1992

Transportation Obligations and the Canadian Constitution

Patrick Monahan
Osgoode Hall Law School of York University

10

TRANSPORTATION OBLIGATIONS AND THE CANADIAN CONSTITUTION

Patrick J. Monahan*
October 1991

I. INTRODUCTION: TRANSPORTATION AND THE CANADIAN CONSTITUTION

> The problems and methods of transportation constitute an essential thread in the development of the country.[1]

Transportation policy has always occupied a critical and central place in Canadian nation-building. The close connection between transportation policy and national policy is nowhere more evident than in the terms of the Canadian Constitution itself. Canada is unique among the developed nations of the world for the number and detail of transportation obligations which have been entrenched in its formal constitution.

The *British North America Act, 1867* (now called the *Constitution Act, 1867*) recites the undertaking of the Canadian government to secure the construction of a railway linking the former colonies with each other; British Columbia entered the Union in 1871 in return for a constitutionally entrenched guarantee of a transcontinental railway; the *Prince Edward Island Terms of Union* require the Canadian government to maintain a ferry service linking the Island with the mainland; the Newfoundland Terms of Union (*Newfoundland Act*) provide a guarantee of ferry service between the new province and the

* Director, York University Centre for Public Law and Public Policy.

Canadian mainland. These are merely illustrations of a considerable list of similar constitutional provisions guaranteeing particular transportation services or infrastructure.

Students of Canadian history have long remarked on the number and specificity of these constitutional obligations.[2] The most significant of these relate to undertakings to construct or to take over railways in various parts of the country.[3] It seems that the Canadian government fulfilled these obligations to the ultimate satisfaction of all concerned in the latter half of the 19th century; thus, while of considerable historical interest, such obligations have not been seen as playing a significant role in shaping modern transportation policy in Canada.[4]

More recently, however, interest in the status and meaning of these constitutional obligations has been revived because of the termination or reduction of passenger rail service in many parts of the country. Two provinces have argued that certain proposed reductions are unconstitutional on the basis that they violate constitutional guarantees given to these provinces when they joined Confederation. While Prince Edward Island's legal challenge failed,[5] the challenge in British Columbia succeeded in the trial division of the British Columbia Supreme Court, with the Court ordering the reinstatement of passenger service on a rail line on Vancouver Island.[6] This ruling has recently been upheld by the British Columbia Court of Appeal.[7] The success of this challenge has raised the issue of whether this and other transportation obligations in the Canadian Constitution might indeed have a role to play in the future evolution of Canadian transportation policy.

This paper presents a comprehensive analysis of the legal status, meaning and significance of transportation obligations in the Canadian Constitution.[8] It describes and analyzes the current legal status of the obligations to determine the extent to which they will influence, constrain or shape future transportation policy. While the focus of the paper is on the contemporary legal significance of the obligations, much of the analysis is historical because the current significance of the obligations can only be understood through a review of the purpose and meaning of the obligations when they were first enacted. The report details the circumstances surrounding the enactment of these various obligations as well as the then-prevailing understanding of their meaning and purpose. It also considers the manner in which the obligations have been carried out over the years and the extent to which the original understanding of their meaning has been reflected in subsequent government policy or judicial decision. Finally, it assesses the current significance of the obligations and whether they should be considered by transportation policy makers concerned with meeting Canada's transportation needs into the next century.

The Canadian practice of specifying certain transportation obligations in its fundamental constitutional law has often been regarded as somewhat out of the ordinary. The larger question, however, is whether there is any reason in principle to object to the practice. The concluding section of this paper reflects on the wisdom of the Canadian approach to constitution making. Alternative methods are suggested which would stop short of formal constitutional entrenchment of an obligation to provide named transportation services.

II. The Confederation Era 1867–1873: Transportation Undertakings as the Instrument of Political Union

A. *BRITISH NORTH AMERICA ACT, 1867*

A variety of factors led to the union of the British North American provinces in the mid-1860s, including the fear of annexation by the United States as well as the termination of the reciprocity treaty by the Americans in 1865.[9] But the key factor in securing support for the scheme, at least among the Maritime colonial leadership, was the commitment to construct an intercolonial railway. As one commentator has put it: "[c]ertainly there could have been in 1867 no confederation without the Intercolonial: there might have been an Intercolonial without confederation."[10]

By the early 1860s, the idea of constructing an intercolonial railway linking the Maritime provinces with Canada had been under discussion for at least two decades. Negotiations to build a rail link had been pursued actively but the discussions had ultimately foundered when the Canadians were unwilling to accept certain conditions demanded by Great Britain. By 1862, negotiations reached a stalemate.

When delegates from the various colonies of British North America gathered at Charlottetown in 1864 to discuss political union, the representatives from

New Brunswick and Nova Scotia saw the meeting as an opportunity to pursue their goal of securing a rail link with the markets of Canada. The Maritime delegates insisted that the construction of an intercolonial railway was a non-negotiable condition of their support for political union with Canada.[11] Nor were the Maritimers willing to accept a mere political commitment from the Canadians that such a railway would be constructed following Confederation. Instead, they insisted that the guarantee should be written into the terms of the imperial statute creating the new federation. Invoking the authority of Westminster would provide an ironclad guarantee that the Canadians would keep their promise to build the railway.

At the time there did not appear to have been any great controversy or objection to this way of explicitly guaranteeing the construction of the Intercolonial. Subsequent commentators have suggested that it is somewhat out of the ordinary to make explicit reference to the construction of a railway in a country's constitution. It should be remembered, however, that what was being contemplated was the enactment of an ordinary British statute. It is perfectly commonplace for ordinary legislation to make reference to quite specific matters, including the carrying out of contractual obligations. Clearly, the colonial leaders of British North America in the 1860s approached the matter on this footing. They were seeking to ensure that the commitment to build the Intercolonial could not be reversed by a subsequent Canadian government. The easiest and most straightforward way to secure this commitment was to set it out explicitly in an imperial statute. The British authorities would act as the "guardians" of the commitment, since any change in the terms of the undertaking would require the consent of Westminster.

The draft resolutions agreed to at the Quebec Conference in the fall of 1864 committed the new Canadian government to building the Intercolonial. Resolution 68 from the Quebec Conference reads as follows:

> 68. The General Government shall secure without delay the completion of the Intercolonial Railway from Rivière-du-Loup through New Brunswick to Truro in Nova Scotia.[12]

The importance attached to the construction of the Intercolonial is evident in a comparison of resolution 68 with the terms of resolution 69 from the Quebec Conference. Resolution 69, in its reference to the construction of a railway linking the western territory and the Pacific Ocean with the proposed federation, offered the following commitment:

> 69. The communications with the Northwestern Territory and the improvements required for the development of the trade of the Great West with the Seaboard, are regarded by this Conference as subjects of the highest importance to the Federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.[13]

The delegates clearly thought that cost considerations would govern the timing of the construction of the rail link with the west. The commitment to construct the western railway, while regarded as a subject of the "highest importance," was left to the discretion of the new government of the Dominion "at the earliest possible period that the state of Finances will permit." There was no such concern for cost with respect to the Intercolonial. The construction of that railway was expressed in mandatory terms: the general government "shall" secure the completion of the Intercolonial "without delay." The commitment was unqualified and unavoidable. The Canadian government was to secure construction of the railway without regard to considerations of cost or feasibility. The resolutions left no doubt that the construction of the Intercolonial was, from the point of view of the Maritimes, a "condition precedent" for political union.

The London resolutions in 1866 carried forward the explicit and unqualified commitment to construct the Intercolonial. Resolution 65 provided as follows:

> 65. The construction of the Intercolonial Railway being essential to the consolidation of the Union of British North America, and to the assent of the Maritime Provinces thereto, it is agreed that provision be made for its immediate construction by the General Government, and that the Imperial guarantee for three millions of pounds sterling pledged for this work be applied thereto, so soon as the necessary authority has been obtained from the Imperial Parliament.

The London version differed in certain important respects from the terms set out in the Quebec resolutions of 1864. First, the proposed railway was simply described as the "Intercolonial," without any reference to the starting or endpoint of the line; the reference to Rivière-du-Loup and to

Truro had been dropped. Second, while the London version referred to the fact that the construction of the Intercolonial was "essential to the consolidation" of the British Colonies, the language expressing the commitment was surprisingly vague. Whereas the Quebec resolution had indicated in mandatory terms that the General Government "shall secure, without delay, the completion of the Intercolonial Railway," the London version simply referred to the fact that "provision be made for its immediate construction by the General Government."

Finally, the London version stated that the Imperial Government would guarantee a loan of three million pounds sterling to enable the construction to proceed. The addition of this guarantee was of great practical value and represented the most significant modification from the earlier Quebec resolutions. Constitutional commitments are hardly worth the paper they are written on if they are not backed by the necessary funds. The financial guarantee from Great Britain would ensure that the constitutional commitment to build the Intercolonial would become a practical reality.

The wording of the London resolutions served as the basis for the drafting of the *British North America Act* (BNA Act) in January and February of 1867.[14] Section 145 of the *British North America Act, 1867*, as enacted by the British Parliament, set out the formal commitment to build the Intercolonial in the following terms:

> 145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

It can be seen that the first half of section 145 tracks precisely the terms of the comparable London resolution. It recites the agreement that the construction of the Intercolonial was essential to the union and that "provision should be made for its immediate Construction." The second half of the section, however, is new, setting out a "Duty" of the Government and Parliament of Canada. Certain features of the duty should be emphasized:

1. Whereas previous versions had referred only to the obligation of government alone, section 145 established a duty of the Government and *Parliament* of Canada. This is significant, since the duty to build the railway was thereby entrenched as a limitation on the legislative authority of the Canadian Parliament itself.
2. The obligation had a specific time frame attached; the construction was to commence within six months and was to proceed "without Intermission and . . . With all practicable Speed." Significantly, however, there was no specific date set for completion of the railway.[15]
3. The Intercolonial is specifically identified as linking the "River St. Lawrence with the City of Halifax," similar to the wording of the original Quebec resolution in 1864.
4. Section 145 makes no reference to the financial guarantee of the imperial government. This was because the financial guarantee was secured by a second imperial statute passed contemporaneously, entitled *An Act for authorizing a Guarantee of Interest on a Loan to be raised by Canada towards the Construction of a Railway connecting Quebec and Halifax*. Under this bill, three million pounds were provided for the construction of the railway.[16]

While the Parliament and Government of Canada undertook to secure the construction of the railway, section 145 is silent as to:

- the route to be selected for the railway;
- the amount to be spent on its construction; and
- the manner in which the railway would be operated once it has been completed, including such matters as fares and the general level and quality of service on the road.

However, these matters were dealt with elsewhere in the Act. Sections 92(10)(a) and 91(29) of the BNA Act granted the federal Parliament exclusive legislative authority over interprovincial railways. Thus the Parliament of Canada,

as opposed to the legislatures of the provinces, was granted exclusive legislative authority over the Intercolonial Railway. While Parliament's legislative authority was fettered to the extent that it was obliged to construct the railway, upon completion Parliament would be free to regulate the actual operation of the railway in accordance with the policy of the government of the day.

The larger significance of section 145 was in the precedent it established. Having secured the consent of New Brunswick and Nova Scotia to Confederation with the promise of a railway, the Canadian authorities would soon find that similar promises would be demanded from other prospective provinces. The Canadians would also find that the price would rise with the passage of time; the undertakings which Canada was asked to take on would become more costly and the terms and conditions more difficult to fulfil. Still, having once agreed to such a request, the Canadians could find little reason to reject subsequent proposals. The only issue to be negotiated was the extent and nature of the transportation obligations to be shouldered by the new federal government.

B. WESTERN EXPANSION: THE *MANITOBA ACT, 1870* AND THE *BRITISH COLUMBIA TERMS OF UNION* (1871)

The *British North America Act, 1867* made specific provision for the eventual expansion of the country westward to the Pacific Ocean.[17] In 1870 and 1871, the new nation began to make good on this promise of an expanded union as the provinces of Manitoba and British Columbia entered Confederation. But the terms on which the two provinces joined Canada were quite different, at least in the transportation obligations which were constitutionally assumed by the Canadian government.

