaneously to reinforce the judicial aura of the agency's proceedings, it was nevertheless not adopted.

The traffic officer, as expert and first hand observer, might be expected to exert a considerable influence on decisions, despite the statutory description of his role as an "advisory capacity."[247] The Railway Board seems to have sensed this risk and to have responded to it in some circumstances, perhaps as a matter of regular practice. On several occasions in rate-related cases, full or extensive quotation of the staff report is provided in the judgment or discussion is offered of the investigation that the traffic officer was instructed by the Board to conduct.[248] In two early decisions based upon hearings and supplementary investigations by the Traffic Officer, his reports and recommendations were circulated to the parties for written comment prior to judgment by the Board.[249] The contribution of this procedure to the fairness of the regulatory process is easily recognized in light of the following excerpt from Hardwell's report in the *B.C. Pacific* case:

> My sympathies are with the Coast merchants who are restricted to the very limited markets of British Columbia, as, geographically, I look upon the Calgary and Edmonton road as the national (natural) dividing line. The evidence, submitted, however, is against it; yet, if my views are approved, the Coast shippers will have much more favourable rates than heretofore.[250]

---

[244]P.A.C., Laurier Papers, Andrew Blair to Laurier, 31 December 1903.

[245]*Ibid.*

[246]P.A.C., Laurier Papers, James Mills to Laurier, 18 May 1904.

[247]*Ibid.*

[248]See *Cardston Board of Trade* v. *Alberta Railway and Irrigation Co.*, *supra*, note 215; *Davy* v. *Niagara, St. Catherines and Toronto and Michigan Central Ry. Cos.* (1911), 12 C.R.C. 61 [hereinafter *Davy*].

[249]See *supra*, note 112; *Canadian Manufacturers' Association* v. *Canadian Freight Association*, *supra*, note 227.

[250]*B.C. Pacific*, *ibid.* at 137.

Despite fairly open procedures, suspicion existed that railway personnel on the staff (including Hardwell) exercised an important influence through the preparation of reports, "and judging by some of the reports at times an unfair influence in the sense that the appellants have no opportunity to controvert their statements ..."[251]

Even if its investigative initiatives were not appreciated by all observers, the Board's increasingly conscious attention to iterative and incremental decision-making should have been welcomed by critics of administrative discretion. In addition to the inquiry format and the notice and comment procedures, the Railway Commissioners explicitly addressed the function of precedent as a guide to consistency and predictability. McLean was now among the first to articulate a view of relevant principles and to elaborate their consequences:

> [T]he Board being concerned with the correction not primarily with the initiation of rates must carefully consider in regulating rates in one section of Canada what it has done in another section in Canada.[252]

The precise evolution of the B.R.C.'s attitude towards the use of precedent as a self-imposed limitation on its own discretionary authority is unclear. However, a later commissioner explicitly articulated an obligation to "follow the practise so long established" when dealing with a matter that was "not one of law but of a reasonable exercise of discretion."[253]

From time to time commissioners also expressed views on the relevance of decisions of the United States I.C.C. to their own proceedings. McLean indicated that differences between the *Railway Act* and the I.C.C.'s governing statute made it inappropriate to apply the American findings "in their entirety."[254] Yet he noted that when the I.C.C. had considered identical problems, "the findings and experience of that Commission demand most careful attention."[255] A colleague later acknowledged that the I.C.C.'s regulatory work was appreciated and held in esteem by the B.R.C. He emphasized, however, the importance and the obligation of independent assessments:

> the Board in holding that the decisions of that Commission are applicable in their entirety here only in cases where circumstances in Canada are on all fours with the circumstances upon which the aforesaid decisions depended has recognized the burden placed upon it by Parliament of investigating the special circumstances of the cases coming before it.[256]

---

[251]P.A.C., Laurier Papers, Dominion Millers' Association (Charles B. Watts) to Laurier, 10 March 1908.

[252]*Manitoba Dairymen's Association* v. *Dominion and Canadian Northern Express Cos.* (1912), 14 C.R.C. 142 at 149.

[253]*C.N.R.* v. *Bell Telephone Co. of Canada* (1932), 40 C.R.C. 29 at 42, Fullerton.

[254]*Supra*, note 94 at 344.

