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CONSTITUTIONAL JURISDICTION OVER TRANSPORTATION: RECENT DEVELOPMENTS AND PROPOSALS FOR CHANGE

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I. Introduction

The purpose of this study is twofold: to provide an overview of constitutional jurisdiction in the field of transportation, and to consider the need for constitutional change in this field.

The study examines the relevant provisions in the Canadian Constitution allocating jurisdiction over the field of transportation,[1] and considers the judicial interpretation of these provisions and the extent to which the courts have modified or supplemented the original scheme contemplated by the Constitution. It then examines how legislative jurisdiction has actually been exercised by both federal and provincial governments to establish whether the constitutional division of responsibilities has limited or constrained the ability of governments to respond to changing circumstances in transportation.

This analysis leads logically to the second purpose of the study — a consideration of the need for constitutional change in the field of transportation. Does the existing constitutional scheme require amendment? Such an analysis is timely, given the current constitutional discussions that are ongoing in

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Canada. In September of 1991, the Government of Canada initiated a process aimed at a fundamental and comprehensive re-examination of the Canadian Constitution.[2] In addition to the proposals put forward by the government, there have been a variety of other suggestions for fundamental constitutional change published over the past year.[3] Many have included proposals for change to the constitutional allocation of jurisdiction over transportation. It is important that the debate over such changes be grounded in a detailed and concrete understanding of the existing scheme of the Constitution; it is also important to identify with some care the possible implications of any proposed constitutional amendments. This study will attempt to provide such an understanding.

The first section of the paper outlines the existing constitutional jurisdiction in the field of transportation. Since this is an area that has been discussed quite extensively in the academic literature,[4] the emphasis here is on recent developments, particularly the recent Supreme Court of Canada judgements which have clarified the respective roles and responsibilities of the federal and provincial governments in relation to transportation. This section outlines the various provisions in the Constitution which grant federal or provincial jurisdiction over transportation and reviews the regulatory framework which both levels of government have put in place on the basis of their constitutional responsibilities. Finally, it identifies the issues or areas which can be expected to generate litigation in the future, as reflected by an analysis of recent court decisions.

The first issue discussed in the second section of this study is whether the existing constitutional framework has led to any obvious problems or difficulties. The study examines the extent to which the current constitutional framework may have prevented governments or the private sector from responding to changing needs or circumstances in transportation. It also analyzes the extent to which the Constitution may impede government as it faces the challenges inherent in designing a transportation system that will meet future needs of Canadians.[5]

The second section of the paper also considers the merits and implications of a variety of proposals to change constitutional responsibilities in relation to transportation. Over the last year, the Constitutional Committee of the Quebec Liberal Party (The Allaire Committee),[6] the Group of 22,[7] as well as the Government of Canada,[8] have all put forward proposals for altering the

Constitution as it relates to transportation. This section also considers the extent to which the existing Constitution permits governments to delegate or alter regulatory responsibility in the transportation field.[9] The paper concludes with an overall assessment of the need for formal constitutional amendments in the field.

II. The Existing Constitutional Framework

The *Constitution Act, 1867* does not classify transportation as a class of subject (or head of power) assigned exclusively to Parliament or the provincial legislatures. Instead, specific transportation matters or modes are dealt with in a variety of separate constitutional provisions which effectively divide responsibility for transportation regulation between the federal and provincial governments. In general terms, the Act allocates jurisdiction over interprovincial and international transportation to the federal government, while reserving to the provinces responsibility for transportation matters within a single province. This territorial approach to transportation[10] is reflected most clearly in section 92(10) of the *Constitution Act, 1867*, which reserves to the federal Parliament responsibility over "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province,"[11] while providing for provincial responsibility for "Local Works and Undertakings."

Other provisions in the 1867 Act which allocate jurisdiction to the federal Parliament include sections 91(9) ("Beacons, Buoys, Lighthouses, and Sable Island"); 91(10) ("Navigation and Shipping"); 91(13) ("Ferries between a Province and any British or Foreign Country or between Two Provinces"); section 92(10)(c) (power to declare local works for the "general Advantage of Canada"); and section 108 (certain Public Works and Property of each Province was transferred to Canada, including Canals, Public Harbours, Railways and Military Roads).[12] The federal power over "trade and commerce" in section 91(2) of the 1867 Act was at least potentially relevant to the field of transportation. The courts have construed this provision narrowly, however, and it has never been interpreted as adding significantly to federal authority in this field.[13] Federal authority over criminal law in section 91(27) has also permitted the federal government to establish a set of criminal prohibitions and sanctions relating to the operation of motor vehicles, vessels and aircraft.[14] Provincial authority in relation to transportation matters flows

from section 92(10) ("Local Works and Undertakings"); section 92(13) ("Property and Civil Rights in the Province"); and section 92(16) ("Matters of a merely local or private Nature in the Province").

The courts have also been called upon to supplement the original division of powers contemplated by the 1867 Act as new modes or methods of transportation arise. Of greatest significance in this regard is air travel which of course was unknown in 1867 and was therefore not mentioned in the original division of powers. The courts have interpreted the federal Parliament's power to make laws for the "Peace, Order and good Government of Canada" as including the exclusive authority to regulate all aspects of air travel.

The terms of section 92(10), establishing federal jurisdiction over interprovincial works and undertakings, have been the greatest single source of constitutional litigation in the field of transportation. The principles which the courts have developed in their interpretation of this provision make up the essential core of the constitutional jurisprudence in the transportation field.

JURISDICTION OVER WORKS AND UNDERTAKINGS

Section 92(10) of the *Constitution Act, 1867* provides that the provincial legislatures have exclusive power to make laws in relation to:

> Local Works and Undertakings other than such as are of the following Classes: —
>
> (a) Lines of Steam or Other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> (b) Lines of Steam Ships between the Province and any British or Foreign Country:
>
> (c) Such works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Although section 92(10) is in terms a grant of legislative power to the provinces, the exceptions established in subsections (a), (b) and (c) have proven to be the most significant feature of the provision. These exceptions from provincial authority represent grants of exclusive legislative authority to the Parliament of Canada, in accordance with section 91(29) of the *Constitution Act, 1867.*

There are a number of settled principles with regard to the interpretation of section 92(10). The first relates to the distinction between "Works" and "Undertakings" referred to in the provision. The courts have interpreted an "Undertaking" as involving both a physical and an organizational element. Viscount Dunedin in the *Radio Reference* referred to an undertaking as "not a physical thing, but . . . an arrangement under which . . . physical things are used."[15] Thus, in the *Winner* case, the federal Parliament possessed jurisdiction not only over the buses which provided the interprovincial transportation, but also over the bus company itself.[16] This functional approach means that federal authority over interprovincial undertakings extends to all aspects of the organization or enterprise which provides the service in question.

A second settled principle has to do with the fact that constitutional jurisdiction over a particular work or undertaking is to be undivided: for the purposes of section 92(10) jurisdiction is allocated to a single level of government. The courts have consistently rejected the idea of dividing jurisdiction between the federal and the provincial governments over a single undertaking. This fundamental principle was first established in the *Bell Telephone* case of 1905.[17] The Privy Council rejected the idea that the telephone company's long-distance business and its local business should be separated for the purpose of allocating legislative jurisdiction. The Board held that the telephone company was engaged in an interprovincial undertaking and thus the whole of the company's business, including its strictly local activity, fell under federal jurisdiction.

This approach is quite different from that adopted by the Privy Council in relation to its interpretation of the federal trade and commerce power in section 91(2) of the *Constitution Act, 1867.* It consistently restricted the federal authority over trade and commerce to the interprovincial or international aspects of trade; the local aspects of trade remained subject to exclusive provincial jurisdiction and could not be reached by federal legislation. Thus,

in the *Natural Products Marketing Reference* (1937),[18] a federal statute regulating natural products that were primarily traded in international markets was ruled invalid since the statute included some transactions which could be completed within a single province. The reasoning of the Privy Council was that federal authority could only be exercised in relation to those transactions which crossed provincial borders. This segmented approach to the construction of the trade and commerce power has proven to be one of the key factors in limiting the scope and usefulness of this particular source of federal authority.[19]

On the other hand, the Privy Council's determination that jurisdiction over transportation undertakings was to be undivided has led to quite different results in the transportation field. Once an undertaking is classified as interprovincial, federal jurisdiction immediately extends to all aspects of the enterprise, including any features that are strictly local. This has meant that federal authority to regulate transportation undertakings has been much more extensive and therefore more effective than in many other areas of federal jurisdiction. In particular, the Privy Council's undivided approach to transportation undertakings has meant that this is one of the few areas in which the federal government is capable of effective action without the necessity of involving provincial governments.[20]

The courts' resistance to dual jurisdiction in the transportation field has had important implications in the central issues which have emerged in litigation surrounding section 92(10). The allocation of jurisdiction has been treated by the courts as "an all or nothing affair";[21] a transportation undertaking is subject *either* to federal jurisdiction or to provincial jurisdiction, but not simultaneously to both. This has meant that the key question for purposes of section 92(10) has been the characterization of an undertaking as either local or interprovincial. This, in turn, has led to two recurring questions that continue to dominate the court decisions in this area:

1. What is the extent of the interprovincial activity or connection that is necessary to support a finding that a given undertaking is interprovincial or international as opposed to local?
2. To what extent can federal jurisdiction be extended to an otherwise purely local undertaking because that local undertaking is functionally integrated or connected with an interprovincial undertaking?