For Manitoba, there were no specific constitutional entitlements to transportation services or infrastructure included in the *Manitoba Act, 1870*. In fact, the Act stated that any provision setting out a particular obligation regarding another province or group of provinces had no application with respect to Manitoba.[18] This meant, for example, that the guarantee of a transcontinental railway made to British Columbia was made to that province alone and had no application to Manitoba. The explanation for this variation in approaches is straightforward. Manitoba, unlike British Columbia, did not have to be persuaded to join Confederation. The huge land mass to the west of Ontario known as Rupert's Land and the North-Western Territory was annexed to Canada by imperial Order in Council in 1870.[19] Immediately following the admission of the territories, the federal Parliament by statute created the province of Manitoba out of part of Rupert's Land. Since the land in question was already included within the Dominion, there was no need to use transportation promises to induce the new province to join Confederation.

Such was not the case with British Columbia. In 1867, the colony of British Columbia had watched the creation of the Canadian federation with great interest, even to the extent of passing a resolution in favour of admission to the Dominion. Following the annexation of Rupert's Land in 1870, delegates were sent from British Columbia to Ottawa to discuss the terms of B.C.'s entry to the federation.

British Columbia's interest in union with Canada did not prevent the western delegates from seeking advantageous terms for joining. Before leaving Victoria, the Legislative Council had debated and approved a series of specific proposed terms for admission to Canada, including specific undertakings for transportation services or infrastructure which were to be guaranteed by the Dominion. As in the case of the Intercolonial Railway, these were to be explicitly set out in the Terms of Union and thus permanently bind the Government of Canada. The most significant of these proposed guarantees was for a transportation link between British Columbia and the rest of the Dominion. British Columbia sought two commitments from Canada in this regard:

1. Construction of a coach road between B.C. and Fort Garry, to be completed within three years;
2. The immediate commencement of surveys for a transcontinental railway, with Canada committed to completion of the railway "at the earliest practicable date"; construction of the B.C. portion of the railway was to commence within three years.[20]

Note that, while the Dominion was asked to actually construct the coach road and to open it for traffic within three years, no firm time frame was even requested with respect to the construction of a railway. The B.C. proposal simply asked that the railway be constructed "at the earliest practicable date"; what was "practicable" would no doubt be influenced

by considerations of cost and feasibility. At the time, no surveys had been made of the route through the mountains of British Columbia. Thus the overall cost of the undertaking was unknown and probably unknowable in advance.[21] In short, the opening proposal from the British Columbians clearly contemplated that it might be quite some time before the transcontinental railway was actually completed.

What is somewhat surprising is that the final terms agreed upon went beyond the colony's request. Term 11 of the B.C. Terms of Union provided as follows:

> 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.
>
> And the Government of British Columbia agrees to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the north-west territories and the Province of Manitoba. Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further, that until commencement, within two years, as aforesaid, from the date of union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

The final version of the Terms of Union made no reference to British Columbia's original request for construction of a coach road linking the colony with Canada. However, the Government of the Dominion had assumed a much more onerous obligation regarding the construction of a transcontinental railway. The nature of the obligation can be discerned by comparing the main features of Term 11 with the original British Columbian request:

1. Term 11 stated that construction on the railway linking B.C. with the rail system of Canada had to begin *within two years* of the date of union and that construction had to start simultaneously in British Columbia and in Canada; under the original B.C. proposal, the only requirement was that construction of the initial sections of the railway *in B.C.* was to begin *within three years*;
2. Term 11 stated that the railway had to be completed *within 10 years* of the union; the original B.C. proposal merely required the construction to be completed at "the earliest practicable date."

It is unclear why the Canadians were prepared to accept such an onerous obligation, particularly the requirement that the railway be completed within 10 years. Early drafts of section 145 of the BNA Act had contemplated the establishment of a fixed completion date for the Intercolonial, but the Canadians resisted the idea that the BNA Act should specify a date for completion. In the B.C. case, the Canadians were prepared not only to fix a completion date for the railway but were prepared to do so for a project immeasurably more difficult than the Intercolonial.[22]

The main explanation for this new approach appears to relate to the Canadian government's desire to bind its successors to its own railway policy.[23] Certainly the inclusion of the fixed completion date for the project aroused considerable opposition when it was debated in the Canadian Parliament. The leader of the Liberal opposition, Alexander Mackenzie, moved an amendment to the Terms of Union to the effect that Canada should be

pledged only to make surveys and to build the railway as finances might allow. But Mackenzie's amendment was defeated, and the unqualified obligation to complete the railway within 10 years was approved.

It should be noted that the formal constitutional obligation of Canada was limited to the actual construction of the railway; there is no mention of operation of the railway. Once the construction was completed, Canada would have fulfilled its obligation under Term 11. The absence of any requirement to "maintain" the railway after its completion was not accidental. In formulating its original request, the B.C. Legislative Council had instructed its negotiators to seek a commitment that Canada would construct "and maintain" a coach road linking the colony with Canada.[24] Similarly, B.C. had requested that an "efficient Coast Mail Service . . . be established and maintained. . . ."[25] Thus the omission of reference to any requirement to "maintain" the railway suggests that the obligation was simply to construct the railway and not to operate or maintain it afterward.

There were other transportation obligations assumed by the federal government under the B.C. Terms of Union. Under Term 4, the Dominion undertook to "provide an efficient mail service, fortnightly, by steam communication between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers." This obligation was in response to what had originally been two separate requests from the B.C. delegation: (a) that the Dominion government "supply an efficient and regular fortnightly steam communication between Victoria and San Francisco" and (b) that the Dominion government "establish and maintain" efficient coast mail service between Victoria, New Westminster, Nanaimo "and such other places as may require such services."[26] Steam communication between Victoria and San Francisco was requested because San Francisco was the western terminus for the American transcontinental railway, at the time, and the main means of communication between British Columbia and Canada. Ferry service to San Francisco then, was an important transportation link with the other Canadian provinces. At the same time, it was recognized that the San Francisco ferry service would become unnecessary once the Canadian transcontinental railway was completed.

During the debate over the Terms of Union in the B.C. Legislative Council, it was argued that the reference to a ferry service to San Francisco was a mere "makeweight," and not an essential condition of the colony's entry into Confederation.[27] In the end, the British Columbian proposals requested that a ferry service to San Francisco be "supplied"; the comparable B.C. proposal dealing with the coastal mail service stated that such service was to be "established and maintained." The absence of any requirement to "maintain" the San Francisco service might be taken to suggest that the obligation would not necessarily continue indefinitely.[28]

Term 4 of the B.C. Terms of Union combines these two requests. Under Term 4, the Dominion is required to "provide" an efficient mail service linking Victoria with both San Francisco and Olympia on the mainland. The absence of the explicit requirement to "maintain" the service may indicate some ambiguity as to the duration of the commitment. There is no indication as to the precise meaning which the drafters associated with the requirement to "supply" mail service. Unlike Term 11 and the transcontinental railway however, Term 4 of the B.C. Terms of Union suggests that the obligation to supply ferry services in British Columbia was an obligation that would continue over time. Nor is there any indication that the obligation to "supply" the service would terminate at some fixed point in time. It seems that the Dominion requirement to "supply" the named ferry service was expected to continue indefinitely, until such time as the Terms of Union themselves were amended.[29]

C. THE *PRINCE EDWARD ISLAND TERMS OF UNION* (1873)

While Prince Edward Island delegates had participated in both the Charlottetown and Quebec conferences in 1864, the Islanders were opposed to the proposed terms of Confederation as reflected in the Quebec resolutions. One of the main complaints was that the Quebec resolutions required construction of the Intercolonial; the P.E.I. delegates regarded the Intercolonial as imposing a heavy tax burden on Island residents without any corresponding benefit.[30] Following the Quebec Conference, the Prince Edward Island colonial Legislature passed resolutions rejecting the proposed terms of Confederation.

Following Confederation, negotiations to secure the Island's admission to Canada continued. In December of 1869, the Canadian government made a formal offer of new terms that were a significant improvement over what had been offered to P.E.I. under the Quebec resolutions. One of the terms in

the Canadian offer was for provision of a ferry service linking the Island with the mainland. The Canadian offer stated that "Efficient Steam Service for the conveyance of mails and passengers was to be established and maintained between the Island and the Mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the International Railway and the Railway system of the Dominion."[31] Although the 1869 offer had been framed in accordance with the advice of R.P. Haythorne, the Premier of the Island, it was still regarded as inadequate by the Island government.

One of the main objections was that the new terms made no provision for construction of a railway on the Island. At a series of public meetings held in Prince Edward Island in early 1870, it was argued that the terms would be acceptable only if they were supplemented by a sum sufficient for the construction of a railway. It was suggested that since P.E.I. would have to bear a portion of the expense of building Canadian railways, it was appropriate for the other provinces to contribute towards the construction of a railway on the Island.[32] In April of 1870, the P.E.I. Legislative Council unanimously rejected the proposed Canadian terms.

In 1871, the Island decided to undertake construction of a railway on its own, without assistance from Canada. Legislation was passed providing for the construction of a railway the length of the Island, with the contractors to be paid through the issuance of debentures. The P.E.I. government estimated that the annual interest on the required capital would amount to 30,000 pounds, money that could be raised through a combination of modest tax increases and revenues raised from the operation of the road.[33] The actual costs, however, wildly exceeded these estimates. By 1873, total expenditures on the Island railway had exceeded $3.2 million and the annual interest on the debt was nearly $200,000. To place this debt load in perspective, the entire Island revenue from all sources for 1873 was a mere $395,000.[34] The Island was simply unable to meet the financial obligations associated with the railway and looked to Confederation with Canada as a means of escaping bankruptcy.

Negotiations with the Canadian and imperial authorities began in early 1873. While the Canadians realized that the Island's financial crisis had prompted the negotiations, they agreed to relatively generous terms to secure the admission of P.E.I. to Confederation. The final Terms of Union were drafted and mutually signed on May 15, 1873. The Dominion was to take over the railway that had threatened to cause the financial collapse of the Island government.[35] While the cost of the railway was to be charged against the Island as a local debt, the Dominion agreed to a "debt allowance" of $50 per capita, twice the amount which had been agreed to in the case of the other provinces. P.E.I. was to receive an interest payment from Canada on the difference between its "debt allowance" and its actual debts upon admission.[36] Furthermore, since Canada had taken over the Island railway, all further costs associated with the railway would be the responsibility of the Dominion government rather than the Island.

It was further agreed that the Dominion government would "establish and maintain" a ferry service linking the Island with the mainland.[37] The use of the word "maintain" is significant; this was the first occasion that the Canadian government accepted the responsibility to ensure the continued operation of a transportation service. The undertaking was apparently open-ended, and there is specific reference to the fact that the ferry service must place the Island in "continuous communication" with the mainland. However, the use of the word "maintain" in connection with the ferry service coupled with its absence in the case of the Island railway is significant. It indicates that the obligation to "take over" the railway does not entail any obligation to "maintain" or actually operate the system.[38]

One final transportation obligation of a relatively minor nature was included in the P.E.I. Terms of Union. The Dominion government assumed the cost, approximately $2,500 per year,[39] of maintaining telegraph communication between the Island and the mainland.[40] As with the ferry service, the obligation to "maintain" the telegraph entailed an ongoing obligation until such time as the Terms of Union themselves were modified.[41]

III. Making Good on the Obligations, 1873–1945: Transportation Undertakings as an Instrument of National Policy

Transportation undertakings played a key role in securing political support for Confederation among the colonial leadership in British North America. The distinctive feature of these undertakings was their explicit guarantee by imperial statute. Successive Canadian governments would be bound, as a

matter of law, to carry out the undertakings agreed to at the time of Confederation. The "guarantee" by Great Britain insulated them from the vagaries of Canadian party politics and from the unpredictable hazards of electoral contests. This was their overwhelming attraction to reluctant or doubtful political leaders in the various colonies.

It was one thing to assume certain obligations and have these obligations set out in imperial legislation. It was quite another matter actually to carry them out. The Intercolonial or the transcontinental railway may have existed on paper but passengers or freight could not be moved by means of constitutional language alone, no matter how majestic or unambiguous the wording. Moreover, the transportation undertakings which the Canadian government had assumed in the 1867–1873 period were extremely onerous, given the significant debt load which the new federation had inherited from the former colonies. There was no reason to assume that the government of the new Dominion would be capable of meeting all such obligations.

A. THE INTERCOLONIAL RAILWAY

In late 1867, the Parliament of Canada passed *An Act respecting the construction of the Intercolonial Railway*.[42] This Act authorized the construction of the Intercolonial from Rivière-du-Loup to Halifax and placed the project under the authority of a board of four commissioners appointed by the Government (section 3). The Act also provided for a loan of four million pounds to finance construction, of which three million was guaranteed by the imperial government (sections 27, 32). The Chief Engineer, Sir Sandford Fleming, estimated the total cost of the project to be approximately $20 million.