[255]*Ibid.*

[256]*Supra*, note 252 at 148.

Such an observation may have provided some re-assurance to those who were concerned about arbitrary decision-making, as well as to parties appearing before the Board. Nevertheless, there was persistent suspicion that on certain broad rate matters the conclusions of the I.C.C. might exert an inordinate influence. Thus, through *Industrial Canada*, the Canadian Manufacturing Association reminded regulators of their duty to review railway applications in the national context, and not to adopt automatically the American results of similar petitions.[257]

Participation in the rate regulation process and other aspects of the B.R.C.'s operations was controlled through the "binding and conclusive" power to determine who was a "party interested."[258] Although the Commission might have resisted a broad or inclusive reading in order to "protect itself against being flooded with irresponsible complaints,"[259] in practice this does not appear to have been the case. Chief Commissioner Killam provided insight into the Board's treatment of a "party interested" in *Duthie* where he rejected a "narrow or technical view"[260] of this criterion. Parties, he suggested, might be interested in rate issues regarding certain types of traffic or demurrage charges "without being directly interested in particular transactions giving rise to a complaint, even, perhaps, without being engaged in that kind of traffic."[261]

Boards of Trade, numerous other organizations, and a variety of producer groups appeared from the outset in the B.R.C. proceedings. For example, the Canadian Manufacturers' Association appeared as an applicant in several early cases and the agricultural interests represented included the Fruit Growers, the Dominion Cattle Dealers and the Ontario Bee Keepers Association.[262]

There is evidence, as well, that the Board welcomed intervenors. The Grand Trunk Lord's Day application of 1908 involved several railways, the Lord's Day Alliance, the Rational Sunday League and representatives of the Department of Railways and Canals, the Department of Labour and the Attorney General of Ontario.[263] While this case may have been unusual, multi-party proceedings were a frequent occurrence, and were from time to time actively encouraged. In the *Winnipeg Jobbers' Association* decision, for example, Chief Commissioner Killam stated that,

> [n]otice of the taking of this evidence was given to the Winnipeg Board of Trade, that those representing the commercial interests of Winnipeg affected by or interested in the tariffs might have an opportunity of taking part in the pro-

---

257"The Railway Board and Freight Rates" (1914) Ind. Can. 713 at 713.
258*Railway Act*, s. 23(2).
259*Duthie*, *supra*, note 183 at 314-15.
260*Ibid.* at 314.
261*Ibid.*
262Board of Railway Commissions, *First Annual Report*, Appendix C.
263*Supra*, note 118.

> ceedings and of taking action which they might desire in support of the tariffs objected to.[264]

It was apparent from several of the early cases that broadened participation did not simply involve the multiplication of representatives from either of two opposing sides, although the extent to which "polycentricity"[265] consciously concerned the B.R.C. is uncertain. John S. Ewart represented both Winnipeg and Calgary in *B.C. Pacific* when he told the Board:

> Calgary contends that the trade of Alberta belongs to it and does not think that a quarrel between Winnipeg and Vancouver traders as to rates should have the effect of injuring Calgary merchants in the distributing trade of Alberta.[266]

Despite interventions of this kind, the early Board in *B.C. Pacific* and other cases appeared more comfortable in either/or situations than in balancing a range of interests.

The extent of intervenors' participation varied from active involvement throughout some proceedings to a clearly supplemental role in others. The judgment in *Kemp Manufacturing* records that subsequent to the application made in Winnipeg, and the submission of statements by the Canadian Pacific Railway, a number of Ontario manufacturers in the same industry as the applicant asked to intervene. The Board agreed to receive only written submissions on the ground that these same manufacturers had participated fully at an earlier hearing. Participation in the regulatory process was also influenced by evidentiary considerations. For example, perhaps only a trade organization rather than a single manufacturer could meet a test involving "carload" ratings like the one laid down for the cigar industry in *Ledoux Company* v. *Canadian Freight Association*:

> [U]ntil the Board is satisfied that the establishment of a carload rating on cigars would result in a substantial percentage of the traffic moving that way [by carload], and that it would be taken advantage of by a reasonable number of those in the trade, the application should be refused.[267]

Generally, the Board seemed willing to listen to anyone prepared to appear before it, subject to the possibility that a grievance might be treated informally and settled without a hearing. It appears that the Board's interpretation of "party interested" had the effect and may even have had the purpose of enhancing the acceptability of decisions in the rate regulation area where imprecise legislative standards were in constant need of interpretation involving discretionary rulings with policy implications.