INTERPROVINCIAL WORKS AND UNDERTAKINGS

The courts have established a relatively low threshold of interprovincial activity to support a finding that a particular undertaking qualifies as an interprovincial one. The courts have consistently held that an undertaking falls within federal regulatory authority even if only a small percentage of its business activity is interprovincial or international. The primary test is whether the interprovincial or international services are a "continuous and regular" part of the undertaking's operations. If this requirement is met, then the whole undertaking is subject to exclusive federal regulation.

There are many examples of this rule being applied so as to include primarily local undertakings within federal jurisdiction. In the case of *Re Tank Truck Transportation* (1960),[22] the issue was whether the *Ontario Labour Relations Act* was applicable to an Ontario trucking company whose operations were predominantly confined to the province of Ontario. The evidence before the Court was that, in 1959, the trucking firm had completed 94 percent of its trips within the province, with just 6 percent extending beyond provincial borders. But the Court found that the interprovincial activity was a "continuous and regular" aspect of the trucking firm's operations and, as a result, the whole of the undertaking, including the local operations within Ontario, was subject to the exclusive authority of the Parliament of Canada.[23] A similar ruling was made in the *Liquid Cargo* case (1965),[24] where only 1.6 percent of a trucking firm's trips extended beyond provincial boundaries.

The most recent Supreme Court of Canada pronouncement on this issue was made in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications*.[25] The question here was whether Alberta Government Telephones (AGT), a provincial Crown corporation operating a telephone system in Alberta, fell under federal or provincial authority. AGT's physical facilities were located entirely within the province of Alberta and the system could carry telephone messages only within the province. However, the AGT system was connected with other telephone companies outside the province to enable local subscribers to make extra-provincial telephone connections. AGT argued that it fell under provincial regulatory authority since its activities were confined totally to the territory of the province of Alberta. The Supreme Court unanimously rejected this claim, holding that AGT was subject to exclusive

federal authority.[26] In reaching this conclusion, the Court articulated a number of general principles that it indicated ought to guide analysis of this issue:

1. The location of the physical apparatus of an undertaking in a single province and the fact that all the recipients of a service are within a single province will not preclude a finding that an undertaking is interprovincial in scope. The primary concern is "not the physical structures or their geographical location, but rather the service which is provided by the undertaking through the use of its physical equipment."[27]
2. In considering the nature of the service or operation, one must look to the "normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors. . . ."[28]
3. It is impossible to formulate in the abstract a single comprehensive test which will be useful in all cases; instead, the court must be guided by the "particular facts in each situation. . . ."[29]

Applying these principles to the situation of AGT, the Court found that the operations of the Crown corporation were interprovincial and international in scope. The primary basis for this conclusion seemed to be that AGT provided a service which enabled residents of Alberta to communicate beyond the borders of the province. According to Chief Justice Dickson, who wrote for the Court on this point, "AGT is, through various commercial arrangements of a bilateral and multilateral nature, organized in a manner which enables it to play a crucial role in the national telecommunications system."[30] It was the capacity to provide this extra-provincial service which supported the finding that AGT was subject to exclusive federal authority.

One leading commentator, Professor P. Hogg, has observed that this represents a more expansive reading of federal authority than has been adopted in other contexts.[31] As he has pointed out, the fact that a local undertaking is capable of providing a service beyond the borders of a single province had previously been regarded as an insufficient basis for asserting federal regulatory jurisdiction. For example, in the *Cannet Freight Cartage* case,[32] a freight forwarder provided local customers with the opportunity to ship goods beyond the borders of the province. The freight forwarder took delivery of goods in one province and made all the arrangements necessary to ship the goods to another province by rail. The Ontario Court of Appeal

found the freight forwarder to be subject to exclusive provincial jurisdiction because its own operations were limited to a single province. The Court reasoned that the freight forwarder did not become an interprovincial undertaking by virtue of shipping goods on an interprovincial railway.

Professor Hogg has expressed the view that it is not easy to see a difference in the facts that make up the *AGT* case and those of earlier cases such as *Cannet Freight*. He has suggested that what might explain the Supreme Court's most recent decision was the sheer scope and complexity of the agreements between AGT and the other Canadian telephone companies. These multilateral agreements meant that AGT was part of what amounted to an integrated national telecommunications network.[33] What seems evident, in any event, is that the Supreme Court was prepared to take a slightly broader view of federal regulatory authority in this case than it had previously. It is also significant that the Court was prepared to move in the direction of greater federal authority in an area which had traditionally been subject to control by the provinces.

Historically, federal regulatory authority had included Bell Canada (serving Ontario and Quebec), the British Columbia Telephone Company, as well as telephone companies serving Yukon, the Northwest Territories and parts of Newfoundland.[34] But the telephone companies in the other provinces had traditionally been subject to provincial or local control.[35] Thus, in a practical sense, the Court's decision in *AGT* had quite significant practical implications. It opened the door for federal regulatory authority in a context which had traditionally been regarded as subject to exclusive control of the provinces.[36]

INTEGRATION OF LOCAL AND INTERPROVINCIAL UNDERTAKINGS

As noted, a transportation undertaking can be classified as federal if the undertaking itself is regarded as interprovincial (as in the *AGT* case), or if a purely local undertaking is integrated or connected with another undertaking which is itself interprovincial.

The precise degree of the connection or integration that is required has been the subject of extensive litigation over the years. An early Privy Council case determined that mere physical connection between a local railway and an interprovincial railway was insufficient to bring the local railway under federal authority.[37] Integration in an operational or functional sense is

required before local undertakings fall within federal authority. For example, a local railway line that was operated under a formal management agreement by the CNR was held to fall within federal authority.[38] Similarly, a company supplying stevedore services in Toronto to seven shipping companies involved in international shipping was held to be subject to federal labour legislation.[39] Although the stevedore company was independent of the shipping companies, the services which it provided were integral to the successful operation of the shipping enterprises. The same reasoning was applied in the *Letter Carriers* case,[40] in which a trucking company which had contracted with the Post Office to deliver and collect mail was found to be within federal authority. The Court found that the trucking operation was integral and necessary to the operations of the Post Office itself.

The most recent Supreme Court of Canada judgement on this issue is the *Central Western Railway* case.[41] The issue here was whether Central Western Railway, a small railway located entirely within the province of Alberta, fell within federal or provincial jurisdiction. Central Western used its 105 miles of track in central Alberta to transport grain from nine elevators to the CNR's interprovincial rail line. The grain cars were then transported by CN to Vancouver for export. Central Western's tracks were separated from those of CN by a four-inch gap, and the CNR controlled the device which regulated entry onto its line. The issue for the Court was whether the degree of connection and integration between Central Western and CNR was sufficient to subject the local railway to federal jurisdiction.

Chief Justice Dickson, speaking for a majority of the Court,[42] rejected the argument that Central Western could be regarded itself as an interprovincial railway, noting that mere physical connection between a local and an interprovincial rail line was an insufficient basis for establishing federal jurisdiction. He cited the *AGT* case, arguing that "[t]he linchpin in the *AGT v. C.R.T.C.* decision was this court's finding that AGT, by virtue of its role in Telecom Canada and its bilateral contracts with other telephone companies, was able to provide its clients with an interprovincial and, indeed, international telecommunications service."[43] The Chief Justice regarded Central Western's operation as quite different from that of AGT. He noted that Central Western simply moved grain within Alberta and that the interprovincial transportation of grain was handled entirely by CN. On this basis, he concluded that Central Western was a local railway and not itself part of an interprovincial undertaking.

The Chief Justice then turned to the second possible basis for finding in favour of federal authority. Even though Central Western was a local railway, it would fall under federal authority if it could be characterized as an integral part of a federal work or undertaking. Dickson C. J. indicated that this integration might develop in at least two different ways.[44] First, the management and operation of Central Western might be coordinated or undertaken in common with that of an interprovincial undertaking. Second, the effective operation of a federal undertaking might be dependent on the services of Central Western.

Dickson C. J. concluded that Central Western was not functionally integrated with any interprovincial undertaking and therefore not subject to federal authority. He reasoned that Central Western and CN were operated as separate undertakings rather than in common; further, CN was not dependent on the services of Central Western for its own operations. Nor was Central Western integrated in a functional sense within a so-called "Western Grain Transportation Network."[45]

Despite the Court's ruling in this particular case, Chief Justice Dickson's judgement illustrates the very broad reach of federal regulatory authority in this field. The functional character of the Court's approach is noteworthy. Even where there is in form two separate undertakings, the courts will inquire into the degree of practical or operational integration between the undertakings. Federal regulatory authority will extend to any operations that are regarded as essential or conducted in common with a core interprovincial undertaking. The practical effect of this approach is to ensure an expansive interpretation to federal authority under sections 92(10)(a) and (b) of the *Constitution Act, 1867*.

WORKS DECLARED FOR THE GENERAL ADVANTAGE OF CANADA

Paragraph 92(10)(c) of the 1867 Act provides an exception to the principle that local works and undertakings are subject to exclusive provincial jurisdiction. This subsection provides that the Parliament of Canada may simply declare that a local work is "for the general advantage of Canada or for the advantage of two or more of the provinces"; such a declaration is sufficient to bring an otherwise local work within federal regulatory authority.

