POLICY FAILURE OR LEGAL FAILURE? THE CASE OF LOGISTICAL CONTROL OF WESTERN GRAIN

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Introduction

There are few more spectacular failures in Canadian transportation policy than those suffered by the western Canadian grain handling and transportation system between 1945 and the 1990s. Emerging from WWII with a configuration designed for the 1920s, the grain supply chain remained 20 to 30 years out of date for nearly half a century. During that time, it was plagued by repeated breakdowns, bitter policy disputes and an appalling level of inefficiency.

Most transportation professionals in Canada are aware of the saga of the Crow's Nest Pass freight rates and the role that their distorted economic signals played in creating these failures (Canada Grains Council, 1973; Earl, 2000), but the impact of the Canadian Wheat Board's (CWB's) regulation of grain logistics is less broadly appreciated. While concern about the CWB's role emerged as early as the 1950s, and a few comments were made in the 1970s and 1980s (Earl, 1983), it was not until the 1998 Estey inquiry, that the industry focussed on the part played by the CWB's regulatory control in the problems that had plagued the industry for so long. One of the more intriguing aspects of this issue is the possibility that the CWB does not actually have the legal authority to perform this role.

James Bromley, a Washington based transportation lawyer, provides a useful framework for considering this question (Bromley, 2005). He identifies two approaches taken by the courts in interpreting legislation: "the objective view" and "the common sense view." Under the former, a court will take the legislation precisely as written.

However, this approach is only possible if the statute's wording is not "ambiguous," with "two or more meanings [being] equally plausible." If it is, then a court will need to turn to the "common sense" approach, which necessitates "resorting to legislative history (committee reports … debates, hearings etc.), the history and structure of the statute and common sense" in order to determine "what it believes the legislature intended." (Bromley, 200, 202). In fact, as we will see, the CWB's legislation is indeed ambiguous, and both approaches are used in this paper to examine this issue.

This paper reviews the historical background to the way the legislation now reads and presents the arguments pro and con the proposition that the CWB lacks the legislative authority to control the grain logistics system. It concludes, firstly, that the evidence favours the proposition that the legislation fails to give the CWB the powers it has exercised, and secondly that, regardless of the legal question, the legislation is a questionable legacy from the past, designed to deal with problems that no longer exist. Finally, the paper returns to the theme of this conference and examines whether the well-known policy and operational failures in the western grain handing and transportation system may have been exacerbated by the legislative shortcomings that the paper describes.

The historic background and evolution of "car allocation"

The term "car allocation" is widely used in the rail transport sector to refer to the process of priorising access to car supply, particularly in times of tight supply. However, in the grain industry, it has taken on a broader connotation, referring to the entire system of logistics control. The grain industry's use of the term, and the role played by the CWB in grain logistics, both have their roots in the way that grain logistics worked prior to WWII. At that time, the elevator companies, who were the owners and shippers of grain, ordered cars directly from the railways. Railway station agents at approximately 3000 prairie shipping points, maintained what was called a "car order book" in which the shipping requests of the local country elevators were recorded (Wilson, 1980b). Cars would then be distributed among grain shipping points on the basis of the total requests of all

shippers across all points, and among individual elevators at each shipping point in accordance with the car order book entries at the local station. The allocation of cars was therefore done by the railways in two steps: among shipping points first; at individual points second. The underlined words, at and among, are important because they were put into the legislation that created the regulatory powers over transportation, and they remain there to this day.

The CWB was created in 1935 with a very narrow mandate. However, under wartime conditions, it was given regulatory control over transportation (in 1942), and monopoly marketing powers (in 1943). Although both were intended to be temporary, it retained these powers after the war, partly to implement a wheat marketing agreement with Britain, and partly because of political pressure from western farmers who, at that time, strongly favoured centralised marketing and regulation (Wilson, 1980a 1980b). In 1947, the CWB Act was amended, *inter alia*, to make its regulatory control over transportation permanent. These provisions remain in the CWB Act as section 28(k) and they give the CWB authority over "the allocation of railway cars at any delivery point … to any elevator, loading platform or person at the delivery point" (emphasis added).