---

[264] *Supra*, note 105 at 181.
[265] L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L. Rev. 353.
[266] *Supra*, note 112 at 141.
[267] *Ledoux Company* v. *Canadian Freight Association* (1911), 12 C.R.C. 3 at 5.

Whether participants were actually seen as representative, and especially as representative of the public interest where this criteria was seen to be relevant, was a different matter altogether. Chief Commissioner Blair referred in *Stamford Junction* to "deeper and broader, though at the moment less vocal, interests of the greater portion of the public."[268] Additional remarks on the "public interest" during the same year suggest further limitations on the effect of participation on commission decision-making:

> The general public have [*sic*] theoretically a right to complain if the people in one or more sections of country served by a particular railway are given a better service than the people of other sections; but with every desire on the part of the railway company to accord equally fair treatment to all patrons over its entire system, circumstances and conditions are too controlling often times, to be resisted or overcome. The argument most strongly urged in support of the present application affords an illustration in point. Give us, say the applicants an opportunity to bring pressure to bear upon the railway such as can spring only from competition, and we may hope to succeed in obtaining more favourable treatment than we now received, and it might be added, or than other sections receive, which have not and cannot enjoy the advantages which competition affords. My doubts arise as to whether we can justly regard an application founded upon such a ground as involving the public interest. Does it not follow that the interest is a particular rather than a general interest which we are asked to serve, and may it not be true that the larger the results which the applicants hope may flow to them when this competition is secured, the more essentially particular is the interest involved, and the more may the interest of the general public be injuriously affected.[269]

In early proceedings applicants were frequently individuals appearing on their own behalf, or lay representatives of small companies and partnerships. This tendency became less evident as the Board's deliberations more regularly involved reference to previous cases and I.C.C. rulings. The *Canada Law Journal* reacted critically to a suggestion in 1908 that counsel be made available — presumably as a procedural right — to those opposed to the railways: "The latter suggestion would seem to lead to multiform complications and savours of a form of democracy which does not at the moment appeal to us."[270] Several years later, in negotiations leading up to the important *Western Freight Rates* Case,[271] the Winnipeg Board of Trade requested "that counsel resident in the City and free from all railway corporation control, be appointed to act with this Board [the Board of Trade] and other public interests in establishing the facts

---

[268]*Supra*, note 95 at 270.

[269]*Ibid.*

[270]"The Board of Railway Commissioners" (1908) 44 Can. L.J. 169 at 171. The possibility that the B.R.C., upon application to the Minister of Justice, might be authorized to employ counsel "on behalf of the public interest as opposed to any conflicting interests that may be represented before the board" had been actively debated in the House of Commons. Canada, H.C. *Debates* (23 April 1907) at 7410-36.

[271]*In re Western Tolls* (1914), 17 C.R.C. 123 [hereinafter *Western Freight Rates*].

complained of."[272] The government complied with this request, appointing Isaac Pitblado, among others, to represent the western complainants.

Apart from the distinctive circumstances of the *Western Freight Rates* proceedings, provision had been made in 1907 for the Minister of Justice — by application of the B.R.C. or of his own motion — to appoint counsel "to conduct or argue the case ... as to any public interest which is or may be effective thereby ..."[273] In debate on this amendment to the *Railway Act*, parliamentarians recognized a significant distinction between the public interest and what the Minister of Justice described as "any conflicting interests" otherwise represented in the proceedings.[274]

Aside from questions of participation and counsel, several evidentiary matters could affect the parties' prospects in rate review. Because railways themselves set rates, subject to the approval of the Board, complaints typically arose when existing rates were revised upwards. With reasonableness as the test for approval, it was necessary to devise arrangements to determine whether reasonableness or unreasonableness had been shown. "Undue discrimination"[275] produced similar difficulties. Some general principles served as a point of departure. For example:

> A toll has been established upon which it is presumed a reasonable profit arose to the carrier, and if, without any change in the conditions, the carrier makes up his mind that he will increase the toll, it is only reasonable the carrier should show why the toll should be increased.[276]

Thus railways — at least in principle — appeared to be institutionally accountable. The option of requiring some change of conditions to justify a rate increase compelled the Board to consider what changes would satisfy the principle and what evidence would establish that those changes had occurred. Changes in operating costs were of considerable importance, yet these are complex and railways would regard much of the relevant information as confidential. If proposed rate changes were assessed from the perspective of profitability, the tension about disclosure might be equally acute. Although the kinds of considerations arising from these circumstances are now considered to be central problems in rate regulation, the Railway Board's appreciation of their significance in its first decade seems incomplete and its response inconsistent.

One of the clearest early examples of the need for reliable disclosure is found in the case of *Cardston Board of Trade* v. *Alberta Railway and Irrigation*

---

[272]*Ibid.* at 131.

[273]*Ibid.*

[274]S.C. 6-7 Ed. VII, c. 38, s. 1; Canada, H.C., *Debates: Railway Act* Amendment (23 April 1907) at 7410-35.

[275]*Supra*, note 105 at 177.

[276]*Ibid.*

Co.[277] The respondent railway company had emerged from the amalgamation of four corporations active in irrigation and development, land speculation and transport. The statistics presented by the railway to account for a proposed rate increase failed to satisfy the Chief Commissioner as they "in no way present, with any minute detail, the financial history of this organization."[278] The capital structure, for example, he regarded as "something that could be so easily proved and is of so much importance that we take the liberty of thinking should not have been left open to question."[279] Unusual, but evidently not fraudulent, book-keeping practices confused the railway's earning position by allocating switching charges on coal cars sometimes to the colliery division and sometimes to the railway. The Board was sensitive to confidentiality claims involving the sources of earnings although in this case the absence of information was decisive against the railway:

> Now in one aspect of the situation this is an entirely domestic matter and something that the public have [*sic*] no business to inquire about, but as it arises here, it ceases to be a private booking matter of the company and becomes one that the public is largely concerned in.[280]

Standards of disclosure were referred to by the Board on several occasions, though not always enforced. In *Cardston*, the Board declared itself unable to make a finding of fact that would have sustained the railway's claim without "an intimate knowledge of capitalization acquired."[281] In *Cardwell Sand and Gravel Co.* v. *Canadian Freight Association* the general principle was stated that, "where a business has been built up relying upon a particular rate adjustment, an increase in this rate adjustment should not be made without amply sufficient reasons."[282] During the course of lengthy proceedings in *Davy*, the railway was instructed to produce "definite positive evidence" to show why a long-established rate should be increased:

> If the company desired ... to make a point out of the question of the cost of operation, it should have submitted details of the expense of operation when the two cent rate was in effect and details of its operation under the three cent rate for comparison.[283]

In two early dissents, Commissioner Mills focussed on weaknesses or potential risks in the Board's acceptance of evidence. In the *B.C. Pacific* case he was content merely to alert his colleagues to "evidence into which the element of interest enters largely and there is clear ground for difference of opinion

---

[277]*Supra*, note 215.
[278]*Ibid.* at 215.
[279]*Ibid.*
[280]*Ibid.* at 217.
[281]*Ibid.* at 218.
[282](1913), 14 C.R.C. 172.
[283]*Supra*, note 248 at 496.

as to its value ..."[284] However, in the *Tan Bark Rates Case* his dissent openly exposed the possible dangers of making decisions without certain factual information which would ordinarily be available only from the railway company.[285]

McLean considered the concept of "substantially similar circumstances and conditions"[286] in the context of a dispute over differential main and branch line rates. He concluded that "each ton or passenger moving over such portion (a branch line) must, if the traffic is light, contribute a proportionately higher amount per unit"[287] to the upkeep than where greater traffic density prevails, and he found for the railway on the basis of evidence of lighter traffic on the branch where the complainant was located. Mills analyzed the underlying economic factors rather differently, and was sharply critical of the conclusion that branch line traffic should be made to pay higher taxes:

> Is it not a fact that the capital invested in branch lines is generally much less per mile than that invested in the main line—less expensive bridges, comparatively inferior road-beds with sharper curves made to save expense, lighter rails, less expensive stations, lighter engines, and less valuable passenger cars? Is it not also a fact that the service on branch lines is nearly always less frequent, less regular, and worth less than that on the main line? Branch lines figured alone may not make a very good showing, but they may nevertheless pay well as feeders to the main line; and without such feeders the profits on many main lines would be greatly reduced.[288]

McLean was subsequently more sensitive to the factual foundations of his expert conclusions, as his discussion of reasonableness from *In Re Joint Freight and Passenger Tariffs* shows:

> When the reasonableness of a rate is at stake a question of fact is involved, and it is not to be assumed that the Board would make a final decision as to unreasonableness on the basis of a mere presumption. ... When it does appear that the joint rate is in excess of the sum of the locals such higher joint rate is prima facie unreasonable. But nothing conclusive as to its reasonableness or otherwise can be established until the evidence is heard. There is no yard stick of reasonableness.[289]

With this background in mind, the result in *International Paper*[290] a few years later is somewhat surprising (although the B.R.C. was by then under a new chairman). In considering the claim of the Grand Trunk, Canadian Pacific and Canadian Northern Railways that their rate increases could be justified on the basis of rising costs, Chief Commissioner Drayton commented:

---

[284]*Supra*, note 112 at 148.
[285]*Malkin and Sons* v. *Grand Trunk Ry. Co.* (1908), 8 C.R.C. 183 [hereinafter *Tan Bark Rates*].
[286]*Ibid.* at 186.
[287]*Ibid.* at 187.
[288]*Ibid.* at 188.
[289]*Supra*, note 94 at 347.
[290]*Supra*, note 98.

> It was stated on behalf of the carriers that their records were not so kept as to admit of the segregation of the cost of handling this particular traffic; but notwithstanding more efficient facilities it has been fairly established from time to time that the expenses of conducting transportation, following the universal tendency, have increased considerably during the past few years.[291]

Although Drayton also stated that another factor actually governed the case "and makes unnecessary any minute consideration of operating costs,"[292] the willingness of the Chief Commissioner to assume as given one of the principal bases on which railways could justify increasing long-established rates is striking.

McLean's dissent in *International Paper* reflects his view that the role of rising costs was and should have been of prime importance notwithstanding Drayton's attempt to downplay it. McLean attempted to impose more rigorous tests on the carrier seeking to defend a rate advance, and he called on the railway to "adduce particular information as to the increase of the particular costs affecting the traffic in question, if the increase of cost is to have any adequate weight in justifying the reasonableness of the rate attacked."[293] If that involved more elaborate bookkeeping, then so be it. This element of control of access to information and its necessity for the reasonableness test is sufficiently central to the rate-making process and to the legitimacy of the regulatory agency's findings that an argument firmly rooted in first principles might have been expected. Instead, McLean supported his case only with reference to a comparable I.C.C. decision, leaving the full implications of the evidence issue in abeyance.

Drayton's use of official notice in *International Paper* to relieve the railway from the burden of establishing cost increases seriously threatened to undermine any claim that unreasonable rates were being charged by a railway. Indeed, official notice even seemed to give an advantage to poor record-keepers, hardly a result to enhance the status of the B.R.C. as an adjudicative forum.

Conclnsion

In response to longstanding and controversial railway problems, turn-of-the-century advocates and designers of a Board of Railway Commissioners examined previous British and American experience with economic regulation. The outcome, in the words of a recent assessor, was a grant to the new agency of "almost unlimited power over freight rates."[294] Yet the decision to adopt regulation to replace the disappointing legacy of the courts and the Railway Com-

---

[291] *Ibid.* at 114.
[292] *Ibid.*
[293] *Ibid.* at 118.
[294] "Transportation," *supra*, note 1 at 136.

mittee of the Privy Council had certainly not resolved difficult questions concerning the independence of the B.R.C. and the Board's relations with the judiciary, Parliament, the executive and the community.