This power has been used close to 500 times, mostly in the late 19th and early 20th centuries and in most cases in relation to railways.[46] It can be used in relation to a specific work or to a broad class of works.[47] Moreover, the "works" in question need not be limited to the field of transportation or communication but can involve any sort of physical or tangible thing.[48] Once the declaration is issued, the courts will not inquire into whether the work is in fact for the general advantage of Canada. The declaration by Parliament will be regarded by the courts as dispositive.[49]

Various commentators have suggested that the declaratory power is inconsistent with classical principles of federalism since it permits the federal government to increase its jurisdiction unilaterally at the expense of the provinces.[50] The power has fallen into relative disuse and appears to have been used only twice in the last 25 years.[51] A recent federal proposal that the power be abolished[52] is discussed later in this study.

PEACE, ORDER AND GOOD GOVERNMENT

The opening words of section 91 of the *Constitution Act, 1867* grant the Parliament of Canada power ". . . to make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." While this source of federal authority has generally been interpreted narrowly by the courts, one important exception has been in the field of transportation. The "Peace, Order and good Government" power has been held to support exclusive federal jurisdiction over air transportation.[53] The Supreme Court of Canada found aeronautics to be a "distinct subject matter" which went beyond local concern and "must from its inherent nature be the concern of the Dominion as a whole."[54]

The effect of the *Johannesson* case was to include all aspects of aeronautics, including purely local aeronautics undertakings, as subject to exclusive federal authority. Thus the distinction between interprovincial and local undertakings, which has been critical in the judicial interpretation of section 92(10), has no application to the field of aeronautics. Even purely local airline operations fall under exclusive federal regulatory authority, without any requirement that the local operation be connected to or integrated with an interprovincial undertaking.[55]

Given the settled nature of federal jurisdiction over aeronautics, the litigation in this field has tended to focus on a variety of subsidiary issues such as the extent to which provincial laws of general application apply to airports. The courts have tended to hold that airports and aeronautics undertakings are exempt from the application of any provincial legislation which affects a vital part of the federal undertaking. For example, it has been determined that airports are exempt from municipal zoning bylaws of general application[56] as well as from height restrictions imposed by a province on land adjacent to an airport.[57]

A second issue that has produced some litigation is the extent to which federal jurisdiction extends to undertakings that are connected to aeronautics. Here, the courts have relied on the jurisprudence developed in relation to section 92(10)(a); the issue has been whether the related undertaking is sufficiently integrated with the main aeronautics undertaking. For example, in the *Field Aviation* case,[58] the Alberta Court of Appeal held that a company engaged in the servicing of aircraft was so intimately connected with aeronautics as to fall within federal jurisdiction. On the other hand, a company constructing airport runways,[59] as well as companies offering porter services or limousine service to and from the airport[60] have been held to be separate undertakings subject to provincial jurisdiction.

OTHER CLASSES OF SUBJECTS

Three other enumerated classes of subjects assigned to Parliament in section 91 of the *Constitution Act, 1867* deal explicitly with matters related to the field of transportation.[61]

These are:

- 91.9 Beacons, Buoys, Lighthouses and Sable Island
- 91.10 Navigation and Shipping
- 91.13 Ferries between a Province and any British or Foreign Country or between Two Provinces.

Federal authority over transportation matters is also supplemented by section 108 of the *Constitution Act, 1867*, which provides as follows:

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

The Third Schedule includes the following classes of provincial public works and property:

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other debts due by Railway Companies.
7. Military Roads.

Although the Third Schedule transfers to the federal government all improvements or public works associated with rivers and waterways, the ownership of the rivers themselves remains with the provinces.[62] This means that the provinces may legislate with respect to the use of these waters, as long as their legislation does not interfere with federal legislation in relation to navigation and shipping.

The most important source of federal authority from the above catalogue of powers is section 91(10), "Navigation and Shipping". The language in the section is unqualified, suggesting that federal authority could be extended to all aspects of this subject. However, for many years the courts seemed to take the position that this head of power was circumscribed by the same limits that had been developed with respect to federal undertakings under section 92(10)(a).[63] In *Agence Maritime v. Canada Labour Relations Board*,[64] for example, it was held that local shipping was subject to provincial labour relations legislation. Similarly, ferries that operated largely within the waters of British Columbia were held to be within provincial jurisdiction for purposes of labour legislation.[65] In these cases, the courts seemed to interpret federal authority over navigation and shipping as extending primarily to interprovincial and international undertakings.

The most recent decision of the Supreme Court of Canada on this issue suggests a somewhat more expansive reading of federal authority over navigation and shipping. In *Whitbread v. Walley* (1990),[66] the issue was whether certain limitations of civil liability contained in the *Canada Shipping Act*, R.S.C. 1970, c.S-9 applied to a pleasure boat operated within provincial waters. The Supreme Court unanimously held that the provisions in the *Canada Shipping Act* applied uniformly to all shipping, including local shipping as well as pleasure boats. Mr. Justice La Forest, writing for the Court, distinguished the federal power over navigation and shipping in section 91(10) from that applicable to works and undertakings in section 92(10)(a). Whereas federal jurisdiction over works and undertakings was limited to interprovincial and international transportation, there was no such limitation with respect to navigation and shipping. La Forest J. stated that Parliament's jurisdiction over maritime law should be viewed as territorially co-extensive with its jurisdiction in respect of navigable waterways.[67] He rejected the idea that any distinction could be made between local shipping and interprovincial shipping. Instead, he took the view that all navigable waterways within Canada are part of a single navigational network which must be subject to a uniform legal regime. La Forest J. drew an analogy between navigation and shipping and the field of aeronautics which, as noted above, has been regarded as a single subject matter within the exclusive authority of Parliament. This is so, Justice La Forest suggested, because it is functionally impossible to make a distinction between air travel of a local versus an interprovincial nature. The same situation holds true, according to Justice La Forest, with respect to navigation and shipping. This points to the need for a uniform regulatory and legal regime for navigation and shipping and for "a broad reading of the relevant head of federal jurisdiction."[68]

The analogy which Mr. Justice La Forest draws between "navigation and shipping" and "aeronautics" is significant. Certainly the federal power over navigation and shipping has never been regarded as being as extensive as the power over aeronautics.[69] This result is somewhat ironic, given the fact that the area of navigation and shipping is an enumerated head of federal authority, while aeronautics has simply been added through judicial interpretation of the federal residual power. The result and the reasoning in *Whitbread and Walley* indicate the Supreme Court's willingness to reassess this situation and to consider expanding the limits of federal authority over navigation and shipping.

As to the manner in which governments have actually exercised their constitutional authority, our analysis thus far indicates that the courts have taken a much more expansive approach to federal authority over transportation matters than they have in other fields, such as federal authority to regulate trade and commerce.[70]

To what extent does the federal and provincial legislation enacted in this field reflect the fairly centralized scheme contemplated by the formal Constitution? In general terms, the regulatory framework does recognize a leading role for the federal government over transportation matters. However, in certain instances the federal government has chosen not to exercise the full range of authority which it has been allocated under the Constitution. Of course, this is a political rather than a constitutional stipulation, one which can be reversed by ordinary legislation.

What follows is a brief overview of the regulatory framework that has been put in place in the four principal modes of public passenger transportation: air, water, rail and motor vehicle. The focus of this analysis is on particular modes of transportation or forms of regulation which have been an important source of litigation or court decisions in the past. As such, there is no attempt to provide a comprehensive outline of federal or provincial legislation relating to transportation matters.[71] The main purpose of including this information is to provide a more complete understanding of how governments have actually used their formal powers set out in the Constitution.

Air Transportation

The federal government currently dominates the regulation of all air passenger transportation in Canada. Under the *National Transportation Act, 1987* it has exclusive responsibility for regulating the provision of all air services in Canada; and under the *Aeronautics Act* it regulates the safety and security of passengers, aircraft, airport and aviation facilities. All air carriers in Canada are subject to exclusive federal regulation under these statutes, including carriers engaged in purely local transportation. The provincial role in the transportation field is currently limited to establishing and directly operating certain airports as well as subsidizing some air passenger services.[72] Almost all of the airports and airstrips owned and operated by provincial governments are located in remote, northern areas of the provinces.[73]

Three provinces directly subsidize air passenger services; one province (Ontario) has established a provincial Crown corporation to provide air passenger services directly in Northern Ontario.[74] However, all the provincially-operated airports as well as all air passenger services must be federally licensed and meet all the relevant federal regulatory requirements. In short, the regulatory framework governing aeronautics reflects the centralized interpretation developed by the Supreme Court of Canada in this area.

Marine Transportation

The primary public mode of marine passenger transportation is provided by passenger and automobile ferries. The Parliament of Canada has established safety requirements under the *Canada Shipping Act* which apply to all ferry services, including ferries operating within a province. This statute represents a codification of the "rules of the road" for all navigation and shipping within Canadian navigable waters. The federal government also assumes responsibility for the provision of ferry services between provinces,[75] as well as for certain ferry services that are intra-provincial in nature.[76] Many of the provinces also provide local ferry services, the most important of these being provided by British Columbia, Ontario, Newfoundland and Quebec.[77] However, even these provincially operated services are subject to the safety and operational requirements of the *Canada Shipping Act*, thus ensuring a uniform regulatory framework across the country. The provinces have not imposed any additional ferry safety requirements on services which they operate or subsidize but would be free to do so as long as their regulations did not conflict with the paramount provisions in federal law.

