The Estey Review’s Contribution to Transportation Policy

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One of the last major undertakings of Justice Willard Z. Estey was a comprehensive review of the grain handling and transportation system in Western Canada, undertaken for the federal government. Commissioned in December 1997, it was completed in two phases – May and December 1998. Conducted with Justice Estey’s usual energy, the review undertook an extensive consultation process, first to identify problems in the grain handling system and then to suggest solutions. Reform of the grain handling and transportation system has been an extremely contentious issue in the Canadian Prairies, and it took considerable courage to propose the radical changes contained in Judge Estey’s review. While the federal government has implemented a number of Judge Estey’s recommendations, it did not implement his entire package. The impact of the reforms is still being debated. This article discusses Judge Estey’s approach to the review process, outlines the major issues the review addressed and provides a preliminary assessment of the implementation of the review’s recommendations.

Keywords: Estey Review, Grain Handling, Railways, Transportation
Introduction

There is an old story about a Prairie farmer in the Dirty Thirties, when depression and drought blighted the land. The farmer works hard and prays hard and somehow manages to raise a huge field of grain. Then, a few days before harvest, a thunderhead rolls in with a blast of hailstones that flattens the whole field in seconds. Looking out over this cosmic bad joke, the farmer rears back, shakes his fist at the heavens and cries out, “God damn the CPR!”

While the story of the Prairie farmer’s predilection to blame all the ills in the world on the Canadian Pacific Railway is meant as a joke, as with many jokes it has an element of truth. The debates surrounding the marketing, handling and transporting of grain grown in Western Canada have a long history and bring forth deep-seated emotions – as the debate over the future of the Canadian Wheat Board at the end of the first decade of the 21st century attests. In the era when grain was transported from farms to loading points on the railway in horse-drawn wagons, both the local elevator which purchased the grain from farmers and the railway had considerable opportunity to exploit market power, acting as a monopsonist when buying grain or as a monopoly when selling transport services. Competition was constrained by the difficulty and cost of hauling grain off the farm. Realistically, most farmers had access to one grain handling facility and one railway. Further, railways were the first modern conglomerates and were the focus both of early fears regarding unregulated capitalism and of financial scandal in the “robber baron” era of capitalism’s development, particularly in the United States (Nolan, 2001). In this era, there was a large “spillover” of anti-railroad sentiment from the United States into Canada.

In addition, the building of Canada’s transcontinental rail networks was fraught with scandal (Currie, 1967). Prairie farmers felt isolated and vulnerable far from export ports at the end of long and sometimes unreliable rail lines. In such a system, it is easy to see why economic difficulties could be attributed to grain companies and railways (whether or not the attributions were valid); it is also easy to see why farmers wanted greater control over the marketing, grain handling and transportation upon which they were dependent.
Prairie farmers sought to reduce the inequities in market power that they perceived in the grain marketing, handling and transportation system in two ways. They joined together in cooperatives to operate their own grain handling facilities – the Alberta Wheat Pool, the Saskatchewan Wheat Pool, the Manitoba Pool and United Grain Growers – and lobbied the government for regulatory institutions and policies to govern the grain handling and transportation system. From the 1890s to the end of the Second World War, a complex web of regulatory institutions was assembled that, in its heyday, controlled virtually all aspects of Prairie grain marketing, handling and transportation.

Central to the development of this system were the creation of the Canadian Wheat Board (in 1935), a quasi-governmental organisation tasked with the international marketing of grain, as well as the so-called Crow’s Nest Pass Rates, which were regulated grain transportation charges applicable to all Prairie grain shipments moving to ports shipping Prairie grain (Schmitz and Furtan, 2000; Currie, 1967). In addition, a group of institutions evolved that spanned the spectrum of grain handling operations, from allocating rail cars to grading grain to licensing new grain varieties. The grain pools evolved into large multifaceted organizations with large investments, not only in country grain elevators but also in port facilities. By the 1950s Prairie farmers were proud of what they had accomplished, and the consensus was that they had considerably reduced the risk of capricious activities by railways and grain handling companies. The battles fought to achieve this increased security had been hard won and were not easy for farmers to forget. These battles became the stories (sometimes legends) passed on to children and grandchildren on the Prairies.

The creation of a wide-ranging web of institutions, however, also meant a considerable degree of institutional inertia and inflexibility. Vested interests in the system naturally arose. The broader economic environment within which the institutions of the Prairie grain marketing, handling and transportation system operated was also constantly evolving. Technological change in agriculture, inflation, farm consolidation, increased competition for export markets and the fiscal difficulties of governments all acted to put stress on the system. In particular, improvements in road transportation and road infrastructure in the 1950s (see Bantjes, 1992) reduced the dependence of farmers on local elevators and rail loading points. Some farmers began to view the extant institutional structure as a constraint rather than a benefit, while complaints regarding the system’s inefficiency became widespread. Concerns with the disincentives within the grain handling system for diversification of the Prairie economy into higher value-added products were also expressed at this time. Ultimately, the existing system still enjoyed considerable support among farmers,
while at the same time strong advocates for reform became increasingly vocal. This set the stage for a prolonged public policy debate over the grain handling system.