During the late nineteenth century several public inquiries into railway rate controversies had exposed differing views about the choice of regulation as a "governing instrument" which are effectively captured in Armstrong and Nelles' conclusion that political, economic and ethical considerations were in constant tension.[295] It would be equally appropriate to speak of representational, efficiency and accountability issues in public institutions in order to emphasize the tensions within, and not only between, different forums of public decision-making. However one describes the underlying tensions, the challenge of promoting and maintaining acceptability was acute for the B.R.C. in light of its simultaneous responsibilities for functions then regarded as judicial, administrative and legislative in nature, and in light of intense regional concerns. The response to that challenge involved both structural (or design) and operational factors. It also involved some tentative accommodation on the part of existing institutions. Reconciliation of parliamentary sovereignty with the new decision-maker and the response of the legal community were particularly intriguing (and enduring) dimensions of that process of accommodation.[296]

Initially, and from the perspective of the basic design of the new institutional arrangements, two forms of external scrutiny might have served the purpose of subordinating the new agency to recognized and established sources of authority. The possibility of appeals to the Supreme Court on questions of law and jurisdiction offered some comfort to those who were apprehensive about the scope of the new agency's activity, while the more broadly worded cabinet appeal and review powers appeared to provide assurance that on matters of policy some degree of ministerial responsibility and parliamentary scrutiny would be maintained. These safeguards represented clear checks on the independence of the fledgling agency.

If opportunity for review of agency action either by court or cabinet confirmed the subordinate status of the B.R.C., the choice of two alternative supervisory mechanisms simultaneously underlined constraints upon the legitimacy and capacity of those reviewing bodies themselves. Since matters involving law or jurisdiction were considered suitable questions for judicial examination by the Supreme Court of Canada, similar issues coming before the cabinet on appeal or review might seem to call for comparable treatment. On the other hand, given the possibility that matters of policy or discretion were subject to direct review by an executive body, an essential rationale for judicial interven-

[295]Armstrong & Nelles, *supra*, note 12.

[296]"Independence" *supra*, note 11. See also "Independent Regulatory Agency," *supra*, note 1.

tion, legislative intent,[297] was eroded. Consequently, and as described above, the cabinet was highly attentive to procedural considerations when reviewing Railway Board matters, and the Supreme Court was circumspect in its dealings with the Board.[298]

The B.R.C.'s independence emerged in this atmosphere of inter-institutional deference. Serious disagreement and reservations about tribunal independence remained strong at the time of the Killam amendment in 1905. While one member insisted that "[w]hat we wanted when the Bill was passed was to have legislative control over every action of that commission, and to have them directly responsible to this House through ministerial responsibility,"[299] Charles Fitzpatrick, Minister of Justice in 1905 and about to join the Supreme Court himself) replied that "the whole principle of the *Railway Act* under which the board was created, is a departure from that principle."[300] Within two years, and despite Prime Minister Laurier's clear account of Killam's independence and its significance,[301] a new Minister of Justice, A.B. Aylesworth, was emphatic that the B.R.C. "is but the immediate successor of a subcommittee of the council. ... It is in a sense but a branch of the government of the country."[302] By 1919, however, when judicial tenure provisions were made applicable to all commissioners, the amendment passed virtually without comment. Sir James Lougheed, government leader in the Senate, informed Senate colleagues almost casually that, "[t]his put the commissioners in the same position as judges in this regard."[303] Thus, in a comparatively short period of time, considerable awkwardness over the appointment of a senior judicial figure to the chief commissionership had given way to a commonplace acceptance of the idea that railway commissioners generally were to be regarded as decision-makers of judicial stature.

The incorporation of judicial figures and judicial norms into the new regulatory regime was remarkable in several respects, for it will be recalled that judges had been considered inappropriate in the rate-regulation context where policy issues could arise, and that the court-like attributes of the Railway Committee were often regarded with hostility as an obstacle to participation. Other aspects of the early evolution of the B.R.C. appeared to involve the incorporation of judicial norms into the structure and operations of a body which many

---

[297]P.P. Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 L.Q. Rev. 105.

[298]*Supra*, note 192.

[299]*Debates: Railway Act Amendment*, *supra*, note 93 at 1609 (Haggart).

[300]*Ibid.* at 1610.

[301]*Supra*, note 180.

[302]Canada, H.C., *Debates: Exportation of Electric Power* (13 March 1907) at 4645.