Rail Transportation

The federal Parliament regulates the vast majority of passenger rail services in Canada. The federal government has responsibility for all interprovincial and international railways, as well as for any other railways which have been declared to be for the general advantage of Canada. This includes the vast majority of all passenger rail operations in the country. These rail services are regulated by a variety of federal statutes including the *National Transportation Act, 1987* (NTA) and the *Railway Act* (RA). The NTA provides for an administrative agency, the National Transportation Agency, and grants it certain regulatory powers in relation to federally-regulated passenger rail services. Certain decisions of the Agency can be varied or rescinded by the federal Cabinet.

Provincial regulation of passenger rail services is extremely limited. In British Columbia,[78] Ontario[79] and Quebec[80] there are various provincially operated or subsidized local rail services which are subject to provincial regulation. But these provincial services are confined mainly to commuter rail networks or to remote, northern regions. The vast majority of all passenger rail activity is subject to exclusive federal regulation.

Motor Vehicle Transportation

The primary public mode of motor vehicle transportation is provided by the bus industry. As noted above, the Privy Council decision in the *Winner* (*supra* note 16) case established that bus undertakings engaged in regular interprovincial service fell under exclusive federal authority. However, the bus industry had traditionally been regulated at the provincial level, and the federal government had no regulatory structure in place to assume control over the industry. Accordingly, within months of the Privy Council decision in *Winner*, the federal government delegated the regulation of interprovincial undertakings back to the provinces.

The *Motor Vehicle Transport Act, 1987* transfers regulatory authority over interprovincial motor vehicle undertakings to provincially appointed boards. The provincial boards are granted the authority to license the undertakings and to determine the terms and conditions under which they will operate.

It is an established principle of Canadian constitutional law that one level of government cannot directly delegate legislative powers to another level of government.[81] Thus it was inevitable that questions would be raised regarding the validity of the delegation to provincial boards under the *Motor Vehicle Transport Act*. However, the Supreme Court of Canada upheld the validity of the delegation in *Coughlin v. Ontario Highway Transport Board*,[82] ruling that a provincial board, validly constituted under provincial law to regulate local undertakings, could be vested with the authority to regulate extra-provincial undertakings. This left the regulation of the bus industry to the provinces and has led to significant variations in the applicable regimes governing bus operations across the country.[83]

Two general points should be noted about the delegation of authority to regulate the bus industry. First, the delegation under the *Motor Vehicle Transport Act, 1987 (MVTA)* can be revoked, altered and limited by ordinary federal legislation. Indeed, there is already a provision in the MVTA permitting the federal Cabinet to exempt certain undertakings from the Act through regulation.[84] This exemption has only been used on one occasion, with respect to the Roadcruiser bus service in Newfoundland.[85] The point is that it can be used at any time in the future by the federal government without the necessity of obtaining provincial consent. This would mean that the federal government could resume responsibility for the regulation of any or all aspects of the interprovincial bus industry simply by passing an Order in Council or by amending the terms of the *Motor Vehicle Transport Act, 1987*.

The second general point is that there appear to be some limits to the capacity of the federal government to delegate authority to the provinces. In *Coughlin* the provincial board that was granted the authority was already validly established under provincial law. Implicit in this decision, therefore, is the requirement that the provincial legislation establishing the provincial board be valid independently of any federal law.[86] This would mean that the province could not establish a board or agency whose sole purpose was to regulate interprovincial undertakings.[87] The provincial legislation establishing such an agency would be beyond the constitutional capacity of the provinces, since there would be no valid provincial purpose which the agency was fulfilling.

FUTURE LITIGATION

This discussion indicates that the main outlines of jurisdiction in the field of transportation are now relatively settled. Over the years, the courts have identified a series of general principles which govern the allocation of jurisdiction over transportation. These principles are reasonably well understood by both government and industry, and the dividing line between provincial and federal responsibility is relatively clear.

However, transportation issues will continue to be a frequent source of constitutional litigation in the future. This litigation will arise out of the attempt to apply the general principles identified by the courts to the facts of specific cases. While such issues will vary, one or two central issues will tend to recur with particular frequency.

The first of these issues is the extent to which federal regulation can be extended to local undertakings which have been integrated or connected with interprovincial undertakings. Future transportation systems will place

an emphasis on developing more integrated forms of travel, permitting Canadians to use different modes of transportation on a single trip.[88] As local and interprovincial modes of transportation become more integrated, the constitutional jurisdiction over these systems might shift in favour of the federal government. As we have seen, the courts have adopted a functional approach to the issue of jurisdiction, inquiring into the degree to which there is common management or operation of various transportation undertakings. As intermodal transportation increases, the issue will be the extent to which an otherwise purely local transportation undertaking becomes integrated within some larger interprovincial network. In such cases, the precise dividing line between federal and provincial responsibility may be uncertain and require clarification by the courts.

A second, related issue which may produce future litigation relates to a possible move away from regulation based on distinct modes of transportation. In the past, governments have tended to establish separate schemes of regulation for specific modes of transportation. In recent years, however, there has been a recognition that certain issues, such as safety, security, substance use and environmental pollution cut across all modes.[89] The federal government has responded by enacting legislation based on a particular issue or public purpose rather than on a specific mode of transportation.[90] Within this context, the distinction between "local" and "interprovincial" undertakings is largely meaningless. For example, legislation designed to regulate environmental harm will presumably be aimed at all undertakings with possible adverse effects on the environment. Yet purely local undertakings may cause just as much harm to the environment as interprovincial ones. Thus for such legislation to be truly effective, some means must be found to ensure that all undertakings which produce adverse environmental effects are subject to a set of common standards.

Since constitutional jurisprudence developed by the courts has been premised on a traditional, modal theory of government regulation, the principles which apply to one mode of transportation are quite different from those which apply to others. If the distinctions between modes begin to break down, it may cause the courts to re-evaluate some of its previous jurisprudence. In particular, it may prompt the courts to try to create some room for the development of a set of uniform principles — issue-specific

rather than mode-specific — which would apply across a series of transportation modes. The regulation of adverse environmental effects is a prime instance of where such a re-evaluation might take place.

Even were this to occur, it would be an incremental process which would take many years to develop. The main outlines of constitutional authority over transportation policy are now so well settled, there should not be any significant shift in the courts' approach to these matters in the foreseeable future. The litigation which does arise will be issue-specific and narrowly focussed, and will turn on how the generally accepted principles apply to the facts of specific cases. These fact-specific judicial decisions are unlikely to involve significant implications for transportation policy makers and planners.

III. Proposals for Constitutional Change

The first section of this paper has provided a snapshot of the current constitutional arrangements governing the field of transportation. The question which now arises is whether these existing arrangements require modification or amendment.

It is important to keep in mind the distinction between purely statutory arrangements, subject to amendment through ordinary legislation, and the dictates of the Constitution. The focus here is on the degree to which the terms of the formal Constitution require modification. The related issue of whether government policy in the transportation field ought to be altered in some way is beyond the scope of this paper.

This section begins with an examination of the degree to which the terms of the Constitution may have limited governments or the private sector from responding effectively to transportation issues. It measures the practical impact and significance of the Constitution on both government and industry. A number of issues arise here. First, has the Constitution prevented governments from putting in place forms of regulation which would be better suited to the underlying transportation marketplace? In effect, has the Constitution forced governments to rely upon inefficient or ineffective forms of regulation? Secondly, has the Constitution had any negative impact on the

way in which the transportation industry delivers services to the public? For example, has it acted as a barrier to the development of more efficient modes of transportation?

Then follows an examination of various proposals for constitutional change; this assessment focusses on recent proposals for constitutional amendment which have surfaced on the public policy agenda and suggests which, if any, ought to be included in any amendments to the Constitution.

THE PRACTICAL IMPACT OF EXISTING CONSTITUTIONAL ARRANGEMENTS

The transportation industry in Canada has undergone a fundamental transformation since Canada's original constitutional arrangements were put in place nearly 125 years ago. Despite this transformation, the Constitution has not prevented governments from responding effectively to the changing circumstances because of the courts' flexible and functional interpretation of the division of powers in the field of transportation. As the transportation industry has evolved, the courts have in effect updated the Constitution. This has ensured that any gaps or ambiguities are resolved in a satisfactory fashion. It has also meant that constitutional jurisdiction has evolved to take account of changing needs and circumstances in the industry.

The most obvious example of this constitutional "updating" is in air transportation. The courts have allocated exclusive jurisdiction over air transportation to the federal government, thus ensuring the development of an effective national air transport system. But the courts have taken a similarly broad interpretation to federal authority over interprovincial works and undertakings and have found that even predominantly local undertakings are subject to federal regulatory authority if they are engaged in regular interprovincial activity. This preference for federal authority is important, since it permits the creation of a national "level playing field" to govern the transportation industry.

This is not to say, however, that either the federal or provincial governments have put in place a regulatory structure which actually creates this level playing field. The Interim Report of the Royal Commission on National Passenger Transportation makes the observation that the laws affecting passenger transportation are "fragmented" and suggests that passenger transportation companies "may not be competing against other modes on

a level playing field."[91] However, this fragmentation is more a result of policy decisions by successive governments than by the dictates of the Constitution.