The legislation did not specify the route which the Intercolonial should follow. This was a matter of considerable controversy, particularly with respect to the location of the line through New Brunswick. Some argued that the line should run close to the American border in order to take advantage of railways which had already been constructed; others argued for a northern route which would be safer from a military point of view; still others suggested a central line through the province.

In the end, political and military considerations won out and the northern route was followed, a decision that proved to be a source of resentment and grievance for Maritimers for many years. Maritime political leaders charged that the northern route added to the cost of construction while increasing the distance and the costs of transportation between Halifax and the markets of Central Canada. The decision in favour of the northern route, as well as the subsequent government management of the railway, contributed significantly to the sense of Maritimers' regional grievances over their status within the federation.[43]

The railway was completed in 1876. The final cost of construction came to $34 million, some $14 million more than estimated, with the difference being financed entirely by the Government of Canada.[44] Control of the railway had been removed from the four commissioners and placed directly under the authority of the federal Minister of Public Works in 1874.[45] The Government of Canada found itself in the business of running a railroad.

From the day it opened, the Intercolonial was a losing proposition. In part, this was a product of the artificially low rates which were charged on the line. On average, freight rates on the Intercolonial were discounted approximately 20 percent from comparable rates in Central Canada. The Maritimes insisted that these discounted freight rates were appropriate, because of the selection of the longer northern route through New Brunswick. In 1927, this preferential rate structure for the Maritimes was given a statutory basis in the *Maritime Freight Rates Act, 1927* (S.C. 1927, c.44) whose purpose was described as to give "certain statutory advantages" in rates to persons and industries in "select territory" (section 7).

It must be emphasized that the decision to grant preferential rates was a matter of government policy rather than constitutional entitlement; nothing in section 145 of the BNA Act constrained the Government of Canada in its determination of rates on the Intercolonial. The lack of connection between section 145 and the rate structure is illustrated by the repeal of section 145 by the United Kingdom Parliament in 1893. Despite this repeal, the Maritimes insisted on continuation of the policy of discounted rates and the successive Canadian governments carried on with this preferential policy.

The Intercolonial never became profitable. In 1923, along with other government-owned railways (the P.E.I. Railway, the Grand Trunk and Grand Trunk Pacific and Canadian Northern), it was amalgamated into the Canadian National railway system.[46] Since then, what had been the Intercolonial has continued to be operated as a public enterprise by either CN or VIA Rail.

B. BUILDING THE CANADIAN PACIFIC RAILWAY

In 1871, the Canadian government decided that the railway to the Pacific would be built by a private corporation rather than by the government itself (see S.C. 1871, c.71). The government would provide assistance to the contractors through grants of land and subsidies, up to a limit of 50 million acres and $30 million. But the negotiations between the government and potential contractors soon became mired in scandals and charges of corruption, eventually bringing down the Macdonald Government in 1873.[47]

The subsequent Mackenzie administration had an entirely different attitude towards the construction of the Pacific railway, believing that the line could be built only as financial resources permitted. Prime Minister Mackenzie took the view that the promise of completion within 10 years was physically impossible to fulfil and should never have been given in the first place. Negotiations began between British Columbia and Ottawa in an effort to find some compromise acceptable to all parties.

The federal government sought an extension of the time for completion, and in return offered to construct a railway on Vancouver Island between Esquimalt and Nanaimo. The British Columbia government was unhappy with this proposal, maintaining that the construction of the Esquimalt-Nanaimo line was part of the original obligation under Term 11.[48] The negotiations dragged on for years with the Colonial Secretary, Lord Carnarvon, acting as an arbitrator and trying to help the parties identify a mutually acceptable compromise.[49]

The two governments finally reached agreement in 1883, two years *after* the original deadline for construction of the CPR. By this time, the main line of the railway was nearing completion. The Settlement Agreement of 1883 stated that it represented a settlement of all claims by the province in respect of "delays in the commencement and construction of the Canadian Pacific Railway and in respect of the non-construction of the Esquimalt and Nanaimo Railway." As for the island railway line,[50] British Columbia was to transfer a large portion of land on Vancouver Island to Canada which in turn agreed to grant this land to a private company for the construction of the line. The land would be exempt from taxation by the province as long as it was used for railway purposes. The federal government agreed to provide a subsidy of $750,000 for the construction of the Island railway. Under the terms of the Agreement, construction was to "commence forthwith" and was to be completed by June of 1887.[51]

The Agreement was ratified by legislation passed by the B.C. Legislature and by the Parliament of Canada,[52] and the federal government contracted with a private company to construct the line. The terms of this second agreement were attached as a "schedule" to the federal legislation implementing the Settlement Agreement with British Columbia. Under this agreement, the contractors (known as the Dunsmuir Syndicate) were obliged to "construct, complete, equip, maintain and work continuously" the line of railway between Esquimalt and Nanaimo (section 3 of the Agreement). The contractors also agreed to maintain the railway "in good and efficient working and running order" (section 9) and to equip the railway in accordance with specifications set down by the federal government (section 10). The construction proceeded largely according to schedule, and in 1886 the 70-mile stretch of railway between Esquimalt and Nanaimo was completed and opened for traffic.

While the governments were reaching a settlement of these issues, the construction of the CPR main line was nearing completion. Under the terms of a contract signed in 1881, the federal government granted the Canadian Pacific Railway Company a subsidy of $25 million and a land grant of 25 million acres to complete the railway by May of 1891. The company was also granted a permanent exemption from taxation by all levels of government.[53] In return, the company agreed to construct the line and to "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway."[54] The terms of the contract with the CPR were approved and ratified by federal legislation.[55] In November of 1885, Donald Smith hammered in the last spike of the Canadian Pacific Railway and the project of a transcontinental railway was finally completed.

All the various agreements, contracts and statutes entered into regarding the completion of the Canadian Pacific Railway were incorporated into federal or provincial legislation and, accordingly, were legally binding. However, these statutes have been a source of considerable litigation over the years, primarily in relation to attempts by provinces to modify or cut down the tax exemptions which they contemplated.[56] But the important point, from a constitutional standpoint, is that none of these agreements or

statutes altered section 11 of the B.C. Terms of Union. Thus, while they may have been legally enforceable, they were not constitutionally entrenched. They could be amended or modified by Parliament or by a province, subject to the paramountcy of federal laws over provincial laws.[57]

For example, in 1950 the Privy Council decided that the British Columbia legislation granting a tax exemption for railway lands on Vancouver Island could be amended or repealed by the provincial legislature.[58] Similarly, the federal legislation establishing the Canadian Pacific Railway was ordinary federal law which could be amended or repealed as the Parliament of Canada saw fit.[59] In this sense, the agreements did not themselves constitute a constitutional limitation on the jurisdiction of Parliament. The only constitutionally mandated obligation remained that specified in Term 11 of the B.C. Terms of Union: to secure the construction of the CPR.

While fulfilment of Term 11 proved a source of great controversy and dispute, there were no significant problems in satisfying the other transportation obligations in the B.C. Terms of Union. To fulfil its obligation to provide efficient mail service between Victoria and both San Francisco and Olympia, the federal government contracted with private carriers and paid any necessary subsidies. There is no record of any complaint from the province regarding the quality or level of the service. In 1925, the two governments agreed that further subsidy of the Victoria to San Francisco service was unnecessary. The federal subsidy of $3,000 which had been paid towards this service was used by the province to improve mail service within British Columbia rather than for the San Francisco service.[60]

While the province had agreed that the federal government should be "relieved of its obligation to maintain a subsidized steamship service between Victoria and San Francisco,"[61] no change was made in the Terms of Union themselves. Accordingly, Term 4 of the Terms of Union continues to refer to the obligation to provide mail service on the Victoria–San Francisco route, even though this service was discontinued in 1925.

C. THE PRINCE EDWARD ISLAND FERRY

In the years following Confederation, the operation of the ferry service connecting P.E.I. with the Canadian mainland proved to be a source of considerable dispute. The federal government was obliged to provide this ferry service under the Terms of Union with the province. The federal government attempted to fulfil this obligation by contracting with private companies to provide a subsidized service during the summer months. There appears to have been considerable dissatisfaction with the winter service which was provided by the government itself, using ferries operated by the Department of Marine and Fisheries.

In April of 1901, the province presented a memorial to the federal government alleging a failure by the Government of Canada to fulfil its obligation to provide a "continuous communication" between the Island and the mainland. The memorial claimed that the federal government's "solemn undertaking was systematically and continuously broken from the year 1873 to 1888 when for the first time in that latter year an adequate vessel was constructed and placed in service during the winter season."[62] The province claimed damages in the amount of $5 million for the alleged breach of the Terms of Union and asked that the claim be referred to a board of arbitrators. The federal government referred the claim to a committee which found that the federal government had failed to satisfy its obligations during the winter months of 1873 to 1887. The committee recommended that the province be paid an allowance of $30,000 annually as compensation. The government accepted the recommendation and passed legislation authorizing the payments, stating that they would "be paid and accepted in full settlement of all claims of the said province against the Dominion of Canada on account of the alleged non-fulfilment of the terms of Union."[63]

Following the 1901 settlement, there were further provincial complaints regarding the ferry service. In 1912, the Province presented another memorial seeking an increase in the annual subsidy set out in the 1901 legislation. The provincial claims were again referred to a committee for consideration. Following a series of negotiations, Parliament passed legislation authorizing an increase of $20,000.[64] The federal government has continued to pay these subsidies annually in accordance with the terms of the legislation.

Following these two settlements, provincial complaints regarding the operation of the ferry service appear to have diminished. The federal government contracted with Northumberland Ferries Limited to operate a ferry service between P.E.I. and Nova Scotia and, beginning in 1923, employed CN Railway to operate the service between P.E.I. and New Brunswick. Until

the nation-wide strike by CN Rail in 1973, which resulted in a work stoppage of 10 days and a shutdown of the ferry service to New Brunswick, the federal government appears to have satisfied its obligations under the Terms of Union.

D. SUMMARY: POLITICAL OVER LEGAL ENFORCEMENT

The various transportation obligations reviewed here were all established by imperial statute or Order in Council. As such, they were legally binding obligations that could not be unilaterally altered by the federal government. While the obligations were binding, the striking feature of these provisions is that there was no legal mechanism for enforcing them. The only machinery contemplated by the *British North America Act* for settling disputes between Canada and the provinces in 1867 was section 142, relating to disputes over the division of debts and assets — a mechanism that did not apply to transportation obligations. In the absence of legal machinery for settling disputes, the parties would have to rely on negotiation, political pressure or the intervention of third parties to ensure that the obligations were carried out.

The early history of these obligations confirms that this was in fact the prevailing understanding of how they were to be enforced. In each instance when a dispute arose, the parties commenced political negotiations designed to reach a compromise acceptable to both sides. There was no attempt to invoke judicial involvement in the settlement of the dispute. Thus the dispute between British Columbia and Canada over the construction of the CPR was resolved through direct political negotiations as well as through the intervention of the imperial authorities. Similarly, when the Prince Edward Island government became unhappy with the manner in which the Island ferry service was being operated, it presented a brief to the federal government rather than to the courts.

A second observation is that, because the enforcement mechanism was political rather than legal, the political authorities of the time resolved their disputes without regard to the precise legal limits of the particular obligation. Under the B.C. Terms of Union, for example, the federal government was obliged to construct a railway to the "Seaboard" of British Columbia; it later agreed to finance construction of a railway line on Vancouver Island, even though such a line was not expressly required.

Similarly, the only constitutional obligation of the British Columbia government under Term 11 was to transfer land that was directly along the main line of railway in the province; it later agreed to transfer an additional block of some 3.5 million acres in the interior of the province when the land originally to be transferred proved to be of lower value than expected.

The same pattern is repeated in the case of the Intercolonial Railway and the P.E.I. Terms of Union. In the case of the Intercolonial, the constitutional obligation of the Canadian government was limited to the actual construction of the railway. Subsequently, however, the government adopted a policy of discounting freight rates on the line, even though there was no constitutional obligation to do so. In P.E.I.'s case, the federal government agreed to provide an annual subsidy of $50,000 in perpetuity following provincial complaints over the quality of the ferry service.

In each case, there was no attempt to insist on the strict letter of the law; the overriding concern was to ensure that political compromises acceptable to all parties were achieved. Such reliance upon political mechanisms as an instrument of enforcing constitutional obligations was regarded at the time as entirely appropriate and straightforward. The political leaders of the 19th century would no doubt have been surprised by the modern tendency to rely on legal mechanisms to insist on strict adherence to constitutional commitments.