[303]Canada, Senate, *Debates* (27 February 1919) at 49.

of its early supporters had hoped would be accessible to the public, highly practical and oriented towards common sense in its decision-making.

The changing composition of the Board reflected the multi-faceted nature of the tribunal's assignment. Early members included the first chairman, Andrew Blair, a former minister of Railways, an advocate of public ownership of railways, and a critic of the government which appointed him.[304] Blair was soon replaced by Justice Killam, recruited directly from the Supreme Court of Canada to avert a premature collapse of the regulatory initiative. Nova Scotian by birth, Ontario-trained in the law, and ultimately a practitioner whose career was centred in Manitoba, Justice Killam simultaneously offered judicial stature and regional recognition. James Pitt Mabee, who served as chief commissioner from 1908 to 1912, extended the custom of appointing commissioners from the bench, as he had previously been a judge of the Ontario High Court. Yet he was also a pioneering appointment in the direction of a career commissioner in light of his previous experience on the Inland Waterways Commission. Simon J. McLean, political economist and commission technocrat, eventually joined the board himself and was later joined by Henry L. Drayton, a utilities lawyer with some railway policy-making experience as a Royal Commissioner. The contributions of Blair, the politician, of judges Killam and Mabee, and of Drayton, McLean and others as regulatory specialists, reflect a continuing effort to enhance institutional acceptability in several constituencies.

As first chairman, Andrew Blair demonstrated enthusiasm for an interventionist response to perceived railway abuses and a remarkable willingness to offer opinionated judgments about the relationship between rate matters and the well-being of the national community.[305] He served, however briefly, in a manner consistent with his earlier statement of the purposes of the new tribunal, "the object which we have in view; that is, while not injuring the railway interests of the country, to promote the interests of the country as a whole."[306] An adjudicative emphasis became more-pronounced during the tenure of Killam, who in his capacity as chief commissioner of the B.R.C. invoked the policy of the law as understood by Mr. Justice Killam of the Supreme Court for the purpose of excluding socio-economic impacts on communities from the ordinary considerations of the regulatory board.[307]

An adjudicative emphasis and the expansion of the number of lawyers on the board reduced the likelihood that controversy might arise in relation to the broadly distributive consequences of rate-making. In the minds of some observ-

[304]For Borden's views on Blair's unfitness for office, see Canada, H.C., *Debates: Railway Act 1903, Amendment* (14 March 1904).

[305]*Supra*, notes 125-30.

[306]Canada, H.C., *Debates: The Railway Act*, 1903 (7 May 1903) at 2587.

[307]*Supra*, note 131.

ers at least, Killam's thrust had been deliberate; a brief obituary in the commission's annual report for 1909 stated:

> Mr. Killam realized that the railway act was on trial, and that it was well to proceed carefully and cautiously. He felt that when action was taken by the Board, there should be, as far as possible, no uncertainty in regard to the propriety and correctness of such action."[308]

Killam may have intended to reduce the B.R.C.'s vulnerability to criticism from within the legal community; the task may not have been all that difficult in light of indications that the legal community was already inclined to regard the new agency as a familiar court-like institution, rather than the disruptive innovation it might have become.

The first volume of the reporter series *Canadian Railway Cases* actually appeared shortly before the Board was established for the purpose of consolidating a record of court judgments affecting railway matters. Editors MacMurchy and Denison incorporated decisions of the B.R.C. into the series alongside the findings of the Supreme Court of Canada and the courts of the provinces. The same authors, in 1905, produced an annotation to the *Railway Act* which no doubt thoroughly familiarized at least regular participants in B.R.C. proceedings with references to the leading principles of earlier cases, English, Canadian and American. In commenting on the new agency's powers, the authors' emphasis on the applicable limitations was unmistakable. S. 23 set out the Board's powers on an application, providing that the "Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested ..." Observing that the B.R.C.'s powers were "to a considerable extent similar to the jurisdiction of the I.C.C.", MacMurchy and Denison cited American authority for the proposition that the Board "has no power to construe, interpret, or apply that Act in advance of an actual act or omission by a railway company in contravention of the provisions of the Act."[309] This framework supported a focus on specific disputes arising from actual conduct and experience, thus discouraging a more anticipatory or managerial approach independent of individual cases. Royal Commissions continued to serve from time to time as forums for considering particularly controversial inter-regional issues.[310]

In recognition of the judicial attributes of its decisions, the agency formulated principles and procedures which were generally consistent with the stand-

---

[308]Canada, Board of Railway Commissioners, *3rd Annual Report*, Sessional Papers 1909 No. 20C, 30.