These powers were intended to deal with three issues that the car order book system could not handle, particularly when rail cars were in short supply, namely: the CWB's need to have the right grain shipped to destination; its mandate to ensure that every farmer gained an equitable share of its sales; and the competitive situation at each shipping point. The second issue arose because the CWB quota system, that allowed farmers to deliver a specified number of bushels of wheat per acre, did not function unless the requisite storage space was available to accommodate the permitted deliveries, and that did not happen unless the elevators were able to ship the grain out. The third problem was related to the fact that most of the elevators were cooperatively owned, and if transportation was not allocated "fairly," farmers could be denied the ability to patronise "their own" company.

The CWB Act was not the only legislation under which grain transportation was regulated. Sections 61 to 76 of the Canada Grain

Act (CGA) specified in great detail how the car order book was to operate, and section 15 allowed the Board of Grain Commissioners (now the Canadian Grain Commission) to "make regulations and orders … in case there is a shortage of railway cars for the shipment of grain, governing the equitable distribution of cars among shipping points on any line of railway"[1] (emphasis added).

In 1947, therefore, the regulatory powers of the two agencies matched existing operating practices and fitted together to provide for all contingencies. Under normal circumstances, the railways would distribute cars, first among shipping points and then among shippers at the points, basing both allocations on information contained in the car order books. The CWB could override the distribution among shippers at the point to give preference to grains that were in demand, or to achieve "equity of delivery opportunity," or to allow farmers to deliver to their own cooperative. When there was an overall shortage of cars, the Board of Grain Commissioners had the regulatory power to allocate cars among shipping points.

Between 1947 and 1967, this system gradually eroded as the railways phased out station agents and the car order book fell into disuse. Hence both railways and grain handlers increasingly came to rely on CWB shipping orders to tell them what, when and where to ship. At the same time, grain volumes increased, and the grain supply chain moved from a "push" to a "pull" system to accommodate the growing use of forward sales. The CWB's car allocation system was no longer able to cope with these emerging realities, and a completely new system of logistical control had to be developed. Accordingly, in 1967, the "Block Shipping System" came into being, under which the prairie area was divided into 48 geographic areas, each comprising 3 or 4 railway subdivisions and about 50 or 60 elevators. The two-step process of transportation control disappeared, and was replaced with a complex, multi-stage, process under which the total cars available from each railway were divided, first among these geographic areas, then among grain handling companies within each area, and finally among each company's individual elevators. The CWB performed

[1] "Shipping point" and "delivery point" are synonymous.

the allocations, first by geographic area, and then by company, and also coordinated the entire system, while the allocations to individual elevators within each area were done by the elevator companies.

There were two important results from this system. The first was that the allocation which the CWB was empowered to do – i.e. to divide cars among elevators at a shipping point – was no longer directly done; rather, the division of cars among elevators at each shipping point emerged indirectly from the new multi-stage process. The second was that the CWB's newly-acquired transportation responsibilities – to allocate among blocks and companies within a block and to administer the entire system – were not included in the narrow wording of its legislation.

In 1997 and 1998, following a massive breakdown in grain movement, retired Supreme Court Judge Willard Estey was commissioned to conduct a detailed review of the system. By this time, the CWB's control of transportation was seen by many, not only as a major factor in the long delay in modernising the grain handling and transportation system, but also as exacerbating the kind of breakdown that Estey was investigating. The core of both problems was that the CWB's centralised control severely constrained the grain handling companies' ability to manage their facilities, thus impeding their ability to rationalise, and obscuring the accountability for system breakdowns. Many of the parties who participated in the review argued this point strenuously, ultimately leading Estey to recommend that the CWB's role in transportation be terminated.