Certainly with respect to the main public modes of passenger transportation — air, bus, marine and rail — the federal government possesses very broad regulatory powers under the Constitution. But the Constitution is largely permissive; it creates room for federal regulatory authority but does not require that authority to be exercised in any particular manner. Thus the federal government has chosen in some instances to delegate at least some of its authority back to the provinces.[92] In other cases, federal statutes have been drafted in such a way so as not to take complete advantage of the potential federal authority available in a particular area. For example, the *Canadian Transportation Accident Investigation and Safety Board Act* establishes a federal board with authority to investigate and report upon accidents in certain specified modes of transportation.[93] The Act does not apply to accidents occurring on highways, where the vast majority of all transportation accidents occur. However, there is certainly no constitutional reason which would prevent the federal government from extending the Act to govern at least some aspects of highway transportation.

As noted above, the federal government has authority over interprovincial undertakings operating on highways. Furthermore, the Parliament of Canada has enacted legislation governing the safety of new cars and components sold in Canada.[94] In addition, the federal Parliament regulates the behaviour of individual drivers through a variety of provisions in the *Criminal Code* of Canada. These various sources of federal authority would provide an ample basis for extending the application of the federal safety legislation to at least some aspects of highway transportation. Thus the fact that the legislation is framed more narrowly is attributable to factors other than the absence of appropriate constitutional authority in the federal Parliament.

What of the extent to which the Constitution may have indirectly limited the development of more efficient modes of transportation? Again, there seems little basis for concluding that the Constitution has had such an impact. Consider the development of intermodal or integrated systems of transportation, in which passengers might rely on more than one means of travel to arrive at their destinations.[95] Such systems depend upon the construction

of terminals that serve airplanes, trains, buses and taxis; they also depend upon the development of support services such as intermodal baggage handling, scheduling, reservation systems and ticketing. It might be thought that divided constitutional jurisdiction in the transportation field might make the development of such intermodal systems more difficult to achieve. For example, the fact that the provinces have jurisdiction over local undertakings, while the federal government has jurisdiction over interprovincial undertakings, might be seen as a factor limiting the development of integrated transportation networks.

In fact, however, there would appear to be little basis for supposing that the Constitution would prevent the emergence of more integrated transportation systems. As noted in the first section of this paper, the courts have framed constitutional jurisdiction over transportation undertakings in functional terms. Federal jurisdiction extends to a purely local undertaking only when it is integral to the successful operation of the related interprovincial undertaking or when the two are managed in common. In short, there is no hard and fast distinction between those undertakings that are subject to provincial jurisdiction and those subject to federal authority. The jurisdictional line depends upon the facts and circumstances of particular cases and turns on the degree of functional integration between the various elements of a transportation network.

The greater the degree of functional integration between different modes of transportation, the more likely it will be that the integrated system as a whole will fall under exclusive federal jurisdiction. This is because the integrated or intermodal system will necessarily involve at least some undertakings or modes of transportation that already fall under exclusive federal authority. As these federally regulated modes of transportation become integrated within some larger network of transportation undertakings, the larger system itself may well become subject to exclusive federal jurisdiction. For example, jurisdiction over intermodal stations for buses, trains, urban transit and airplanes appears to be vested in the federal Parliament[96] because all air travel as well as a significant amount of bus and train travel are already within exclusive federal jurisdiction. The operation of terminals to link these federally regulated modes of transportation with other modes would be an integral part of these federally regulated undertakings. As such, the federal Parliament would possess exclusive authority to regulate the operation of such terminals.

There are, of course, numerous obstacles to the emergence of intermodal transportation systems. The infrastructure to support such systems is extremely costly, while the successful operation of the system can be frustrated by congestion and delays in the urban transportation network.[97] But these are economic, social and political problems, rather than constitutional ones. An amendment to the Constitution would not make the emergence of intermodal systems significantly more likely or feasible.

Thus, in general terms, I would conclude that the Constitution has not posed a serious problem for either government or industry in the transportation field in the past. This being said, it should also be recognized that there are inevitably going to be certain difficulties associated with divided jurisdiction over transportation matters. The main difficulty has already been alluded to earlier: divided jurisdiction carries with it the possibility that different modes or systems of transportation will find themselves competing on an uneven playing field. If regulations set by one level of government are inconsistent with those set by another, it may produce a situation in which a particular mode of transportation receives a competitive advantage.[98] This is particularly the case since it is now becoming apparent that competition occurs across transportation modes rather than simply within a particular mode. Within this context, the actions of all three levels of government — municipal, provincial and federal — have impacts on transportation policies undertaken at each level. For example, the choice between air, bus, rail or private automobile for a particular intercity traveller will be affected by such factors as the nature of the road system, the degree of urban congestion or the development of good public transit. Yet these factors are subject to the control of different levels of government. Thus, even though a particular mode of transportation might be subject to the exclusive control of a single level of government — such as aeronautics — the competitive position of that industry will be affected by decisions taken by other levels of government.

Some degree of divided jurisdiction would appear to be inevitable, since it is simply not feasible for a single level of government to assume jurisdiction over all matters which have an impact on the transportation sector. If divided jurisdiction is a fact of constitutional life, there will always be the possibility that the actions of one level of government might frustrate or undermine the policies of another. This problem cannot be solved through a constitutional amendment, since any amendment would still leave a situation in which jurisdiction was divided between two (or perhaps three)

orders of government. The only long-term solution to the problem is to achieve greater coordination and cooperation between the various levels of government.

PROPOSALS FOR CONSTITUTIONAL CHANGE

Over the last year, a variety of proposals for comprehensive constitutional change have been advanced both by governments and non-governmental bodies. While jurisdiction over transportation has certainly not been a central feature of any of these proposals, some of the proposed changes would affect transportation policy.

1. The Group of 22[99]

The Report of the Group of 22 recommends that the declaratory power of the federal government in section 92(10)(c) of the *Constitution Act, 1867* be abolished (recommendation 4). The Report also recommends that interprovincial and international transportation be federal and intra-provincial be provincial (recommendation 19). Since there is no elaboration of the intent underlying this recommendation, it is not clear whether it contemplates any change to the existing division of powers over transportation. In one sense, the recommendation might be regarded as an affirmation of the *status quo*, since subsections 92(10)(a) and (b) of the *Constitution Act, 1867* provide for federal responsibility for interprovincial undertakings and provincial responsibility for local undertakings. However, it is possible that it contemplates some reallocation of jurisdiction over aeronautics or navigation and shipping, which are now wholly subject to federal authority.

The Report also recommends that the residual power of the federal Parliament be deleted from the Constitution, leaving the question of the allocation of undetermined powers to the political process and the courts. The courts would allocate powers "based on the roles of the two orders of government as reflected in the distribution of powers" (recommendation 3). The effect of this proposal on constitutional jurisdiction over transportation is altogether unclear. Presumably the existing jurisdiction of the federal government over aeronautics, which flows from the federal residual power, would be maintained; it is unclear what would occur with respect to new modes of transportation.

2. The Allaire Report[100]

The Constitutional Committee of the Quebec Liberal Party proposes a comprehensive revision of the division of powers. The Committee proposes that transportation be an area of shared jurisdiction between the federal and provincial government, with Quebec having authority over what is termed "regional" transportation, while the federal Parliament would have authority over "inter-regional" transportation (p. 39). There is no indication whether the proposed provincial responsibility over "regional" transportation would involve transportation beyond the borders of the province of Quebec or whether it would be confined purely to intra-provincial transportation. The Allaire Committee also proposes to grant all residual powers to the provinces. There is no indication whether this would affect existing court decisions which have granted jurisdiction to the federal Parliament on the basis of the residual power.

3. Federal Government Proposals

The federal government's proposals for constitutional amendment, entitled *Shaping Canada's Future Together*, contain a number of recommendations with potential impact on transportation. The federal government proposes to abolish the declaratory power with respect to local works in section 92(10)(c) of the *Constitution Act, 1867* (proposal 23). It also proposes to limit the scope of the federal government's residual power (proposal 22). The federal residual power would not be abolished, however; the proposals contemplate that the federal government would retain authority over matters of "national concern," which was the basis for the Supreme Court's decision that aeronautics was a matter of exclusive federal authority. All that is proposed to be transferred to the provinces is authority for "non-national matters not specifically assigned to the federal government under the Constitution or by virtue of court decisions."[101] Finally, the federal government identifies a number of areas of jurisdiction which are "candidates for streamlining." The intent of this proposal is to eliminate duplication and overlap of services by the various levels of government. The list of items to be discussed with the provinces includes transportation of dangerous goods, ferry services and small craft harbours.[102]

4. Assessment

Both the federal government and the Group of 22 propose to abolish the federal declaratory power in section 92(10)(c) of the *Constitution Act,*

1867. However, there is no discussion in either document of the rationale underlying this recommendation. One can only assume that it is based on the assumption that a unilateral power of this type is inconsistent with the equality of the two levels of government. Some commentators, as well as provincial governments, have criticized the declaratory power on this basis, arguing that it grants the federal government the power to extend its own jurisdiction unilaterally and reduce the jurisdiction of the provinces.[103]

These criticisms must be balanced against a recognition of the important role which this power has played in the past. For example, shortly after World War II, the federal government used the declaratory power to establish federal jurisdiction over atomic energy.[104] The existence of the declaratory power was important in this context since it permitted swift and effective action on the part of the federal government — a necessary response because of the implications of atomic energy on national security. Speedy and effective national regulation was essential. It is arguable that the courts would have eventually recognized that atomic energy would fall under federal authority as a matter of "national concern."[105] But even so, there would have been a period of uncertainty during which the status of the federal legislation would have been unclear. The existence of the declaratory power provided a means of virtually eliminating this uncertainty and ensuring effective and timely federal intervention.