[309]A. MacMurchy & S. Denison, *The Canadian Railway Act, 1903 (Annotated)* (Toronto: Canada Law Book, 1905) at 48.

[310]See, *e.g.*, E.R. Forbes, *The Maritime Rights Movement, 1919-1927: A Study in Canadian Regionalism* (Montreal: McGill-Queen's University Press, 1979).

ards and expectations of an adjudicative process.[311] But other concerns or values including access and participation were also important elements of the evolution of the tribunal's authority.[312] Minor matters were processed expeditiously in high volume, and on the other hand, the Board did attempt to be responsive to major political or policy-oriented dimensions of its role through the use of fairly extensive representation of affected interests. Public hearings, investigations, and rule-making procedures involving the circulation of proposals for comment and analysis, became part of the tribunal's operational repertoire.[313]

As debates about interpretation of the term "party interested" and about the availability of independent legal representation for the public interest in B.R.C. proceedings indicate, there was a willingness to acknowledge that community interests different from those of the immediate participants were entitled to consideration.[314] If the treatment of these matters in the context of the B.R.C. significantly broadened the scope of proceedings, in comparison with a more formal and traditional *lis inter partes*, it also had the effect of channelling the participation of various dissenting interests into a less volatile forum than the political arena, and it provided extensive opportunities for lawyers. In *Re Increase in Passenger and Freight Tolls*, for example, five railways, several Boards of Trade, the Canadian Manufacturers Association and the Government of Manitoba were represented by counsel including seven King's Counsel. "Various other interests were also represented."[315]

Some American commentators have recognized the broader participatory initiatives as a later development of administrative practice. Stewart, for example, speaks of "the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision,"[316] and regards this as a comparatively recent concern in administrative law, an emphasis that emerged after the decline of "transmission belt" and "expertise" models as legitimating rationales for tribunal decision-making.[317] The B.R.C. experience suggests that these various rationales may have co-existed at an earlier stage, though it is not clear that the expertise model

---

[311]"Rules and Regulations of the Board" 'Appendix B' in Canada, *Sessional Papers 1907* No. 20C.

[312]R.L. Smith, "The Work and Powers of the Board of Railway Commissioners for Canada" (1908) 20 Green Bag 30.

[313]See text accompanying notes 240-42.

[314]See D. Sugarman, "Law, Economy and the State in England, 1750-1914: Some Major Issues" in D. Sugarman, ed., *Legality, Ideology and the State* (New York: Academic Press, 1983) 213 at 244 for discussion of agency responses to a public interest mandate.

[315]*Supra*, note 104 at 51.

[316]*Supra*, note 171 at 1760.

[317]*Ibid.*

enjoyed much credence or support.[318] In contentious matters, even the technocrat McLean hopefully presented his conclusions in the form of compromise (as his Reports had originally urged):

> The conclusions which have been arrived at represent what the Board considers a just and reasonable mean between the extremes; and it is of the opinion that the results, having regard to the railway situation in the west, are fair not only to the people but to the railway companies."[319]

Substantive fairness may or may not have been the outcome of this or of other individual B.R.C. decisions. What is clear however is that the B.R.C. experiment significantly advanced the stature of the regulatory commission in Canada as an institution capable of providing a divided and expanding population with new mechanisms to resolve its differences. The actual characterization of those mechanisms was often in doubt and their claim to authority was continually being developed in the operations and procedures of the new tribunal as well as in its basic structure and design. The challenging questions of relating a general rise of regulation in Canada to the nature of the broader legal environment and the evolution of a professional public service remain.

---

[318]As Doug Owram observed about commission government of urban affairs in this era, "the very concept of expertise remained loosely defined and reform was still very much the property of the eclectic generalist" (Owram, *The Government Generation: Canadian Intellectuals and the State* (Toronto: University of Toronto Press, 1986) 57).

[319]*Supra*, note 271 at 230.