Over the latter part of the 1990s and early 2000s, the grain handling system underwent massive changes. The number of primary elevators shrank from 1578 in 1990 to 336 in 2007 (Canadian Grain Commission), while the four large grain co-ops (the three provincial Wheat Pools and United Grain Growers) disappeared and were replaced with one publicly traded company (Viterra). Increasingly, therefore, the competition among grain companies to attract farmers' grain occurred between elevator points, rather than between elevators at each point. The effect of this was to further separate the reality

of car allocation from the regulatory framework of 1947. While there were some changes in the way transportation and logistics were controlled and regulated (see below), the basic architecture of the system did not change and the CWB's role is still much like it was at the start of the 1990s. And these allocation activities still differ from the allocation authority described in the CWB Act.

So the question remains: does the legislation provide the CWB with the necessary power to do what it does in controlling transportation?

What the statute says

A careful look at section 28(k) of the CWB Act shows that its language is, to use Bromley's word, ambiguous. Broken into its grammatical phrases, the section reads as follows (emphasis added).

> The Board may, notwithstanding anything contained in the Canada Grain Act, but subject to directions, if any, contained in any order of the Governor in Council, by order:
>
> (k) provide for the allocation of railway cars available for the shipment of grain
>
> at any delivery point
>
> to any elevator, loading platform or person at the delivery point.

The ambiguity arises because it is not clear exactly what the middle phrase, "at any delivery point," actually modifies. In the context of 1947, the meaning of the section was clear and was consistent with the operational practices of the time. The section, without any ambiguity mean that the CWB was able to exercise allocative authority only over rail cars that were (a) located at any point on a rail line to which farmers deliver grain, and (b) spotted there for the purposes of shipping grain. Rail cars located elsewhere in the system, but not yet placed at a specific delivery point, had to be allocated among points before they fell under CWB jurisdiction.

It is grammatically possible, however, to interpret the middle phrase as modifying the word "grain," in which case it could be argued that the CWB's powers extend to any cars that are located anywhere in the railways' systems and that might be moved to the point in question for the purposes of grain carriage. The wording of the section might, therefore, be interpreted so as to empower the CWB to allocate among shipping points as well as at shipping points.

So Bromley's "objective" interpretation founders, as he suggested it could, on the section's ambiguity, and we must turn to the "common sense" analysis. Using this approach, the arguments against and for this broader interpretation are advanced under the following two headings.

The arguments against

There are four arguments against the position that the CWB has the legislative authority to do what it has done since 1967: the historic context in which the section was written; a 1971 "Order-in-Council" issued by the Canadian government; an examination of what the Canadian government did **not** do in 1970; and a study done on the Grain Transportation Agency in 1982.

The historic context

This argument has already been developed. The section was introduced in 1947 when the CWB needed to override the existing car order book process at a point, while the broader regulatory authority to allocate among points rested with the Grain Commission.

The 1971 Order-in-Council

In 1971 there was a special government body called the "Grains Group" which had been set up to address a number of outstanding issues in the grain industry. The transportation specialist in this body was a man by the name of R.J. Shepp who had been one of the architects of the Block Shipping System, and who had been seconded

to the federal government from Canadian Pacific Railway. Shepp believed that the CWB was exceeding its legal authority in managing the Block Shipping System, and recommended that an Order-in-Council (O.C.) be passed to legitimate its activities. The Honourable Otto Lang, Minister Responsible for the Canadian Wheat Board (and, it is worth noting, former Dean of Law at the University of Saskatchewan) agreed. So an O.C. was passed to transfer, to the CWB, the general allocation powers contained in what is now section 118 of the Canada Grain Act. (The O.C. was repealed in 1979.)

The conclusion seems inescapable that the Order-in-Council represented a concern on the part of government that section 28(k) provided the CWB with only narrow powers and that it needed more legislative authority than it had to perform the duties it had assumed.[2]

*What the government did **not** do in 1970*

At roughly the same time that the Grains Group was formed, the government undertook a complete review of the Canada Grain Act. By this time, the car order book had faded into history, and the CWB had already assumed its expanded role in the new Block System. In 1970, therefore, the federal government had an opportunity to legitimate that role, and to provide the CWB with the more expansive powers to allocate rail cars among points. However, it did not do so. Instead, it left the scope of the CWB's powers unchanged, and the key phrase found in the Grain Act – "among delivery points" – remained conspicuously absent from section 28(k).