IV. Completing Confederation 1949: Transportation Undertakings in the Newfoundland Terms of Union

The Newfoundland Terms of Union contain the most detailed set of constitutional obligations of any province in Canada. This is hardly surprising since the drafters of the terms had before them the precedents established by the Terms of Union with the other provinces as well as the interpretation of those terms.

The colony of Newfoundland at the time of Confederation in 1949 was particularly concerned about the status of the Newfoundland Railway which it had started to build in the late 19th century. The cost of its construction imposed a crippling financial burden on the island economy,

and the operation of the railway generated large financial losses.[65] Although the railway was taken over by the Newfoundland government in 1923, it remained unprofitable.[66] In the negotiations over the Terms of Union, the Newfoundlanders proposed that the federal government be responsible for any and all financial losses associated with the operation of the railway. The Canadian authorities' agreement is reflected in Term 31 of the Terms of Union:

> 31. At the date of Union, or as soon thereafter as practicable, Canada will take over the following services and will as from the date of Union relieve the Province of Newfoundland of the public costs incurred in respect of each service taken over, namely,
>
> (a) the Newfoundland Railway, including steamship and other marine services;

During the negotiations, the Newfoundland authorities expressed some concern that the Terms of Union did not require the federal government to continue operating the Newfoundland Railway. The only obligation stated in Term 31 was to "take over" the railway and to pay for any losses which might arise from its operation. This suggests that the federal government would be in compliance with Term 31 as long as it ensured that the province did not have to assume any of the losses of the Newfoundland Railway. But the federal government apparently reserved the right to determine the level of service on the railway or, indeed, to shut it down entirely.

During the negotiations leading to Newfoundland's entry into Confederation, the Newfoundland authorities sought clarification of what was entailed by Canada "taking over" the Newfoundland Railway. Prime Minister St. Laurent replied:

> During the course of our negotiations covering the final terms and arrangements for the union of Newfoundland with Canada a number of questions concerning Government policy were raised by your delegation and answered by the Canadian Government. In addition a number of temporary administrative arrangements were settled in order to facilitate the union.
>
> It would not seem fitting to include in formal terms of union matters of this kind, since they are scarcely of a constitutional nature. I am therefore sending you the enclosed memorandum covering these various items. While these will not form part of the Terms of Union, they contain statements of the policy and intentions of this Government if union is made effective by the approval of the Parliament of Canada and the Government of Newfoundland and confirmed by the Parliament of the United Kingdom.
>
> Yours sincerely
> Louis S. St. Laurent
> [enclosure]
>
> STATEMENTS ON QUESTIONS RAISED BY THE NEWFOUNDLAND DELEGATION
>
> (xiv) NEWFOUNDLAND RAILWAY
>
> After the date of Union, the Canadian National Railways will be entrusted with the responsibility of operating the Newfoundland Railway and Coastal Steamship Services, and it will be their responsibility to see that the services are furnished commensurate with the traffic offering.[67]

The Sullivan Commission, in its report to the Newfoundland House of Assembly in 1978, argued that the letter from Prime Minister St. Laurent had the effect of modifying the Terms of Union. The Commission took the position that the letter obligated the federal government to maintain the Newfoundland Railway, regardless of cost, as long as there was reasonable demand for its services.[68]

This interpretation of the effect of the letter seems rather doubtful. In the first place, while the courts will no doubt consider material such as parliamentary debates, government reports and other documents,[69] they tend to accord such material minimal weight in assigning meaning to the Constitution.[70] Secondly, St. Laurent's letter specifically distinguished between "government policy" and matters of a "constitutional nature." St. Laurent indicated that the policy and intentions of the government regarding the Newfoundland Railway "are scarcely of a constitutional nature . . . [and] will not form part of the Terms of Union." Thus St. Laurent himself suggested that the undertaking to operate the railway was a political rather than a constitutional commitment and that a conscious decision

was made *not* to include this duty in the Terms of Union. Thirdly, St. Laurent indicated that the policy of the government was to entrust the operation of the Newfoundland Railway to CN Rail and that "it will be *their* responsibility" [our emphasis] to see that the services were operated in accordance with the traffic offering. In effect, St. Laurent did not commit the government to ensure the continued or perpetual operation of the railway. The responsibility was to be imposed on CN by the government. The implication is that a subsequent government could decide to modify the terms and conditions under which CN would operate the railway.

This is precisely the approach taken in the federal Order in Council entrusting the operation of the railway to CN on condition that "such management and operation shall continue during the pleasure of the Governor in Council and be subject to termination or variation from time to time in whole or in part by the Governor in Council."[71] Under the terms of the Order, the federal government specifically contemplated the possibility that the operation of the railway would be "terminated . . . in whole or in part." This provision can be contrasted to the terms set out with respect to the operation of the Canadian Pacific Railway, which specifically required the corporation to operate the railway in perpetuity. The absence of any such requirement in the 1949 Order In Council indicates that the government of the day did not believe that it had any constitutional obligation to ensure the perpetual operation of the railway.

A further significant consideration is that in Term 32(1) of the Newfoundland Terms of Union, the federal government specifically undertakes an obligation to maintain a specific transportation service, namely, the ferry service between North Sydney and Port aux Basques.[72] This makes the failure to include any such statement with respect to the Newfoundland Railway all the more decisive.

Although this provision is similar to the ferry service provisions in the P.E.I. Terms of Union, it differs in its stated obligation to maintain the service "in accordance with the traffic offering." The Sullivan Commission in 1978 speculated that there might be circumstances in which traffic would cease to "offer" and that, in such a case, the obligation to provide the service would cease. However, the Commission emphasized that such a situation would be exceptional and would arise only when there was no longer any demand for the service.[73] It is evident that the obligation to provide the ferry service between North Sydney and Port aux Basques is very nearly absolute, similar in practical effect to the obligation regarding ferry service in P.E.I.

Between 1867 and 1873, railway rate regulation by the government was unknown. Rates were regarded as a matter of contract to be left to the determination of the market. Thus the various transportation obligations assumed by the federal government during this early period made no reference to them. By the 1940s, of course, the government had assumed a significant role in regulating railway rates. Thus it is hardly surprising that the Newfoundland Terms of Union would make reference to rates to be charged on the named transportation services. The relevant provisions in Term 32 were as follows:

> (2) For the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime region of Canada, and through-traffic moving between North Sydney and Port aux Basques will be treated as all-rail traffic.
>
> (3) All legislation of the Parliament of Canada providing for special rates on traffic moving within, into, or out of, the Maritime region will, as far as appropriate, be made applicable to the Island of Newfoundland.

The effect of Term 32(2) was to impose a constitutional cap on railway rates in Newfoundland and on the Port aux Basques ferry. Rates on the Island of Newfoundland itself were to be fixed in accordance with comparable rates in other parts of the Maritimes. Thus, even though transportation in Newfoundland might be more difficult or costly, rates were not permitted to move above the level of rates throughout the Maritimes.[74] Further, Term 32(2) stated that the rates for rail traffic moving on the Port aux Basques ferry were to be set as if the traffic were moving on land rather than by ship.

Term 32(3) has a slightly different impact. This term did not impose an absolute rate cap. Rather, it simply required that any legislation enacted by the Parliament of Canada providing for special or preferential rates for the Maritime region would also be applied to Newfoundland. There is no obligation to enact such legislation, however. Nor is the federal government constitutionally barred from repealing any legislation which it chooses to

enact, as long as it treats Newfoundland on a footing identical to that of the other Maritime provinces. Of course, given the long history of preferential freight rates for the Maritimes, dating back to the operation of the Intercolonial Railway, the possibility of repealing such legislation is perhaps more theoretical than real. The point is simply that nothing in the Terms of Union prevents Parliament from amending its legislation, as long as any preferential rates applying in the Maritimes also apply in Newfoundland.

V. The Present Status of the Undertakings: The Movement from Political to Legal Enforcement

As we have seen, the original method for enforcement of federal government transportation obligations was political rather than strictly legal. A province that was unhappy with the way in which the federal government was carrying out its responsibilities would typically complain to the federal or imperial authorities. Eventually some compromise solution would be proposed which met the concerns of both levels of government.

In recent years, there has been a slow but discernible shift in the approach to these various constitutional entitlements. Although the transportation obligations set out in the Canadian Constitution continue to be the subject of political negotiations and bargaining compromise between the two levels of government, there is an increasing tendency to seek judicial and legal enforcement of these obligations, rather than to rely exclusively on political avenues of redress. The courts have demonstrated a willingness to take on responsibility for enforcing these obligations, and have assumed an increasingly significant role in their interpretation.

A watershed in this regard was litigation undertaken by the Prince Edward Island government in the mid-1970s following the shutdown of part of the Island ferry during a labour dispute.[75] This case established the proposition that provincial governments could seek enforcement of transportation obligations through the courts. The case also attempted to define the precise legal nature of the obligations and the extent to which it was open to private citizens to seek legal enforcement.

A. THE PRINCE EDWARD ISLAND FERRY

A nation-wide legal strike by employees of CN Rail in August of 1973 resulted in the shutdown of the ferry service between New Brunswick and P.E.I. for 10 days. Although ferry services were still operating between Nova Scotia and P.E.I. as well as air service to and from the Island, since it was the height of the tourist season, these alternative services were unable to meet the demand. As a result the shutdown had a major negative impact on the Island economy.[76]

The province commenced an action in the Federal Court seeking damages for the losses suffered by the Island during the strike. The province alleged that the federal government had breached its obligation under the P.E.I. Terms of Union to maintain an efficient ferry service linking the Island and the mainland and that the province had a right to compensation for the resulting losses.

The trial judge, Mr. Justice Cattanach, agreed with the province that the federal government had breached its constitutional obligation to provide an efficient ferry service. Holding that an "efficient" service is one that is reasonably capable of meeting the demand for the service, he concluded that there had been a breach of this undertaking during the strike since the service was "wholly inadequate for the need at that time."[77]

However, Mr. Justice Cattanach stated that this breach of obligation did not give rise to an action for damages by the province. In arriving at this conclusion, Cattanach J. distinguished between actions for declaratory relief and actions for damages. He was prepared to grant a mere declaration setting forth the rights and obligations of the Dominion vis-à-vis the province,[78] but he concluded that the province could not succeed in an action claiming monetary compensation for breach of the obligation to provide ferry service. His reasoning was that the obligation was one owed to the public generally rather than for the benefit of any particular individual or class of individuals. Because the obligation had been created for the general public good, Cattanach J. reasoned that no particular person or even province had a right to seek damages for a breach of the obligation.[79]

The Federal Court of Appeal agreed with Justice Cattanach that the federal government had breached its constitutional obligation to provide an efficient ferry service. However, a majority of the Court disagreed with his

conclusion that the province could not bring an action for damages. Chief Justice Jackett concluded that the effect of the Terms of Union was to impose a legal duty on "Canada" in favour of "the Province" of Prince Edward Island. He reasoned that when there is a statutory right to have something done, there is an implied right to be compensated for a breach of such right.[80] Jackett C. J. concluded that the province of Prince Edward Island, as opposed to the residents of the Island themselves,[81] had a right to be compensated for losses sustained due to the interruption of ferry service.

In a separate opinion, Mr. Justice Le Dain agreed with this conclusion. He stated that breach of the constitutional obligation to provide ferry service did not permit individual citizens to sue for monetary compensation. However, he was of the view that the provincial government could sue for any loss directly caused to it by the failure to provide efficient ferry service.[82]

In summary, this case established the following three propositions:

1. The constitutional transport obligations set out in the P.E.I. Terms of Union are legally enforceable;
2. In the event that the obligations are not fulfilled, the provincial government has a right to monetary compensation from the Government of Canada for losses resulting from the breach; and
3. It is unlikely that individual citizens have any right to compensation for losses which they might have suffered as a result of the breach of the obligation; the right to compensation is apparently limited to the provincial government alone.

It is important to consider whether the principles set down in *Canada v. P.E.I.* have been modified in any way by the enactment of the *Constitution Act, 1982*. Section 52(1) of the *Constitution Act, 1982* provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The "Constitution of Canada" is defined in section 52(2) and it includes the BNA Act, 1867, the *British Columbia Terms of Union*, the *Prince Edward Island Terms of Union* and the *Newfoundland Act*.[83] It is evident, in other words, that all of the various provisions establishing transportation obligations of the federal government are included within the meaning of the term the "Constitution of Canada."