Some commentators have suggested that the declaratory power has fallen into disuse and that its abolition would have little practical effect.[106] In fact, while it has been used sparingly in recent years, it was relied on by the federal government as recently as 1987.[107] And it is impossible to predict the kinds of situations or problems which may emerge in the future. The existence of the declaratory power preserves flexibility in the constitutional framework, ensuring the ability of the federal government to respond effectively to changing circumstances.

Despite these considerations in favour of retaining the declaratory power, it would seem preferable to impose some kind of limitation on its use by the federal government. The existence of such a unilateral and unconstrained power is inconsistent with the fundamental equality of the two orders of government.

Furthermore, while the declaratory power has served an important and useful function in the past, it must be remembered that this was during a period in which the Privy Council had adopted a very narrow interpretation

to other sources of federal authority. The federal trade and commerce power, for example, was interpreted by the Privy Council as applying mainly to interprovincial and international trade. In recent years, the Supreme Court of Canada has adopted a much more flexible and expansive approach to the interpretation of the federal trade and commerce power. Thus the need for a unilateral federal power to declare works for the general advantage of Canada has diminished considerably.

It would seem appropriate to limit the use of the declaratory power in order to protect provincial interests. For example, it might be provided that the federal government could only invoke the power after obtaining the consent of the province in which a particular "work" is situated,[108] or that the federal government must obtain the consent of some number of provinces before issuing a declaration.[109] These changes would protect provincial interests while preserving some limited scope for the use of the declaratory power.

Both the Group of 22 and the Allaire Committee propose to eliminate the federal residual power from the Constitution. The federal government, on the other hand, proposes merely to limit the power. The total abolition of the residual power of the federal government might have significant implications in the field of transportation. As noted above, the courts have used the residual power to recognize exclusive federal authority over aeronautics. As new modes or methods of transportation emerge, the courts might well rely on the residual power as a basis for federal authority. To abolish the residual power altogether would appear to represent an unwarranted limitation on the powers of the federal Parliament.

The federal government proposals suggest that the provinces should be granted authority over "non-national matters not specifically assigned to the federal government." However, the federal government proposes to maintain its authority to deal with "national matters or emergencies."[110] This is important, since federal authority over aeronautics is based on the fact that this is a matter of national concern.[111] Thus it would appear that the federal proposals on the residual power do not contemplate any changes in the current jurisdiction over aeronautics. More importantly, the federal government could also acquire jurisdiction over modes or methods of transportation which might arise in the future. Jurisdiction over these would turn on the question of whether the transportation matter raised a question of "national concern."

In short, there does not appear to be any significant difficulty with the current federal proposals in relation to the residual power. The only real area of concern is whether it will be possible to find language that is sufficiently precise to distinguish between matters of "national" versus "non-national" importance. The current proposals require the addition of constitutional language to the opening words of section 91 of the *Constitution Act, 1867* to grant some additional scope for provincial authority. If the language is ambiguous or imprecise, then there could be unintended or unanticipated consequences in terms of the division of powers. Since the federal proposals do not set out the terms of a formal constitutional amendment, it is impossible to state in advance whether this concern is real or merely theoretical.

The other proposals outlined above do not appear to contemplate any significant realignment of responsibilities in transportation. In general terms, they assume the continuation of federal responsibility for interprovincial and international transportation, with the provinces maintaining control over local transportation. However, the federal proposals for streamlining government appear to contemplate some form of delegation of responsibility to the provinces in areas such as ferries and small craft harbours.

In an evaluation of such delegation, it should be noted that the Constitution already permits some degree of delegation of powers between governments. While the courts have held that direct delegations of powers between legislatures are invalid, they have permitted delegations made to third parties, such as administrative tribunals. Thus the federal Parliament has been able to delegate authority to regulate interprovincial motor vehicle undertakings to provincially-appointed regulatory tribunals through ordinary federal legislation — the *Motor Vehicle Transport Act, 1987.*

The immediate question is whether this existing delegation power might be employed to transfer regulatory authority over other transportation matters to provincial authorities. For example, could regulatory authority over interprovincial ferry services be transferred to a provincially appointed tribunal through an ordinary federal statute similar to the *Motor Vehicle Transport Act, 1987*? Alternatively, could jurisdiction over an interprovincial rail undertaking, such as a high-speed train operating in Ontario and Quebec, be transferred to the provinces?

The answer to these questions would depend on the precise nature of the delegation which was contemplated. The delegation in the *Motor Vehicle Transport Act, 1987* involved a transfer of authority to provincial boards which were already validly constituted under provincial legislation. It would appear that the federal government could make a similar delegation involving ferries, railways or any other mode of transportation. The only necessity would be that the provincial boards which were to exercise the delegated power be validly constituted under provincial law. The province or provinces would have first to create tribunal(s) with authority to regulate intraprovincial and local undertakings. These provincial boards could then receive delegated power from the federal government to regulate interprovincial undertakings operating into or within the province concerned.

There are obviously important limitations and drawbacks associated with a delegation of this type. Specifically, any delegation would have to involve several different provincial boards located in different provinces. These separate provincial boards would only be able to regulate the operations of an interprovincial transportation undertaking within the borders of a particular province. To give a concrete example of how this would work, suppose the federal government wanted to delegate authority to regulate a high-speed train running between Windsor and Quebec City to the provinces of Ontario and Quebec. The federal government would delegate authority over the Ontario operations of the undertaking to an Ontario board, while the Quebec operations would be subject to the authority of a Quebec board. The high-speed rail operation would then be subject to the authority of two separate regulators, one established by Ontario, the other by Quebec.

There would seem to be no way to avoid such divided jurisdiction, at least under the terms of the existing Constitution. It does not appear to be possible for the federal government to delegate authority over the complete operations of an interprovincial undertaking to a single provincially appointed board since no single province could validly create a board with such a mandate. An individual province is permitted only to create a tribunal with authority to regulate transportation undertakings operating within that province. For the same reason, no combination of provinces, acting in concert, can create a single board with authority to regulate the complete operations of an interprovincial transportation undertaking. Thus any attempt by the federal government to delegate regulatory powers over a complete interprovincial undertaking to a single provincially appointed

board would be unconstitutional. This would amount to an attempt by the federal government to enlarge the legislative powers of the provinces, a form of delegation which is not permitted under the current constitution.[112]

If this analysis is correct, any delegation of regulatory authority over interprovincial undertakings such as ferries or railways would inevitably create a situation of divided regulatory authority. The major drawbacks to any delegation of this type could only be avoided through an amendment of the Constitution to provide for direct delegations of legislative power between the two levels of government. Significantly, the current federal proposals contemplate an amendment precisely along these lines. The federal government proposes to insert provisions in the Constitution "to enable the delegation of legislative authority between the two levels of government with the mutual consent of the legislative bodies involved."[113] If such provisions were enacted, they would permit the federal government to delegate authority over the complete operations of an interprovincial undertaking to a single provincially appointed tribunal.

There is a long history of similar proposals to permit delegations of powers directly between governments. The Fulton-Favreau amendment proposal of 1964 would have inserted a power of interdelegation in the Constitution. More recently, the Macdonald Commission recommended a constitutional amendment to permit legislative as well as administrative delegation of powers.[114] A similar proposal was endorsed by the Beaudoin-Edwards Committee examining the constitutional amending formula.[115]

Proposals along these lines have certainly attracted some measure of criticism in the past.[116] On balance, however, a carefully framed interdelegation power would appear to represent a positive contribution to our existing constitutional framework.[117] Such a power would permit greater flexibility in the way in which governments respond to social problems. In transportation, for example, it would open the door to a greater range of regulatory responses involving both levels of government. In particular, it would allow the federal Parliament to allocate responsibility over transportation matters on a regional as opposed to a purely provincial basis. There might well be circumstances, such as a high-speed rail service in the Windsor-Quebec City corridor, where such a regional form of regulation is appropriate. A constitutional amendment permitting legislative delegation of powers between the two orders of government would make this form of regional, interprovincial responsibility for transportation matters a possibility.

Such delegation of powers might also make it possible to fashion more creative responses to the difficulties associated with divided jurisdiction over transportation matters. As noted in the previous section, actions and policies of one level of government often significantly affect the activities of other levels of government. Furthermore, competition within the transportation field occurs across transportation modes as well as within a particular mode. If governments could delegate jurisdiction directly, it might be possible to create new regulatory structures to respond to these challenges more effectively. For example, short air trips compete directly with trips by cars and trains. It might be desirable to grant a single level of government the authority to regulate all three modes of transportation for trips involving limited distances.[118] Permitting direct delegations of legislative powers would add greater flexibility in the responses that are available to government. It would ensure that government regulation can be more closely tailored to the realities of the transportation industry as it evolves.

IV. Conclusion

This paper has reviewed the current allocation of jurisdiction over transportation matters and assessed proposals for constitutional change. These arrangements have worked fairly well in the past because of the pragmatic interpretation of the division of powers by the courts. In contrast to their approach to many other areas of the Constitution, the courts have tended to employ a functional analysis in construing constitutional responsibilities over transportation matters. They have rejected the idea of dividing jurisdiction over a single undertaking between two levels of government. They have also held that where two transportation undertakings are functionally integrated or operated in common, they should be subject to a single regulatory authority. The practical effect of this approach has been to expand federal authority in this field. Since jurisdiction over particular undertakings is to be undivided, federal authority has been recognized over undertakings that are involved only minimally in interprovincial transportation. Similarly, federal authority has also been recognized in relation to local transportation undertakings which are functionally connected or integrated with interprovincial undertakings.