"Ordinarily, legislative silence … is meaningless," said Bromley. "Sometimes, however, it may be thought to say something" (Bromley, 213). Although it may have been merely oversight, given that the government was alive to this issue, and that the transportation powers in both Acts were being amended to reflect current conditions, it is not unreasonable to infer that Parliament examined this wording and did not intend that these broader powers should be

[2] A telephone conversation with Mr. Lang when this paper was being researched confirmed that this was the government's intention. .

extended to permit the CWB to exercise allocative responsibility among shipping points.[3]

The federal government study on the Grain Transportation Agency

The fourth argument against a broad interpretation of s. 28(k) comes from a study done by the federal government on the Grain Transportation Agency. This body was established in 1979, and its major role was the allocation of shipping orders and rail cars to grain companies for their own grains. The GTA (which was later called the Western Grain Transportation Office) was disbanded in 1996. In 1982, a Transport Canada official, Anthony Burges, was asked to evaluate the Agency's role and he in turn secured legal advice regarding the legislation governing car allocation. The legal analysis is contained in an appendix to the Burges study.

The report spends many pages mulling over the various sections of the CWB and Canada Grain Acts, and speculating as to which powers were supposed to override which. But it considers this question in the context of 1982, not 1947, when the new section went into the CWB Act. It identifies the important distinction between allocation among shipping points and among shippers at a point without recognising that this wording reflected the way the logistics system operated in 1947. Although the report thoroughly analyzes the problem as it existed in 1982, its authors apparently never went back to either the old Canada Grain Act, or to the original wording of 28(k) (which contained the phrase "other than cars placed pursuant to a car order book)," to see how the powers of the two Acts fitted together, and how they matched the operating procedures of the time. It is likewise silent on how the new procedures under the Block Shipping System procedures created the need for the O.C passed by Lang in 1971. Even without such an analysis, however, the authors of the report concluded: "It is questionable whether [s. 28(k)'s] rather narrow wording empowers the Board to allocate cars to delivery points … especially in light of the power given … to the Canadian Grain

[3] The suggestion was made by a colleague that the ambiguity of s. 28(k) might also result from a legislative process that fails to be as precise it might it be in wording its statutes.

Commission … to specifically do so." (Burges, 63) Had the authors gone back to the pre-1970 Canada Grain Act, it would have strengthened their conclusion that the narrow interpretation of 28(k) is the correct one.

These, then, are the arguments which say that the CWB Act did not, post-1967, have the necessary powers to control transportation as it did. What are the arguments on the other side?

The arguments in favour

Despite its conclusion about the CWB's powers, the Burges report also pondered whether or not there was any legal principle by which s. 28(k) might be interpreted so as to empower the CWB to allocate both at and among delivery points. It concluded that there may be.

The argument of "necessary implication"

According the report, a regulatory body may, under the principle "necessary implication," exercise powers not expressly included in its legislation if the effective exercise of the explicitly stated powers requires it to act beyond its legislative mandate. Given that, under the Block System, allocations were no longer made out of cars already located at delivery points, it might then be argued that, in order to meet its objectives, the CWB needed the powers that it had de facto already assumed. Although the report did not refer to the changes brought by the Block System, it nevertheless acknowledged that it might be argued that "the power to allocate between shippers at delivery points … could include, by necessary implication, the power to allocate to delivery points"(Burges, 70). This, however, was the only argument advanced in the report to support the position that the CWB was properly empowered to perform its post-1967 role.

Which is right?

It is apparent that the question of precisely what the CWB is empowered to do is not crystal clear. The matter has never been tested in the courts, and is unlikely to be. Railway and grain officials

have to work, day by day, with their counterparts in the CWB, and being in litigation does not make for congenial relationships. Moreover, if the matter were to go to the courts, it could not be resolved with Bromley's "textual" approach, because of the clearly ambiguous wording of 28(k). Approached using the "common sense" tests, the court would have to consider the arguments presented above and decide which it found to be the more compelling.