Thus, under the terms of section 52, any law that is inconsistent with the constitutional provisions establishing these transportation obligations is of "no force and effect." Any attempt by the Parliament of Canada to modify or reduce its constitutional obligations to provide transportation services is legally invalid. It is clear that a provincial government could seek a declaration of invalidity in accordance with section 52 of the *Constitution Act, 1982*.[84] The only remaining question is whether private individuals could also bring such an action. The Federal Court of Appeal in the *Canada v. P.E.I.* case was of the view that private individuals could not. But an action under section 52 of the *Constitution Act, 1982* is not an attempt to obtain monetary compensation; section 52 simply contemplates the court declaring invalid any law that is inconsistent with the Constitution of Canada.

Courts have taken an increasingly liberal attitude to the question of who has a right to sue for a declaration of constitutional invalidity. The present rule is that a private citizen can maintain an action for a declaration that legislation is invalid if that person can show "that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court."[85]

There seems to be no reason why this general rule should not be applied in the case of the constitutional provisions relating to transportation. Under this approach, the class of persons who could seek a declaration relating to a particular transportation obligation would be extremely broad and open-ended. Any citizen who was a user or even a potential user of a particular transportation service is affected by a decision to reduce or eliminate that service. It would appear, therefore, that even potential users of the constitutionally mandated transportation services would have legal standing to seek a declaration relating to that service. Nor would the class of potential users (and thus litigants) be limited to the residents of a single province.

As the Federal Court indicated in the *Canada v. P.E.I.* case, the obligation to provide ferry service to P.E.I. is for the benefit of residents on the mainland as well as those on the island.[86] The object of guaranteeing the service is to ensure effective communication *between* the residents of the various provinces. The same can be said of the other transportation undertakings that link provinces. It would appear that any citizen who was a user or

potential user of a constitutionally protected transportation service could challenge a decision to reduce that service below the level guaranteed by the Constitution.

The implications of this conclusion may not be as dramatic as might at first be assumed. First, nothing in section 52 of the *Constitution Act, 1982* grants citizens the right to seek monetary compensation in the case of constitutional invalidity. Thus the conclusion of the Federal Court of Appeal in the *Canada v. P.E.I.* case that individual citizens cannot seek financial compensation for breach of a transportation obligation has not been affected by the *Constitution Act, 1982.*

Secondly, and more importantly, the question of standing to sue is a subsidiary one: the determinative question is the scope of the legal obligations themselves. If, as argued earlier, the transportation obligations of the federal government are relatively narrow and circumscribed, then the fact that a broad class of citizens can seek to enforce those obligations is of secondary importance. The key issue, in other words, is the extent of the obligation, rather than who can enforce it.

B. THE PRINCE EDWARD ISLAND RAILWAY

In 1989, the National Transportation Agency granted an application from CN to abandon all the rail lines on Prince Edward Island.[87] The Prince Edward Island government challenged this Order on the grounds that the P.E.I. Terms of Union imposed an obligation on Canada to operate the railway. The P.E.I. argument relied on the wording of the federal obligation to provide a ferry service: ferry service was to be maintained "thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion." The province claimed that this implied an obligation to operate the Island railway as well as the ferry service; without a railway, there would be no way of connecting with the railway system of the Dominion. The Federal Court of Appeal unanimously rejected this argument.[88] Chief Justice Iacobucci (as he then was) held that the only obligation was to provide a ferry service. The reference to the "railway system of the Dominion" in the Terms of Union did not extend this obligation but merely described its effect. Thus there was no constitutional bar to a decision to shut down the railway.[89] It is clear from this decision that the only ongoing transportation obligation relating to Prince Edward Island is to maintain an efficient ferry service, in accordance with the principles outlined in *Canada v. P.E.I.*[90]

C. THE NEWFOUNDLAND TRANSPORTATION OBLIGATIONS

At the time of Newfoundland's entry into Confederation, the Newfoundland Railway was the only reliable means of overland transportation across the province. On a narrow gauge rail with many steep grades and severe curves, it normally took between 22 and 30 hours to make the 547-mile trip from St. John's to Port aux Basques. Passenger traffic on the railway began to fall off in 1960 and then dropped off substantially after 1965 when the Trans-Canada Highway was completed. The cost of converting the railway to standard gauge or otherwise to improve it was found prohibitive.[91]

In 1967, CN applied to the Canadian Transport Commission (CTC) to discontinue the passenger train service and begin operating a bus service instead. The Roadcruiser bus service was said by CN to be more efficient and convenient than the train service it was to replace. The Railway Transport Committee of the CTC approved the application but adopted what it termed a "large and liberal interpretation" of the Newfoundland Terms of Union so as to give it "the flexibility that changing or unforeseen circumstances may require."[92] According to the Committee, there was a "presumption" under the Terms of Union that public transportation service for passengers between St. John's and Port aux Basques "should be assured so long as it is required by public convenience and necessity." Because of this presumption, the Committee attached a number of conditions to its Order, the most important being that the CN must maintain the bus service "as long as a requirement for passenger service continues."[93]

This interpretation of the transportation obligations of the federal government was indeed both expansive and novel. The relevant provisions in the Terms of Union merely specify that the federal government is to take over the Newfoundland Railway. There is no stated requirement to operate the railway, in contrast to the provision requiring continued operation of a ferry service across the Cabot Strait. The Railway Committee did not interpret the Terms of Union as requiring the maintenance of a passenger rail service *per se.* Rather, it held that the federal government was required to maintain some form of public transportation service which would meet the needs of the residents of Newfoundland.

Canadian National has continued to operate the Roadcruiser bus service in accordance with requirements established by the Canadian Transport Commission and its successor, the National Transportation Agency. While a wholly intra-provincial bus service, it falls under federal jurisdiction due to its close integration with the Newfoundland Railway system.[94]

Although CN discontinued its passenger rail service in Newfoundland in 1969, it continued its freight service on the Newfoundland Railway system. But freight service became increasingly unprofitable, particularly as a result of growing competition from truck transportation on the Trans-Canada Highway. A Provincial Commission of Inquiry into Newfoundland Transportation appointed in the mid-1970s found that the railway could not continue as a viable service.[95] The Commission recommended that the railway system be phased out entirely over a 10-year period. Both the provincial and federal governments rejected this recommendation and instead undertook a major revitalization freight transport program for the railway. Despite these efforts, the railway's losses mounted to over $40 million annually in the early 1980s while its market share continued to decline. By 1987, the railway's share of total freight traffic in the province had fallen to 20 percent, and was projected to decline further.[96]

In 1988, the federal and provincial governments signed a Memorandum of Understanding providing for the phase-out of the Newfoundland Railway on September 1, 1988. Under the terms of the Agreement, the federal government was to provide over $800 million for the improvement of roads and port facilities as well as for labour and community adjustment.[97] The Memorandum of Understanding also provided that the federal payments were offered "in full satisfaction of all Canada's constitutional obligations related to railways on the Island of Newfoundland. . ." [paragraph 10(1)]. Under the Agreement, the province stated that Canada had met all of its constitutional obligations relating to railways on the Island of Newfoundland. In accordance with the terms, the Newfoundland Railway ceased operations, and has been largely dismantled; track and ties have been lifted and the right-of-way returned to its original state.[98]

It is a basic principle of Canadian constitutional law that governments cannot alter the Constitution through mere agreement.[99] Indeed, the Supreme Court of Canada has recently determined that intergovernmental agreements are subject to repeal or abrogation by statute.[100] Thus it is clear that the Memorandum of Understanding cannot have the effect of altering any constitutional obligations which the federal government might have with respect to the operation of the Newfoundland Railway. However, as this report suggests throughout, the federal government has never been under a constitutional obligation to maintain or operate the Newfoundland Railway. This interpretation flows from the Terms of Union themselves, which merely provide that the Government of Canada is to "take over" the railway. The absence of any requirement to maintain the service means that there is no constitutional objection to a decision to close down the railway.

This interpretation of the Terms of Union was explicitly endorsed by the Premier of Newfoundland, the Honourable Brian Peckford, at the time of the signing of the Memorandum of Understanding. Premier Peckford offered the following comments:

> We have assessed the legal intent and obligations imposed on the federal government by the Terms of Union. It is clear that the Government of Canada does not have a legal obligation to operate a railway in Newfoundland forever. We have always felt, however, that the federal government does have an obligation to ensure that there is a viable transportation system in this province. This agreement today constitutes our mutual recognition that this comprehensive transportation package meets that obligation.[101]

In the period since the shutdown of the Newfoundland Railway, the National Transportation Agency has had occasion to interpret and apply the transportation obligations in the Terms of Union. In its conclusions, the Agency has simply assumed that the 1988 shutdown was perfectly lawful and consistent with the Terms of Union. For example, the Agency recently was asked to interpret the meaning of section 32(2) of the Terms of Union in light of the shutdown of the railway. There was no suggestion that the decision to shut down the railway was in any sense a violation of the Terms of Union.

All of these factors confirm the conclusion that the federal government had no constitutional obligation to maintain the Newfoundland Railway. Accordingly, it would seem that the termination of the railway in 1988 did not violate any of the constitutional obligations of the federal government under the Newfoundland Terms of Union.

The remaining question is how the shutdown of the railway may have affected the other transportation obligations in the Terms of Union. Of particular interest in this regard is Term 32(2), which provides that "for the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime region of Canada. . . ." The problem is that, while Term 32(2) specifically refers to "railway rate regulation," there is no longer a railway system in Newfoundland. Does that mean that the shutdown of the railway has somehow rendered Term 32(2) redundant or inapplicable? The National Transportation Agency's unanimous decision was that Term 32(2) continued to apply despite the shutdown of the railway.[102] Although there is no longer a railway in Newfoundland, there are still "railway rates" which are to be developed by CN and applied in accordance with Term 32(2). The Agency ruled that Terms of Union rates should be developed using rail mileage through North Sydney to Port aux Basques and onto St. John's as if the Newfoundland Railway were still in place. The Agency made it clear, however, that such rates constitute a "ceiling" only and there is no prohibition on CN charging rates lower than the Terms of Union rate, as long as such rates satisfy the other requirements of the *National Transportation Act, 1987*.

While the Agency has determined that Term 32(2) continues to apply as a matter of strict law, other developments in the transportation marketplace are reducing its practical impact and importance. Term 32(2) only protects marine traffic moving over a named route from North Sydney to Port aux Basques. At the time of the negotiation of the Terms of Union in 1949 this was the main marine connection between Newfoundland and the Canadian mainland. However, in recent years there has been a dramatic shift in traffic patterns to the Island of Newfoundland such that only about 25 percent of CN's traffic to Newfoundland now moves over the North Sydney–Port aux Basques gateway. The vast bulk of CN's traffic moves between Halifax and St. John's, a route that is more efficient and less costly for shippers. Technology and the transportation marketplace are thus rendering the protections of Term 32 increasingly redundant from a practical point of view.

A further development which has reduced the practical significance of Term 32(2) is the advent of confidential contracting under the *National Transportation Act, 1987*. The vast bulk of goods now moves at rates that are significantly less than published railway tariffs. Upwards of 65 percent of revenue traffic moving to Newfoundland now moves under confidential contracts.[103] Because the terms of these contracts are private, it is becoming increasingly difficult to establish a benchmark Terms of Union rate that reflects the actual costs of moving goods to and from Newfoundland.[104] It would appear that the majority of goods moving to Newfoundland does so at rates well below the constitutional "ceiling" established by the Terms of Union.

The Newfoundland situation can be contrasted with that prevailing in Prince Edward Island. Under the P.E.I. Terms of Union there is no restriction on the rates that may be charged for the ferry service linking the Island with the mainland. Accordingly, any limitations on the rates for the P.E.I. ferry service are political and economic, rather than constitutional. Only Newfoundland has an explicit constitutional guarantee with respect to freight rates on the Sydney to Port aux Basques ferry and on the Island of Newfoundland itself.

D. THE VANCOUVER ISLAND RAILWAY

As previously described, in 1883 the governments of Canada and British Columbia agreed to settle their differences over the delays in the construction of the Canadian Pacific Railway. As part of this settlement, there was an agreement as to the manner of construction of a railway on Vancouver Island between Esquimalt and Nanaimo. The province agreed to make certain land grants in favour of the federal government on completion of the railway. The Government of Canada was to designate and contract with the persons who would build the railway, to transfer the land grant to these persons, and to contribute $750,000 towards the cost of construction. The Canada-B.C. Agreement, which was ratified by legislation passed by both governments, made no provision for the manner in which the railway was to be operated upon its completion.