Because of this expansive reading of federal power, the Constitution has made it possible for a single level of government to play a leading role in transportation policy. The federal government has been able to facilitate

the creation of a truly national transportation network across the country. I conclude that there is no need for major constitutional changes in the existing jurisdiction over transportation matters in the Canadian Constitution. The only only significant change which I propose is an amendment to permit the direct delegation of legislative powers between governments. This proposal, advanced recently by the federal government, would provide for greater flexibility and more effective coordination of the respective roles of governments. It would permit governments to adjust their responsibilities on an incremental basis in response to changing trends and circumstances in the transportation industry. In this way, the Constitution would not block or impede the effort to adapt our transportation system to the needs of future generations of Canadians.

ENDNOTES

1. The focus of this study is on the provisions which grant legislative authority in the field of transportation. A companion study in this volume by Patrick J. Monahan, entitled "Transportation Obligations and the Canadian Constitution," examines a number of constitutional provisions which impose a particular obligation to provide transportation services. The constitutional obligations of the federal government will not be considered in any detail in the present study.

2. Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, 1991).

3. See, for example, *A Quebec Free to Choose, Report of the Constitutional Committee of the Quebec Liberal Party* (Montreal, January 1991); *Some Practical Suggestions for Canada*, Report of the Group of 22 (Montreal, 1991).

4. See, for example, C. McNairn, "Transportation, Communication and the Constitution," 47 *Canadian Bar Review* 355 (1969); C. McNairn, "Aeronautics and the Constitution," 49 *Canadian Bar Review* 411 (1971); C. Dalfen and L. Dunbar, "Transportation and Communications: The Constitution and the Canadian Economic Union," in *Case Studies in the Division of Powers*, ed. M. Krasnick, (Royal Commission on the Economic Union, Background Studies, Vol. 62, 1985), pp. 139–202.

5. For example, the extent to which the development of so-called "intermodal" forms of transportation might be constrained or limited by the Constitution is examined. Intermodal transportation involves the integration of different modes of transportation within a single network or system. The integrated system would connect modes either through a single reservation system or through common facilities, such as train stations, airports and bus terminals. See *Getting There: The Interim Report of the Royal Commission on National Passenger Transportation* (Ottawa: Supply and Services Canada, April 1991), p. 141. It is important to emphasize that this aspect of the study focusses on constraints which are implicit in the scheme of the Constitution itself, as opposed to government regulation or legislation. An examination of the efficacy or limitations of existing government policy in the transportation field is beyond the scope of the present study.

6. See *A Quebec Free to Choose*.

7. See *Some Practical Suggestions for Canada*.

8. See *Shaping Canada's Future Together: Proposals*.

9. The issue here is the extent to which regulatory authority can be transferred from one level of government to another without the need to resort to a formal constitutional amendment.

10. See Peter Hogg, "Transportation and Communication," in *Constitutional Law of Canada*, 2nd ed., (Toronto: Carswell, 1985), p. 484.

11. Section 92(10)(a), *Constitution Act, 1867*, U.K., 30, 31 Victoria, c. 3.

12. See the Third Schedule to the *Constitution Act, 1867*, which sets out the classes of provincial property which passed to the Dominion at the time of Confederation. The transfer of title to the Dominion was effective at the moment of each province's entry into Confederation; as transportation was in a stage of infancy at the relevant dates, Dominion proprietary rights acquired in this way have not proven to be significant factors in the regulation of transportation. See McNairn, "Transportation, Communication and the Constitution," p. 366.

13. It should be noted, however, that the trade and commerce power has been used to regulate the safety of new cars and components. The *Motor Vehicle Safety Act*, R.S.C. 1985, c. M-10 requires all motor vehicles imported into Canada to comply with federal safety and environmental regulations. In addition, vehicles manufactured in Canada must have a National Safety Mark indicating that they meet the relevant federal safety and environmental standards.

14. See the *Criminal Code* of Canada, R.S.C. 1985, c.C-46, sections 249–261.

15. *Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304, p. 315.

16. See *A.G. Ontario v. Winner* [1954] A.C. 541.

17. See *Toronto v. Bell Telephone* [1905] A.C. 52.

18. *A.G. B.C. v. A.G. Can. (Natural Products Marketing Reference)* [1937] A.C. 377.

19. It should be noted that in recent years, the Supreme Court of Canada has moved away from this bifurcated approach to the trade and commerce power, recognizing federal authority to regulate general trade and commerce. See *General Motors of Canada Ltd. v. City National Leasing* (1989), 58 D.L.R. (4th) 255 (S.C.C.).

20. Of course, while this constitutional capacity has been vested in the federal government, it has not necessarily chosen to exercise the jurisdiction to its limits. See, for example, the *Motor Vehicle Transport Act*, 1987, R.S.C. 1985, c. 29 (3rd Supp.) s.4 (delegating authority to regulate extra-provincial bus undertakings to the provinces).

21. *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications* [1989] 2 S.C.R. 225, p. 257 (per Dickson, C. J.).

22. *Re Tank Truck Transportation Ltd.* (1960), 25 D.L.R. (2d) 161, Ont. High Court.

23. This result was affirmed by the Court of Appeal without written reasons. See [1963] 1 O.R. 272 (C.A.).

24. *R. v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.* [1965] 1 O.R. 84.

25. *AGT v. CRTC* [1989] 2 S.C.R. 225.

26. All the members of the Court agreed on the issue of jurisdiction; Madame Justice Wilson dissented on the issue of whether AGT was entitled to assert a claim of Crown immunity.

27. Ibid., p. 259.

28. Ibid., p. 257.

29. Ibid., p. 258.

30. Ibid., p. 262.

31. See P. Hogg, "Comments," (1990) 35 *McGill L. J.*, p. 480.

32. *Re Cannet Freight Cartage* [1976] 1 F.C. 174 (C.A.) (approved by the Supreme Court of Canada in *UTU v. Central Western Railway* [1990] 3 S.C.R. 1112, 1145–47.)

33. See Hogg, "Comment," p. 487.

34. Federal authority over Bell Canada and B.C. Tel was based on provisions in their respective Special Acts declaring them to be works "for the general advantage of Canada"; telephone service in Yukon, NWT and Newfoundland is provided by subsidiaries of CN Railway, which is subject to federal authority by virtue of provisions in the *Canadian National Railways Act.*

35. For a summary and discussion of the regulatory situation prior to the *AGT* case, see Dalfen and Dunbar, pp. 156–160.

36. Because the Supreme Court also held that AGT was entitled to benefit from the doctrine of Crown immunity, the result of the case was that the telephone company was subject neither to federal nor to provincial authority. The other two prairie telephone companies in Saskatchewan and Manitoba were in a similar situation. However, the four Atlantic telephone companies are privately owned and can claim no Crown immunity; the effect of the Court's decision was to immediately bring the four Atlantic companies within federal authority. In October of 1989 the federal government introduced Bill C-41, an amendment to the *Railway Act* to make the Act binding on the three prairie telephone companies. However, this bill died on the order paper and has not been reintroduced (as of October 25, 1991). At the moment, therefore, there is no federal legislation which is applicable to the three prairie telephone companies.

37. See *Montreal v. Montreal Street Railway* [1912] A.C. 333.

38. *Luscar Collieries Limited v. McDonald* [1927] A.C. 925.

39. *Reference re Industrial Relations and Disputes Investigation Act* [1955] S.C.R. 529.

40. *Letter Carriers' Union of Canada v. Can. Union of Postal Workers* [1975] 1 S.C.R. 178.

41. *UTU v. Central Western Railway* [1990] 3 S.C.R. 1112; (1990) 76 D.L.R. (4th) 1.

42. Dickson C.J., spoke for eight members of the Court on the constitutional issue; Madame Justice Wilson was the sole dissenter.

43. *UTU v. CWR*, 76 D.L.R. (4th), pp. 15–16.

44. Ibid., pp. 19-21.

45. It was argued that there was an integrated network for the transportation of grain within Western Canada and that Central Western formed part of this network. However, Dickson C. J. concluded that "I do not agree that a Western Grain Transportation Network exists for the purposes of the jurisdictional designation of the Central Western. . . . [T]he fact that several entities involved in the transport of grain fall under federal jurisdiction cannot on its own serve to bring everything connected with that industry under federal jurisdiction." Ibid., p. 22.

46. See Hogg, "Transportation and Communication," p. 491.

47. See *Jorgensen v. A.G.Can.* [1971] S.C.R. 725.

48. Ibid.

49. See N. Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986), pp. 627–631.

50. See A. Lajoie, *Le pouvoir déclaratoire du Parlement* (Montreal: University of Montreal, 1969) pp. 70–72.

51. See *Cape Breton Development Corporation Act*, S.C. 1967, c.6, s.35(1); *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c.12, s.9.