However, the "common sense" approach – in the normal meaning of the phrase – would also have to ask whether the CWB actually needs regulatory control over car allocation to meet its objectives.

Is the exercise of regulatory powers necessary?

During Justice Estey's review, those who sought a less regulated system argued, not only that the CWB's regulatory control restricted the grain companies' ability to manage their facilities, but also that it was unnecessary.

First of all, they said, commercial contracts between the CWB and grain companies could replace the CWB's current hands-on regulatory control. These contracts would oblige the grain handlers to deliver the required grains to the CWB, but would leave the logistical details to the companies themselves to arrange. Such contracts would be similar to the contracts they now have with customers for grains that do not trade through the CWB.

Secondly, they pointed out that the CWB has already developed producer delivery contracts that are used to ensure "equity." Unlike the former "bushels per acre" delivery quota system, these contracts provide for strict control on grain delivery, specifying who can deliver grain at what times. Moreover, local congestion of elevators no longer prevents farmers from delivering, partly because flexible and extensive truck transport allows them to bypass local congestion problems, and partly because older regulations, extant in 1947, that restricted where farmers could deliver their CWB grains, have not been operative for many years.

The third objective of the 1947 amendment – enabling farmers to deliver to an elevator of their own choosing – has simply disappeared. In the first place, most farmers now haul their grain to where they could get the best deal, making the old loyalties increasingly irrelevant, and secondly, the large cooperatives have all disappeared, along with farmers' ownership stake under the co-op structure.

In summary, therefore, the historic objectives for which section 28(k) was introduced, and which might be the basis upon which broadening the CWB's powers could be justified by "necessary implication," either no longer exist, or could be met by other measures. Moreover, using contractual arrangements to control logistics would enhance the commerciality of the system – another broad government objective which was specifically highlighted when it enacted the few reforms that finally emerged from the Estey recommendations (Transport Canada, 2000).

The situation today

There have been many changes in the grain industry over the past 15 years, of which the dramatic consolidation of the elevator system, and the disappearance of the large co-ops are only two. The Crow subsides ended in 1994; a somewhat more commercial rate structure has been developed; branch lines have been abandoned; and the directors of the CWB are now producer-elected. Despite these changes, however, the essential architecture of the old "Block Shipping System" remains largely intact. The CWB still meets with the railways on a weekly basis to determine the available car supply, and it then allocates 60% of the available cars to the grain companies by geographic areas, and the companies allocate these cars to individual elevators. The remaining 40% are allocated by a more complex process that, in part, involves tendering, and does provide the elevator companies with some additional flexibility in the way the are able to distribute cars among their individual elevators.

The detailed operating procedures, however, are not germane to the argument made in this paper. The relevant aspects of the current situation are: (1) that the CWB still regulates the majority of the

movement in the way it has since 1967, and (2) that the CWB's regulatory actions still do not conform to the powers described in section 28(k).

Conclusions

The following conclusions flow from the analysis of this paper:

- The wording of section 28(k) of the CWB Act, Parliament's 1970 decision not to expand the powers provided in s. 28(k), the 1971 Order-in-Council to transfer the regulatory powers of the Canada Grain Act to the CWB, and the 1982 Burges report, provide a strong case that the CWB has not possessed the legal authority to perform its regulatory role in transportation since approximately 1970.

- Section 28(k) was created almost 60 years ago to provide regulatory authority for logistical operations that are no longer performed in the way that they were, and to address problems that no longer exist. While the logistics have changed, the legislation has not, and the powers provided no longer apply to the current situation.

- It is no longer necessary to use regulation to meet the CWB's operating objectives. New contractual arrangements with grain handlers, and existing CWB delivery contracts with farmers, could replace regulation to provide control of grain movement. The problem of permitting co-op members to patronize their own local elevators simply no longer exists.