As already mentioned, pursuant to the Agreement, Canada contracted with a third-party syndicate (the Dunsmuir Syndicate) to build and operate the railway "continuously and in good faith." The Canada-Dunsmuir Agreement was appended as a schedule to the federal Act of 1884 ratifying the settlement with the province.

The 70-mile stretch of railway was completed in 1886. The rights and obligations of the Dunsmuir Syndicate were transferred to the Esquimalt and Nanaimo Railway Company and later to the Canadian Pacific Railway

Company. Upon CPR assuming control in 1905, the railway was declared to be a work for the general advantage of Canada and came under federal regulatory authority.

Rail service continued to be offered until late 1989, when the federal Cabinet terminated passenger rail service on this line. The province sought a declaration from the British Columbia Supreme Court that the federal government was obliged to provide the service in perpetuity. The province argued that the obligation to operate the railway "continuously and in good faith" was constitutionally binding on the federal government. The province had to surmount two very large obstacles to succeed with this argument: the first was that nothing in the B.C. Terms of Union obliged the federal government to operate either the Canadian Pacific Railway or the branch line on Vancouver Island.[105] Secondly, nothing in the 1883 Settlement Agreement between Canada and British Columbia obliged the federal government to operate the Island railway. The only commitment regarding the operation of the Island railway is found in the Agreement between Canada and the Dunsmuir Syndicate. The promise to operate the railway "continuously and in good faith" was made to the federal government rather than to the province.

Despite these seemingly persuasive objections to the provincial argument, Mr. Justice Esson of the B.C. Supreme Court found that the federal government had a perpetual obligation to operate the Vancouver Island Railway. With respect to the 1883 Canada-B.C. Settlement Agreement, Esson J. acknowledged that the federal government had not promised to operate the railway continuously. However, he was of the view that the province had relied on the undertaking of continuous operation which the Dunsmuir Syndicate had given to the federal government. Therefore, the promise to operate the railway continuously was a benefit "which the Dominion impliedly offered to maintain for the benefit of the province."[106] This "implied offer" became binding on the federal government when the province carried out its part of the bargain, particularly the "very onerous terms relating to the land grant."

Mr. Justice Esson went on to conclude that the 1883 Agreement had "constitutional force" and could not be unilaterally amended by the federal government. The basis for this conclusion appears to be that the 1883 Agreement was "part of the constitutional compact under which British Columbia became part and parcel of the Dominion."[107] He further relies on the "intentions" of the two governments in 1871 and 1883 as a basis for finding an obligation to operate the railway indefinitely:

> In 1871 no one would have thought that, if the railway was built, it would not operate in perpetuity. As between the two levels of government, it was unnecessary to stipulate that both would have the benefit of the covenant to operate — enough that the promise was given to the Dominion by the contractors and the railway company. I infer from all the circumstances that the province relied upon the Dominion to enforce that obligation.

What is most striking about this passage is that it makes no distinction between the construction of the island railway and the main line of the CPR. According to Esson J., the assumption *in 1871* was that if the railway was built it would operate in perpetuity. But the railway that was under contemplation in 1871 was not the Island railway; rather, it was the transcontinental railway linking B.C. with the rest of Canada. The logical implication flowing from Justice Esson's reasoning is that the federal government has an obligation to operate *the whole of the Canadian Pacific Railway system in perpetuity*, not simply the 70-mile stretch of rail on Vancouver Island.

This conclusion is not as improbable as it might at first glance appear. It is important to remember that the CPR gave an undertaking of continuous operation to the federal government similar to that made by the Dunsmuir Syndicate. The federal legislation establishing the CPR required the corporation to run the whole of the transcontinental railway system in perpetuity; the wording in the case of the CPR is even more definitive and unambiguous than it was with respect to the Island railway.[108] Thus, if B.C. is entitled to rely on the undertaking with respect to continuous operation of the island railway, there would seem to be no reason preventing it from also relying upon the promise of perpetual operation of the CPR.

Thus Mr. Justice Esson's interpretation of the B.C. Terms of Union and the 1883 Settlement Agreement has important implications for the whole of the CPR, not just the rail line on Vancouver Island. Under the approach adopted by Mr. Justice Esson, a variety of other federal government orders shutting down or reducing passenger service on the CPR would come into question.

Yet there are a number of difficulties associated with the reasoning of the Court in this case. These difficulties include the following:

(i) The legislative history of the B.C. Terms of Union indicates that the federal government's obligation was to construct the CPR, but not to operate it; of particular significance is the fact that there are references to a requirement to "maintain" services elsewhere in the Terms of Union, but no such obligation was included with respect to the CPR;

(ii) This interpretation places British Columbia on the same footing as the other provinces in Canada; the federal government has assumed responsibility for constructing or taking over a variety of other railways, but in no instance has it agreed to operate these railways in perpetuity. The decision to shut down the P.E.I. and Newfoundland railways has been accepted by the courts and/or the province concerned as perfectly lawful. To hold otherwise in the case of British Columbia is to place that province in a preferred and unique position with regard to railway operation; and

(iii) Whatever may have been the intentions surrounding the Canada-B.C. Settlement in 1883, the Agreement did not amount to an amendment of the Terms of Union. Governments cannot alter the Constitution through mere agreement.[109] Thus, even assuming that the 1883 Canada-B.C. Agreement included a promise to operate the railway in perpetuity, such a promise is not constitutionally binding. The 1883 Agreement is not part of the "Constitution of Canada"[110] and thus cannot amount to a fetter on the legislative authority of the Parliament of Canada.

Notwithstanding these objections, a five-member panel of the British Columbia Court of Appeal unanimously upheld Mr. Justice Esson's conclusions in a judgement handed down on October 4, 1991.[111] The Court of Appeal concluded that Canada had a continuing constitutional obligation to British Columbia to ensure the maintenance of passenger and freight rail service on the rail line between Victoria and Nanaimo. While the Court of Appeal found that the obligation was "continuous" it refused to describe the obligation as "perpetual";[112] it also indicated that the service could be discontinued with the agreement of the Government of British Columbia.

The major focus of the Court of Appeal's reasoning dealt with whether the construction of the Vancouver Island Railway was part of the original Term 11 obligation of Canada. The Court of Appeal reasoned that the construction of the Island portion of the railway was indeed included within the constitutional obligation defined by Term 11. The Court of Appeal suggested that the wording of Term 11, which referred to the construction of a railway to the "Seaboard" of British Columbia, was ambiguous; in the Court's view, this might be read so as to include the construction of a railway line on Vancouver Island. The Court of Appeal relied particularly on an 1873 Order in Council passed by the Government of Canada fixing Esquimalt as the western terminus of the Canadian Pacific Railway. In the Court's view, this was the "best evidence of the intention and understanding of the parties about Canada's Term 11 obligations."[113]

Having found that the obligation defined by Term 11 included the construction of the rail line on Vancouver Island, the Court of Appeal went on to find that the 1883 Settlement arrangements were of a "constitutional nature." In the Court's view, Term 11 was a "skeletal" provision which was "worked out" through the various covenants associated with the 1883 Settlement.[114] These covenants included the undertaking given by the Dunsmuir Syndicate to operate the Vancouver Island Railway "continuously." This meant that this covenant was of a constitutional nature and could not be varied except with the consent of the Government of British Columbia.[115]

To what extent does the Court's reasoning in this case have wider implications for other transportation obligations of the Canadian government? As already noted, the reasoning of Mr. Justice Esson would seem to imply an obligation to maintain perpetual operation of the whole of the Canadian Pacific Railway. This implication is strengthened by the reasoning of the Court of Appeal in this case. The Court of Appeal reiterates at numerous points in its judgement that the island railway is "constitutionally indistinguishable from the Mainland railway."[116] The Court of Appeal also implies that Term 11 itself carries with it some kind of continuing obligation:

> Canada assumed a constitutional obligation to British Columbia, and indeed to all of Canada, to ensure the continuation of the arrangements made to carry the Terms of Union into effect for the benefit of all its citizens. *It is untenable, in our view, to argue that Term 11 was spent once the last spike on the Mainland Railway was driven.* [emphasis added][117]

The Court's theory that Term 11 is a "skeletal" provision only which was to be "worked out" through subsequent enactments also supports the conclusion that the whole of the CPR must be operated in perpetuity. As noted above, the 1881 statute creating the CPR stated that the railway must be operated "forever" by the company. This statutory language could be said to be evidence of what the Court of Appeal identified as an obligation to "ensure the continuation of the arrangements made to carry the Terms of Union into effect for the benefit of all its citizens."

In summary, the implications of the litigation surrounding the Vancouver Island Railway extend far beyond the particular issues raised in the case. The reasoning of both the trial judge and the Court of Appeal supports the conclusion that the federal government has a constitutional obligation to maintain the whole of the Canadian Pacific Railway.[118] Given these very broad implications, it would seem an appropriate matter for review by the Supreme Court of Canada.[119]

The recent litigation on this issue has injected some uncertainty into the precise scope and meaning of Term 11 of the B.C. Terms of Union. The other terms seem straightforward: under Term 4, the federal government is obligated to provide efficient mail service between Victoria and both San Francisco and Olympia. As we noted earlier, the federal approach was to contract with private operators to provide this service and to pay subsidies. Beginning in 1925, a federal subsidy directed towards supporting a ferry service to San Francisco was used by the province to support mail service within the province.

In the 1970s, British Columbia complained that the federal subsidies paid to support ferry service in British Columbia were lower than comparable subsidies paid in the Maritimes. As a result, in 1977 the province and the federal government entered into a new arrangement for ferry subsidies. Under the 1977 Subsidy Agreement,[120] the federal government agreed to pay a block grant of some $8 million annually to the province for support of ferry service. In return for this subsidy, Canada was to be relieved of "any and all obligations for the provision of subsidy or other financial assistance over and above the subsidy provided for in this Agreement" (section 5). It would be up to the province to determine how the federal grant should be used. However, the province agreed to "assure reasonable and adequate service and appropriate supervision thereof" in B.C. coastal waters

(section 4(2)). The province was also obliged under the Agreement to "place appropriate passenger vessels in service . . . to give effective links where required on the coast between communities and principal water and air services" (section 4(3)).

An effective and efficient ferry system has been maintained in the province pursuant to this Agreement. Thus the requirements of the Terms of Union in this regard are currently being satisfied. But the constitutional obligation to provide the service remains that of the federal government rather than the province. The provisions in the Subsidy Agreement imposing obligations on the provincial government are subject to the constitutional requirements of the Terms of Union, which continue to apply.

VI. Conclusions

The first important conclusion is that the ongoing obligations of the federal government are relatively limited and circumscribed. All of the obligations relating to the construction of various railways in different provinces of Canada have long since been satisfied. As suggested, there is no continuing obligation to operate any of these rail services[121] nor is there any constitutional limitation on the manner in which the services are to be provided. The only continuing obligations of the federal government would appear to fall into two categories:

(i) The federal government is obliged to provide the ferry services guaranteed to British Columbia, Prince Edward Island and Newfoundland under the Terms of Union for these particular provinces. Further, it is obliged to maintain passenger and freight rail service on the Island railway on Vancouver Island, pending a final court determination of this issue;

(ii) There is a limitation on the rates which can be charged to Newfoundland in accordance with terms 32(2) and 32(3) of the Newfoundland Terms of Union. It should be noted that this is the only constitutional limitation respecting rates; there is no constitutional constraint on cost recovery in respect of the other mandated ferry services.

The relevant province is entitled to undertake legal action to enforce these ongoing obligations. In addition, the province can seek monetary compensation for any losses which it might have suffered due to interruption of the

guaranteed service. It would appear that private citizens who are affected by breach of a constitutional obligation are also entitled to bring legal action to enforce it. However, it is unlikely that a private citizen would be permitted to obtain monetary compensation for any losses suffered due to a breach of a constitutional obligation. The private citizen could only obtain a declaration of his or her rights with respect to the transportation service in question.

If this first conclusion is correct, then these limited transportation obligations in the Canadian Constitution ought not to be a significant concern for transportation policy makers. Their extremely restricted scope and impact clearly do not represent a significant impediment to the development of a modern and integrated transportation system for Canada.

In one sense, it might be concluded that the inclusion of these transportation obligations in the Constitution was a success; the existence of these undertakings played a key role in the creation of the Canadian State. The critical feature of the undertakings was their binding and enduring character. Because they were incorporated in imperial legislation, successive Canadian governments were obliged to make good on the original undertaking. This provided the colonial leadership in the 1860s and 1870s with the assurances it needed to support political union.