52. See *Shaping Canada's Future Together: Proposals*, proposal no. 23.

53. See *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292.

54. Ibid., p. 308–09.

55. See *Jorgenson v. North Vancouver Magistrates* (1959) 28 W.W.R. 265 (B.C.C.A.).

56. See *Re Orangeville Airport Ltd.* (1976) 11 O.R. (2d) 546 (C.A.).

57. See *Re Walker and Minister of Housing for Ontario* (1983) 41 O.R. (2d) 9 (C.A.).

58. See *Field Aviation Company Limited v. Alberta Board of Industrial Relations* [1974] 6 W.W.R. 596 (Alta. A.D.).

59. See *Construction Montcalm Inc. v. The Minimum Wage Commission* [1979] 1 S.C.R. 754.

60. See *Re Colonial Coach Lines Ltd.* [1967] 2 O.R. 25 (Ontario H.C.); *Murray Hill Limousine Service v. Batson* [1965] B.R. 778 (Que. C.A.).

61. In addition to the three classes of subject noted in the text, the power over "trade and commerce" (section 91.2) and the power over "criminal law" (section 91.27) have been used to enact legislation that relates to transportation policy. See discussion *supra* at notes 13 and 14.

62. See *Attorney General of Canada v. Attorney General of Ontario, Quebec and Nova Scotia,* [1898] A.C. 700.

63. This, for example, was the view expressed by Dalfen and Dunbar in their study for the Macdonald Commission in 1985; see Dalfen and Dunbar, p. 150.

64. *Agence Maritime Inc. v. Canada Labour Relations Board,* [1969] S.C.R. 851.

65. *Singbeil v. Hansen* (1985) 19 D.L.R. (4th) 48 (B.C.C.A.).

66. *Whitbread v. Walley* (1990) 120 N.R. 109.

67. Ibid., p. 120.

68. Ibid., p. 123.

69. For example, labour relations matters in all aeronautics undertakings are subject to exclusive federal authority; in the field of navigation and shipping, federal authority has been limited to undertakings engaged in interprovincial and international activity.

70. See discussion *supra* at note 18 and accompanying text.

71. For example, the regulatory framework with respect to the road system or to private passenger automobiles is not included in this discussion. Neither of these areas has been the source of any significant litigation or court decisions.

72. For an extended discussion of the provincial role in this regard see IBI Group, "Intercity Passenger Transportation Policy Framework: Provincial Economic and Safety Legislation Review" a working paper prepared for the Royal Commission on National Passenger Transportation, October 1990, pp. 3–7.

73. Ibid., p.4. Overall provincial involvement in operating and subsidizing airports has been increasing in the past decade: in 1979, the provinces operated or subsidized about 124 land airports, whereas in 1989 this number had grown to 378. However, Transport Canada continues to operate the largest and busiest airports in Canada and its annual airport related expenditures are about 11 times higher than those of the provinces combined.

74. The province of Ontario has established norOntair to provide subsidized air services to 21 communities in Northern Ontario. In 1988, the operating subsidy for norOntair was $4.3 million.

75. Certain of these ferry services are a constitutional obligation of the federal government, including ferries in Prince Edward Island, Newfoundland and British Columbia. These obligations are contained in the respective Terms of Union admitting these provinces to Canada. Each of the obligations are thus part of the Constitution of Canada and take precedence over all federal and provincial legislation. Further, they may only be amended in accordance with the procedures set down in Part V of the *Constitution Act, 1982.* For a discussion of the precise nature and implications of these various obligations, see Monahan, "Transportation Obligations and the Canadian Constitution."

76. The federal government has, in recent years, sought to devolve responsibility for the provision of intra-provincial ferry services to the provinces. The usual arrangement has the province agreeing to assume responsibility for a service in exchange for payment of a fixed sum from the federal government. For a discussion, see IBI Group, "Intercity Passenger Transportation Policy Framework: Federal Legislation Review," a working paper prepared for the Royal Commission on National Passenger Transportation, June 1990, pp. 14–16.

77. For example, British Columbia has established a Crown corporation (British Columbia Ferry Corporation) to provide ferry services in the province. Tolls and service schedules are established by the Corporation's board of directors and must be approved by the provincial Cabinet. The Corporation also receives a substantial subsidy from the provincial government.

    In Newfoundland, the province directly operates seven intra-provincial coastal ferry services, while an eighth service is subsidized. These services were taken over from the federal government in 1979. Service schedules and fares are developed by the Newfoundland Department of Transportation.

    The Quebec Ministry of Transportation operates or subsidizes about a dozen longer-distance ferry routes across the St. Lawrence River and along the North Shore of the Gulf of St. Lawrence.

    For further descriptions of these various provincially operated or subsidized services, see IBI Group, "Intercity Passenger Transportation Policy Framework: Provincial Economic and Safety Legislation Review," pp. 14–19.

78. The British Columbia Railway provides passenger service between North Vancouver and Prince George, B.C.

79. The Ontario Northland Railway offers passenger rail service in Northern Ontario, while GO Transit provides mainly commuter rail services, some of them on its own trackage, in the Greater Toronto Area. Ontario has also established the Ontario Northland Transportation Commission and granted it the authority to operate and regulate rail services in Northern Ontario. Decisions of the Commission are subject to amendment by the provincial Cabinet.

80. The Montreal Urban Community Transport Commission offers commuter rail services in the Montreal area.

81. This principle was established by the Supreme Court of Canada in *A.G. Nova Scotia v. A.G. Canada* [1951] S.C.R. 31.

82. *Coughlin v. Ontario Highway Transport Board* (1968), 68 D.L.R. (2d) 384.

83. For a discussion of these provincial variations, see IBI Group, "Intercity Passenger Transportation Policy Framework: Provincial Economic and Safety Legislation Review," pp. 20–33.

84. See section 16 of the MVTA, 1987 which provides as follows:

    > The Governor in Council may, by regulation, on the recommendation of the Minister made after consultation by the Minister with the government of each province affected thereby, exempt from the application of this Act or of any provision of this Act, either generally or for a limited period or in respect of a limited area, any person, the whole or any part of any extra-provincial bus undertaking or extra-provincial truck undertaking, every extra-provincial

bus undertaking or extra-provincial truck undertaking, any group or class of such undertakings or any extra-provincial bus transport or extra-provincial truck transport.

85. The Roadcruiser bus service, operated by CN in Newfoundland, was initiated in 1968 when CN shut down the passenger rail service in Newfoundland and substituted a bus service in its place. It was exempted from the MVTA in the mid-1970s following a dispute between CN and the Board of Commissioners of Public Utilities of Newfoundland.

86. This is the view expressed by Peter Hogg in his discussion of the *Coughlin* case. See Hogg, *Constitutional Law of Canada*, 2nd ed., p. 303.

87. This limitation will prove to be significant in our discussion later in this paper.

88. See *Getting There*, pp. 141–42.

89. Ibid., p. 40.

90. See, for example, the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c.3.

91. See *Getting There*, p. 44.

92. See the provisions of the *Motor Vehicle Transport Act, 1987* noted in the previous section, delegating authority over the bus industry to the provinces.

93. *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c.3. See section 3 for a definition of the application of the Act.

94. See the *Motor Vehicle Safety Act*, R.S.C. 1985, c.M-10.

95. See discussion in *Getting There*, pp. 103–05.

96. The possibility of establishing some sort of Canadian Terminals Agency is discussed in *Getting There*, p. 149.

97. For a discussion of these various factors, see *Getting There*, pp. 104–05.

98. Ibid., p. 226.

99. See *Some Practical Suggestions for Canada*.

100. *A Quebec Free To Choose*.

101. *Shaping Canada's Future Together*, p. 58.

102. Ibid., see pp. 58-59.

103. See Hogg, *Constitutional Law of Canada*, p. 493.

104. See *Atomic Energy Control Act*, S.C. 1946, c.37.

105. This was the reasoning of the Ontario High Court in *Pronto Uranium Mines Limited v. The Ontario Labour Relations Board*, [1956] O.R. 862.

106. Hogg (*Constitutional Law of Canada*, p. 493) suggests that the declaratory power has not been used since 1961.

107. See the *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c.12, s.9.

108. See, for example, the *Cape Breton Development Corporation Act*, S.C. 1967, c.6, which recites that the provincial government had consented to the legislation containing a federal declaration under section 92(10)(c) of the *Constitution Act, 1867*.

109. These suggestions have been made before and are reviewed and discussed in Hogg, *Constitutional Law of Canada*, p. 493.

110. See *Shaping Canada's Future Together*, Proposal 22.

111. This was the basis of the reasoning by the Supreme Court of Canada in the *Johannesson* case, *supra* note 53.

112. This is the basic proposition established by the *Nova Scotia Interdelegation Case*. For a discussion of the principles established by this case, and an analysis which leads to similar conclusions proposed in the text, see Hogg, *Constitutional Law of Canada*, pp. 307–08.

113. See *Shaping Canada's Future Together*, Proposal 25.

114. See The Macdonald Commission, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Vol. III, p. 257.

115. See Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada*, June 20, 1991, p. 29.

116. Critics of legislative interdelegation argue that it would promote uncertainty and would "confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions." See W. R. Lederman, "Some Forms and Limitations of Co-operative Federalism," 45 *Canadian Bar Review* 409 (1967), p. 426.

117. The interdelegation power would have to be framed so as to ensure that a delegation might be revoked upon the giving of proper notice. The delegation would also have to be framed in relatively precise terms and in accordance with certain principles or criteria agreed upon in advance by both levels of government.

118. This is suggested in *Getting There*, p. 227.