- Continued regulatory control is inconsistent with broad and long-standing government policies favouring deregulation and greater reliance on market forces.

- At the same time, while the Estey inquiry showed that the centralised control of grain logistics by the CWB was a significant factor in the many failures in the grain handling and transportation system, the CWB's regulatory control over grain movement remains largely unchanged.

To return, then, to the question posed in the title of this paper: did the massive failures in the western Canadian grain handling and transportation system arise from policy failures or legal failures? Laws, of course, are an expression of policy, and policy, at its best, is a reflection of societal values. In the immediate post-WWII era, railways were highly regulated, the CWB enjoyed almost universal support, and society at large held generally positive views about government intervention in economic affairs. All this changed in the ensuing decades but the CWB's practices did not. By the early 1970s, the CWB's regulation of grain transportation began to be recognised as a contributing factor in the industry's problems, and by the time that Burges completed his report on the GTA, a compelling stack of evidence had accumulated, and the argument had been made, showing that the legal authority of the CWB no longer matched its operational practices.

Speculative history is a controversial practice: What would have happened if Anthony had not fallen in love with Cleopatra? Would Germany have triumphed if Hitler had not opened an eastern front against Russia? Nonetheless, it is tempting to imagine some of the things that might have happened if the legal problem described in this paper had been recognised earlier, and if the general move towards deregulation in transport had limited or terminated the CWB's role in transportation, and if the CWB had been forced to use commercial mechanisms to meet its goals rather than continuing its "command and control" approach. Perhaps, with greater freedom to manage their assets, the grain companies might have been better able to consolidate and modernise their elevator systems. Perhaps the massive breakdown of 1996, and many similar if less serious incidents, might not have happened, or might have been less severe.[4] Perhaps the policy debates might have been less bitter and more constructive.

Then again, perhaps not. What is clear, however, is that the CWB's regulatory control of transportation was a major contributor to the

[4] It is worth noting that the grain companies, whose non-board sales of canola should, in theory, have been just as profoundly affected by the alleged "level of service" shortcomings of 1996 did not join the CWB in its legal case against the railways.

failures of the grain handling and transportation system, and that there is a strong argument that the organisation has, for several decades, acted beyond its legal authority. And regardless of whether it is a legal failure, a policy failure, or both, it is a situation that continues to call out for reform.

WORKS CITED

Canada Grains Council. 1973. *State of the Industry.* Winnipeg:, Manitoba Canada Grains Council.

Bromley, James. 2005. "Statutory Metaphysics: Where to Look for What a Statute Says?" *Journal of Transportation Law, Logistics and Policy*, v. 72, no. 2.

Burges, Anthony W. 1982. *Preliminary Report: Evaluation of the Grain Transportation Coordinator's Activities.* Ottawa: Government of Canada, 12 February.

Canadian Grain Commission. (various years.) *Grain Elevators in Canada.* Winnipeg, Manitoba: Canadian Grain Commission. [Recent editions available at www.grainscanada.gc.ca.]

Earl, Paul D. 2000. *Mac Runciman: A Life in the Grain Trade.* Winnipeg: University of Manitoba Press.

Earl, Paul D. 1983. "Logistics of Grain Movement." *Canadian Transport Commission Research Seminar Series* 10. Ottawa: Canadian Transport Commission, Fall 1983.

Estey, Willard Z. 1998. *Grain Handling and Transportation Review.* Ottawa: Transport Canada, 21 December.

Transport Canada. 2000. News Release: "Government of Canada Announces Measures to Improve Western Grain Handing and Transportation System." Ottawa: Transport Canada, 10 May, Found at: www.tc.gc.ca/mediaroom/releases/nat/2000/00_H034e.htm

Wilson, C.F. 1980a *A Century of Canadian Grain: Government Policy to 1951.* Saskatoon: Western Producer Prairie Books.

Wilson, C.F. 1980b. *C.D. Howe: An Optimist's Response to Surfeit of Grain.* (n.p.)