But there are disadvantages to including provisions of this type in a constitution. A constitution is intended to provide a general framework which can be adapted to fit the changing needs and circumstances of state and society. The transportation undertakings set out in the Canadian Constitution are not of this general character. Rather, they set out quite precise commitments to provide certain transportation services, including in some cases the time and manner in which the service is to be carried out. The problem with this type of constitutional provision is not simply that it is out of character with the generality of the constitution as a whole. The real difficulty is that the more specific a constitutional provision, the more difficult it is to adapt that provision to changing circumstances or needs.

One risk is that the provision will simply be rendered meaningless or superfluous by the changing current of events. An illustration of this is the guarantee of preferential rates on the North Sydney to Port aux Basques ferry in the Newfoundland Terms of Union. While this route was once the main gateway to Newfoundland, changes in technology are rendering it increasingly marginal to Newfoundland's transportation system.

But a second risk, by far more worrisome, is that the courts will attempt to apply a particular provision to changing circumstances in a novel or unforeseen way. One possibility is that the courts will insist that a particular mode of transportation must be used, regardless of its relative cost or efficiency. In effect, the courts would attempt to "freeze" the evolution of the transportation system and prevent the movement to more efficient and cost-effective modes. For example, there has been discussion over the years of the possibility of establishing some form of fixed link between Prince Edward Island and the Canadian mainland. Were this fixed link ever constructed, it might render the continuation of ferry service over the same route superfluous. However, the existence of a constitutionally mandated obligation to provide a ferry service would likely prevent governments from discontinuing the service, even though it would have outlived its usefulness.

Of course, even in a case where the courts required the continued use of an inefficient or uneconomic mode of transportation, it would still be open to governments to amend the Constitution.[122] On the other hand, constitutional amendment in Canada is never a simple or straightforward matter, as the events of the past decade have shown.

On balance, therefore, there would appear to be significant disadvantages associated with the constitutional entrenchment of entitlements to specific transportation services. It is no accident that the practice of including such obligations in the Canadian Constitution has been limited to a means of securing the entry of individual provinces or groups of provinces to Canada. Once a province was created, however, there is no instance where its constitutional entitlement to transportation services has been expanded. Instead, transportation services involving particular provinces have been provided for through ordinary legislation or federal-provincial negotiation and agreement. There has been no willingness to entrench any further entitlements in the Constitution. The inclusion of these provisions is clearly anomalous, for the reasons given above. The exceptional character of the existing constitutional transportation obligations is all the more apparent in light of the enactment of the *Constitution Act, 1982*. The entitlements to specific

transportation obligations are now included as part of the "Supreme law of Canada" and any laws which are inconsistent with this fundamental law are of no force and effect.

It is to be expected that provincial entitlement to transportation services will continue to be dealt with largely through ordinary legislation and federal-provincial agreement. No province has sought to entrench further entitlements to transportation services in the Constitution. At the same time, the recent Supreme Court case dealing with the enforceability of federal-provincial agreements[123] may cause some provinces to demand some mechanism to bind the federal government to meet its contractual obligations.

The answer to this concern is not, as has sometimes been suggested, to entrench federal-provincial agreements directly in the Constitution. As argued above, the constitutional entrenchment of what amount to contractual commitments between the two levels of government can have effects that are both unanticipated and unsatisfactory. A better solution to this potential problem[124] is to use the mechanism which was provided under the Meech Lake Accord with respect to immigration: any province which negotiated an agreement with the federal government regarding immigration could have the agreement protected from unilateral amendment by the federal government.[125] This approach, which falls short of entrenching the agreement itself as part of the Constitution, could be applied more generally. In transportation, for example, it could provide a mechanism to ensure that federal government undertakings were legally enforceable. It would also provide an answer to any provincial concerns regarding the uncertain legal status of agreements with the Government of Canada.

ENDNOTES

I am indebted to Mr. Christopher Morrison, a member of the Osgoode Hall class of 1993, for his excellent research assistance in the preparation of this paper.

1. G. P. de T. Glazebrook, *A History of Transportation in Canada*, Vol. 1, (Toronto: McClelland and Stewart, 1964), p. xiii.

2. See, for example, the guarantee in the B.C. Terms of Union that Canada will provide "an efficient mail service, fortnightly, by steam communication between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers." B.C. Terms of Union, section 4.

3. The single most significant and costly transportation obligation was, of course, the undertaking to construct a transcontinental railway linking British Columbia with the other provinces within 10 years of its entry into Confederation. See B.C. Terms of Union, section 11.

4. See, for example, the essays in K. W. Studnicki-Gizbert, *Issues in Canadian Transport Policy* (Toronto: Macmillan of Canada, 1973) which omit any discussion of constitutional transport obligations as a significant factor in contemporary transport policy. See also C. Dalfen and L. Dunbar, "Transportation and Communications: The Constitution and the Canadian Economic Union," in *Case Studies in the Division of Powers*, Vol. 62, ed. Mark Krasnick (Royal Commission on the Economic Union and Development Prospects for Canada, Background Studies, 1985) which makes no mention of the federal obligations to provide transportation services.

5. See *Prince Edward Island (Minister of Transportation and Public Works) v. Canadian National Railway Co.* [1991] 1 F.C. 129.

6. See *Attorney General of British Columbia v. Attorney General of Canada* 42 B.C.L.R. (2d) 339 (1989).

7. See *Attorney General of British Columbia v. Attorney General of Canada* (Reasons for Judgment of the Court of Appeal for British Columbia, October 4, 1991, unreported).

8. It is important to distinguish constitutional transportation obligations from constitutional *jurisdiction* relating to transportation. Constitutional jurisdiction grants authority to deal with a particular matter, without specifying how that authority is to be exercised; a constitutional obligation imposes a duty to deal with a particular matter in a particular fashion. This study examines the transportation obligations imposed on the federal government under the Canadian Constitution.

9. P. B. Waite, *The Life and Times of Confederation* (Toronto: University of Toronto Press, 1967).

10. Glazebrook, p. 14.

11. It should be noted that the delegates from Prince Edward Island were opposed to the Intercolonial, regarding it as a cause for additional taxation of Island residents without any corresponding benefit. Thus the reference to "Maritime" support for the Intercolonial is limited to the provinces of New Brunswick and Nova Scotia.

12. G. P. Browne, ed., "Quebec Resolutions," *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969), p. 165.

13. Ibid. p. 165.

14. The various drafts of the sections of the BNA Act setting out the commitment to build the Intercolonial are found in Browne, p. 278 and pp. 335–36.

15. Earlier drafts of the bill had contemplated specifying a date for completion of the railway; see Browne, p. 278 (3rd draft of bill, 2 February 1867).

16. S. Fleming, *The Intercolonial* (Montreal: Dawson Brothers, 1876), p. 76.

17. See section 146 of the BNA Act, 1867.

18. See section 2 of the *Manitoba Act, 1870.*

19. Rupert's Land and North-Western Territory Order, 1870 (U.K.), R.S.C. 1970, Appendix II, no. 9.

20. The text of the B.C. proposal was as follows:

> 8. Inasmuch as no real union can subsist between this Colony and Canada without the speedy establishment of communications across the Rocky Mountains by Coach Road and Railway, the Dominion shall, within three years from the date of union, construct and open for traffic such Coach Road from some point on the line of the Main Trunk Road of this Colony to Fort Garry, of similar character to the said Main Trunk Road; and shall further engage to use all means in her power to complete such Railway communication at the earliest practicable date, and that Surveys to determine the proper line for such Railway shall be at once commenced; and that a sum of not less than One Million Dollars shall be expended in every year, from and after three years from the date of union, in actually constructing the initial sections of such Railway from the Seaboard of British Columbia to connect with the Railway system of Canada.

Papers in Connection with the Construction of the Canadian Pacific Railway (Carnarvon Papers), Vol. I, no. 2. (1890).

21. See Glazebrook, pp. 48–49.

22. Note, however, that the obligation in Term 11 was merely imposed on the "Government of the Dominion" rather than upon "Parliament," as was the case with the Intercolonial. This indicates that the obligation in Term 11 does not bind Parliament directly in the sense that it does not oblige Parliament actually to enact legislation. Of course, Term 11 is still "constitutionally entrenched" in the sense that any legislation which Parliament does enact must not conflict with its provisions. Further, the courts will rely on Term 11 to strike down any legislation which is inconsistent with its terms. See discussion *infra*, pp. 36 and 56.

23. See, i.e. Glazebrook, p. 47.

24. *Debate on the Subject of Confederation with Canada*, Victoria, B.C. (G.P.O., 1870), p. 92.

25. *Carnarvon Papers,* Vol. 1, no. 2, clause 10.

26. See clause 7 (re San Francisco) and clause 10 (re coastal mail service) of the original B.C. proposals, reprinted in *Carnarvon Papers*, Vol. 1, no. 2, pp. 140–41.

27. *Debate on the Subject of Confederation with Canada*, Victoria, B.C., p. 78.

28. This issue was not raised in the B.C. debates on the terms; no notice is taken of the difference in the wording proposed for the service to San Francisco as opposed to the service to Olympia. Thus it is impossible to state whether the drafters of the B.C. proposal envisaged that the requirement to "supply" the ferry service to San Francisco would terminate at some point.

29. In addition to the obligations outlined above, the Canadian government also undertook to guarantee for 10 years the interest on a loan for the construction of a "first-class Graving Dock" at Esquimalt. Note that here the obligation was limited to the guarantee of interest; Canada did not have to construct or secure the construction of the Graving Dock. See Term 12 of the Terms of Union.

30. For a full account of P.E.I.'s opposition to the Quebec resolutions, see F. W. P. Bolger, *Prince Edward Island and Confederation* (Charlottetown: St. Dunstan's University Press, 1964), pp. 89–107.

31. See Bolger, p. 201.

32. For an account of the public reaction to the 1869 Canadian offer and the demand for construction of an Island railway as the price for entering Confederation see Bolger, pp. 202–13.

33. Bolger, p. 217.

34. Ibid., p. 235.

35. The Terms of Union provided as follows: "That the railways under contract and in the course of construction for the Government of the Island, shall be the property of Canada."

36. The Island's debt stood at approximately $3.7 million while the "debt allowance" amounted to over $4.7 million.

37. The relevant term provided that: "Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial railway and the railway system of the Dominion."

38. Indeed, this point was noted during the debates in the P.E.I. Legislative Council on the proposed Terms of Union. One of the members objected to the fact that there was nothing in the terms requiring Canada to keep the railway in operation. The Premier replied that this was indeed the case, but that the inclusion of such a requirement was regarded as unnecessary. See *Debates and Proceedings of the Legislative Council of Prince Edward Island for the Session of 1873*, May 1, 1873, (Charlottetown: Queen's Printer), pp. 49–50.

39. See *Debates and Proceedings of the Legislative Council of Prince Edward Island for the Session of 1873*, p. 67.

40. This was added to the terms at the very end of the negotiations and was one of the final concessions from Canada which secured the support of the Island government. See Bolger, p. 279.

41. Canada also agreed to take a dredge boat that was under construction at a cost of up to $22,000. However, there was no obligation on the part of Canada beyond the mere purchase of the boat.

42. S.C. 1867, c. 13.

43. See E. Forbes, *The Maritime Rights Movement: A Study in Canadian Regionalism* (Montreal: McGill-Queen's University Press, 1979).

44. The increased cost of construction was attributable to a variety of causes, not the least of which was incompetence and mismanagement by the Federal Board of Commissioners. See G. R. Stevens, *Canadian National Railways*, Vol. 1 (Toronto: Clark, Irwin, 1960), pp. 192–203.

45. See *An Act to amend the Act respecting the construction of the Intercolonial Railway*, S.C. 1874, c. 15.

46. See *An Act to incorporate Canadian National Railway Company*, S.C. 1919, c. 13.

47. The story is well known and will not be recounted here. See, e.g. D. Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: Macmillan, 1955), and H. A. Innis, *A History of the Canadian Pacific Railway* (Toronto: University of Toronto Press, 1971).

48. The wording of Term 11 itself did not support this contention. Term 11 provided that the railway would connect the "Seaboard" of British Columbia with the railway system of Canada: there is no mention of a railway on Vancouver Island. Notwithstanding the wording of Term 11, the Macdonald Government had passed an Order in Council in 1873 fixing Esquimalt on Vancouver Island as the terminus of the Canadian Pacific Railway. It was apparently contemplated that a bridge would be constructed between the mainland and Vancouver Island near Nanaimo, and a line of railway would then be built on the Island from Nanaimo to Esquimalt. The plans for the bridge across Seymour Narrows never materialized.

49. See *Carnarvon Papers*, for the history of the negotiations between 1873 and 1883.

50. The Agreement dealt with a variety of matters in addition to the issue of the Island railway. For example, a change in the route of the CPR through the Rockies had resulted in the land grant in that area consisting of barren and mountainous country. The province agreed to provide compensation for the low value of this land by conveying a huge block of land (3.5 million acres) in the Peace River area. The Agreement also dealt with the terms and conditions respecting the sale of railway lands to the public.

51. Note that under the terms of the Settlement Agreement, the federal government itself did not undertake the obligation to construct the railway line. Its obligation was simply to transfer lands to the railway contractors, to pay a subsidy of $750,000 and to take security from the contractors in order to ensure that the contractors would complete the line on schedule. See section (e) of the Settlement Agreement.

52. See *An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province*, S.B.C. 1884, c 14. and *An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia*, granted to the Dominion, S.C. 1884, c. 6.

53. Section 16 of the contract provided:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

54. See section 7. The obligation of the railway in this case was more clearly expressed than in the case of the Agreement with the Dunsmuir Syndicate regarding the Island railway. The obligation imposed on the CPR to operate the main line of railway "thereafter and forever" did not appear in the Agreement with the Dunsmuir group. The significance of this wording will be explored later in this paper in connection with the recent B.C. court decision on the operation of the Island railway.

55. See *An Act respecting the Canadian Pacific Railway*, S.C. 1881, c. 1.

56. See, e.g. *Esquimalt and Nanaimo Ry. v. A.G.B.C.* [1950] A.C. 87, dealing with the scope of the tax exemption for the lands owned by the CPR on Vancouver Island.

57. The British Columbia courts have recently held otherwise, concluding that certain statutory provisions dealing with the operation of the Vancouver Island Railway have become constitutionally entrenched. This case and its implications will be discussed later in section V of this paper.

58. See [1950] A.C. 87.

59. An exception arose in the case of Saskatchewan and Alberta in 1905. The federal statutes creating those provinces included the tax exemption granted to the CPR under the 1881 contract. (See section 24 of both the *Alberta Act* and the *Saskatchewan Act*, reproducing section 16 of the contract between the CPR and the Government of Canada). These federal statutes became constitutionally entrenched as part of the Constitution of Canada in 1982 and now have full constitutional force and effect. This means they can only be modified in accordance with the amending formula set out in part V of the *Constitution Act, 1982*.

60. See "Report of the Deputy Minister of Trade and Commerce," p. 39 in *The Thirty-fifth Annual Report of the Department of Trade and Commerce for the fiscal year ending March 31, 1927.*

61. Ibid.

62. The terms of the P.E.I. memorial are described in detail by Mr. Justice Cattanach in *The Queen in Right of the Province of Prince Edward Island v. The Queen in Right of Canada* [1976] 2 F.C. 712, p. 718.

63. S.C. 1901, c. 3, s.1.

64. See *The Prince Edward Island Subsidy Act, 1912*, S.C. 1912, c. 42, s. 2. This statute provided for an annual subsidy of $100,000 to the island, of which one half was attributable to the failure to provide efficient ferry service in accordance with the Terms of Union.

65. See *Report of the Commission of Inquiry into Newfoundland Transportation*, Vol. 1 (Sullivan Commission) (St. John's, 1978), pp. 30–31.

66. The Sullivan Commission stated that the railway had been a drain on the Newfoundland treasury of approximately $750,000 annually ever since 1923.

67. Documents on Relations Between Canada and Newfoundland, no. 805.

68. Sullivan Commission Report, p. 34.

69. See *Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714, pp. 721–23.

70. See *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* [1985] 2 S.C.R. 486 [holding that the intentions of the drafters of the Charter of Rights, as manifested by statements made before a Parliamentary Committee, were entitled to minimal weight in judicial interpretation.]

71. Order in Council P.C. 1454, April 1, 1949.

72. Term 32(1): "Canada will maintain in accordance with the traffic offering a freight and passenger steamship service between North Sydney and Port aux Basques, which on completion of a motor highway between Corner Brook and Port aux Basques, will include suitable provision for the carriage of motor vehicles."

73. See Sullivan Commission Report, p. 34.

74. See *Attorney General of Newfoundland v. C.N.R.*, (1951) 67 C.R.T.C., p. 353.

75. See *The Queen (P.E.I) v. The Queen (Can)* [1976] 2 F.C. 712 affd. [1978] 1 F.C. 533.

76. For a description of these impacts, see the judgement of the trial division of the Federal Court: [1976] 2 F.C. 712, p. 728.

77. [1976] 2 F.C. 712, p. 729. The trial judge also held that the federal government's obligation included provision for the conveyance of automobiles as well as passengers. The 1873 Terms of Union did not refer to automobiles, since they were non-existent at the time. But Cattanach J. applied section 10 of the *Interpretation Act*, R.S.C. 1970, c. I-23 to hold that the only sensible modern interpretation of the Terms of Union was one that included automobiles.

78. See [1976] 2 F.C. 712, p. 737.

79. Ibid., p. 734.

80. [1978] 1 F.C. 533, p. 556. In the end, Jackett C.J. concluded that the Court could only issue a declaration that Prince Edward Island had a right to money compensation, as opposed to a judgement ordering the payment. But there was no practical difference between the issuance of a declaration as opposed to an actual judgement since in both cases the federal government would comply with the finding of the Court.

81. While Chief Justice Jackett did not express any final opinion on the point, he indicated that it was probably not open to individuals to seek compensation for the loss of ferry service. He held that the obligation was owed to the "Province," which he defined as "the mass of inhabitants of the geographical area whoever they may be from time to time." He indicated that this obligation to the Province did not give rise to rights in individuals or in groups of individuals. See ibid., pp. 555–56 and footnote 30.

82. Le Dain J. made the point that the provincial claim should be limited to damages or costs imposed on the government directly. The province should not be permitted to obtain a judgement for the adverse effects which the province as a whole might have suffered. See ibid., p. 589.

83. For a complete listing of the relevant statutes and orders, see "Schedule I" to the *Constitution Act, 1982*.

84. This follows from the holding in *Canada v. P.E.I.*

85. *Minister of Justice of Canada v. Borowski* (1981) 130 D.L.R. (3d) 588, p. 589 per Martland J. (S.C.C.).

86. [1976] 2 F.C. 712, p. 731 (per Cattanach J.).

87. See Order no. 1989-R-180.

88. See *P.E.I. v. CNR* [1991] 1 F.C., p. 129.

89. Iacobucci J.'s conclusion was as follows:

    It is clear that Canada was to obtain property in the railway presumably because of Canada's assumption of the debts and liabilities of Prince Edward Island at the time of Union. Once it obtained the property, it was legally free to do what it wished with the railway as owner thereof. If an obligation to operate perpetually were intended, clear language to that effect would have been employed as was done, as Counsel for CN pointed out, in the 1883 B.C. railway settlement.

90. In *P.E.I. v. CNR*, Justice Iacobucci also makes the point that the obligation to maintain a ferry service only extends to passengers and mails, but not freight. This is the same approach adopted by Ledain J. in the Federal Court of Appeal in *Canada v. P.E.I.* On the other hand, Chief Justice Jackett in the *Canada v. P.E.I.* case was of the view that automobiles *were included* within the constitutional obligation. This point does not seem of much practical significance, since the vessels providing the service all are equipped to transport automobiles and freight.

91. See generally the discussion of these developments in the decision of the Railway Transport Committee of the Canadian Transport Commission permitting the substitution of bus service for passenger trains: Pamphlet No. 14, 58 R.T.C., p. 359, July 3, 1968.

92. See opinion of D.H. Jones, Chairman, ibid., p. 371.

93. Ibid., p. 376.

94. See *Canadian National Railway Co. v. Board of Commissioners of Public Utilities* [1976] 2 S.C.R. 112.

95. See *Report of the Commission of Inquiry into Newfoundland Transportation*, Vol. 1 (1978), p. 233–34.

96. See "Remarks by the Honourable John Crosbie on the Newfoundland Transportation Initiative," June 20, 1988, p. 4. (Mimeographed.)

97. See "Memorandum of Understanding between the Government of Canada and the Government of the Province of Newfoundland," (MOU), June 20, 1988, paragraph 5. (Mimeographed.)

98. See *In the Matter of a complaint made by Atlantic Container Express Inc.* (National Transportation Agency of Canada, Decision No. 266-R-1991) May 22, 1991.

99. See *A.G. Nova Scotia v. A.G. Canada* (Nova Scotia Interdelegation) [1951] S.C.R. 31.

100. See *Reference Re. Canada Assistance Plan Act*, (S.C.C., August 15, 1991, unreported).

101. "Statement by the Honourable A. Brian Peckford, Premier of Newfoundland and Labrador on the Newfoundland Transportation Initiative," June 20, 1988, p. 7. (Mimeographed.) Obviously such a statement cannot itself alter any existing constitutional obligation. It does, however, give an indication of the legal opinion of the Government of the day with respect to the extent of the constitutional obligation.

102. All three members of the Agency were in agreement on this point; there was a dissenting opinion from one member of the board on the method to be used to calculate a Terms of Union rate. See *Atlantic Container Express Inc.*

103. Ibid., p. 4.

104. See the attempt by the National Transportation Agency in its recent decision on the complaint by Atlantic Container Express to deal with this and other problems in establishing a Terms of Union rate.

105. In fact, as noted earlier, article 11 of the Terms of Union did not even mention the line on Vancouver Island; the obligation was to build a railway to the "Seaboard" of British Columbia.

106. 42 B.C.L.R. 339, p. 359 (1989).

107. Ibid., p. 362.

108. The operators of the CPR promised to "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway." See S.C. 1881, c.1, section 7.

109. See Nova Scotia Interdelegation case, MOU between the Government of Canada and the Government of Newfoundland and Labrador.

110. As defined by section 52 of the *Constitution Act, 1982*.

111. See *Attorney General of British Columbia v. Attorney General of Canada* (Reasons for Judgment, B.C. Court of Appeal, October 4th, 1991, unreported).

112. Mr. Justice Esson, at trial, had found that the obligation to maintain service on the E. and N. was "perpetual"; this part of his Order was varied by the Court of Appeal.

113. See Reasons for Judgement, p. 41.

114. See, in particular, the Court's reasoning on pp. 44–45.

115. It is interesting to note that the Court of Appeal finds that the obligation is owed to the provincial government only. The implication is that private citizens are not entitled to rely upon these particular constitutional obligations. As noted previously, the obligations in Term 11 are part of the "Constitution of Canada" and are part of the "supreme law of Canada." It thus seems difficult to understand why the obligation can only be enforced by governments as opposed to private citizens. The Court of Appeal does not discuss the issue but merely notes in passing that the obligation could be varied with the consent of the B. C. government.

116. See Reasons for Judgement, p. 43.

117. See Reasons for Judgement, p. 45.

118. The "Canadian Pacific Railway" is defined in an 1874 statute as including the main line of railway, running from "a point near to and south of Lake Nipissing" westward to "some point in British Columbia on the Pacific Ocean." Further, the railway is to include two branch lines, the first constructed in Ontario, the second in Manitoba. See *An Act to Provide for the construction of the Canadian Pacific Railway*, S.C. 1874, ss. 2 and 3.

119. It is not known at this time whether the Attorney General of Canada intends to appeal. Leave to appeal would have to be granted by the Supreme Court of Canada.

120. See "Subsidy Agreement between the Government of Canada and the Government of the Province of British Columbia," April 18, 1977.

121. This is subject only to the single exception noted in paragraph (i) below.

122. All of the constitutional provisions identified here could be amended under section 43 of the *Constitution Act, 1982*, which requires the consent of the Parliament of Canada as well as any province to which the provision applies.

123. See *Reference Re Canada Assistance Plan Act*, (S.C.C. August 15, 1991, unreported).

124. The problem is potential only since there is no indication at this time of any dissatisfaction on the part of provinces with the enforceability of agreements relating to transportation.

125. Under the proposed section 95A, once an agreement had been ratified by the province and by the Parliament of Canada, it would have the force of law and it could not be amended without the consent of both parties. A similar procedure is contemplated by the recent constitutional proposals published by the Government of Canada on September 24, 1991. See *Shaping Canada's Future Together: Proposals*, (Ottawa: Supply and Services Canada, 1991), p. 34.