The first major institutional pillar of the grain marketing, handling and transportation system to succumb to pressures for reform was the regime of Crow’s Nest Pass statutory rates for grain transportation. Initially, this policy had fixed in perpetuity the nominal transportation rates that the private Canadian Pacific Railway and the (formerly) public Canadian National Railway could apply to grain moved to port for export. In a pattern that was recognised as early as the 1940s, but especially with rising rates of inflation during the 1970s and early 1980s, the fixed “Crow” rates covered less and less of the railways’ actual cost of moving grain – a situation that was untenable in the long run given the disincentive it provided for the railways to invest in grain transportation equipment and infrastructure. Many farmers, however, perceived the regulated Crow rates as their major protection against the monopoly pricing power of railways and looked on the perpetuity commitment in the initial Crow rate legislation as a “birthright” for them and their children.

The extensive battles over reform of the Crow policy are chronicled elsewhere (Klein et al., 1993), but the important point is that the Crow rates were eventually increased and supplemented with a system of direct rail subsidies embodied in the 1984 Western Grain Transportation Act (WGTA) (Nolan, 2002). Unfortunately, this new regulatory regime was perceived by many farmers as providing less protection from the pricing power of the railways than the original “perpetuity” clause of the Crow rates. And while the WGTA was repealed in 1995, the lesson of regulatory reform was not lost on the supporters of and the players in the grain marketing, handling and transportation system. New proposals for reform have since been viewed with considerable suspicion.

The abandonment of the long-standing Crow rate system put the entire grain marketing, handling and transportation system into disequilibrium and unleashed a number of powerful market forces that generated hitherto unforeseen effects. These new pressures were met, in the first instance, by simply tinkering with the regulatory regime. This proved particularly unsatisfactory. The disequilibrium, however, also increased the pressure for even greater reforms by some farm groups and the provincial government in Alberta.

By 1997, it seemed clear that a major reform rather than additional tinkering needed to be contemplated by the federal government. In July 1997, federal Transportation Minister David Collenette, together with colleagues Lyle Vanclief, Minister of Agriculture and Agri-food, and Ralph Goodale, Minister responsible for the Canadian Wheat Board, convened a meeting with a number of grain industry
stakeholders on the efficiency of the grain handling and transportation system. The meeting generated widespread agreement on the need for a comprehensive and thorough review of the grain handling and transportation system (GHTS). This review was to be conducted much sooner than the 1999 statutory review set out in the 1996 Canada Transportation Act, which, in part, was intended to fill the void left by the repeal of the WGTA (Transport Canada, 1997). Subsequently, in December 1997, Collenette asked Justice Willard Estey to conduct a comprehensive review of the grain handling and transportation system, with a primary focus on the important, Western Canadian export-destined grain (Estey, 1998). Clearly, this was going to be a politically charged issue where emotions could be expected to run high. In this thankless situation, why was Willard Estey chosen to conduct this task, and, perhaps more importantly, why did he accept?

Why Justice Estey?

On the face of it, there is very little in Justice Estey’s academic or professional experience to suggest that he had any expertise in the areas of rail transportation or grain handling. Due to the wide range of technical topics pertaining to the movement and handling of grain, combined with the compounding distortions that are contained in the multiple policy initiatives and regulatory institutions that were piled onto the system over a long period of time, simply understanding the GHTS would necessarily require considerable human capital built up over a number of years. In general, Justice Estey’s legal education would not have given him any advantage in this area, and his corporate experience had little direct relevance.

In fact, his lack of expertise in this regard appears to have been the source of considerable frustration for some of the participants in the public consultations conducted as part of the review. According to grain industry observer Paul Beingessner (2000), who attended a number of the public meetings,

> It was also obvious he still had a lot to learn. His understanding of the road impacts from grain trucking was that the problem lay with the municipal grid roads. If grain could just get to paved surfaces, it was okay.
>
> The truth is far different. While grain hauls impact grid roads to a certain extent, they are far better equipped to handle heavy trucks than the thin membrane surfaces which the department of highways in Saskatchewan optimistically calls secondary highways.
>
> A more serious deficiency was Estey’s lack of understanding of rail freight rates and the way these are set. Given the importance of understanding this in some detail, Estey’s lack of clarity was disconcerting. It seemed that his staff, experts in this area, had not yet been able to educate their boss about it. (p. 5)
Others were equally disparaging of Estey’s apparent lack of depth on the issues. A Canadian Wheat Board (CWB) response to the final report accused Estey of

… misunderstanding the CWB’s role as a commercial grain marketing organization and of ignoring the needs of Canada’s grain customers, (and) Estey is confused about some existing rules and regulations and entirely misses the point on railway competition and pricing issues. (Ewins, 1999a)

It also appears that Justice Estey did not want to use detailed analyses of the more complex issues. Unlike the more recent Canadian Transportation Act review of 2001, the Estey review did not commission research studies on particular aspects of the problem, although admittedly the time frame was very short.

Even the press release that announced Justice Estey’s appointment did not suggest that he was appointed because he had any particular expertise in the area:

“Justice Estey has served on three royal commissions and numerous panels of inquiry on behalf of the Government of Canada,” said Mr. Collenette. “He is one of Canada’s leading citizens, and it is a privilege to announce the appointment of Justice Estey to lead this important and comprehensive review.” (Transport Canada, 1997)

Of course, he did have considerable experience running panels of inquiry for the government, including those dealing with the collapse of the Northland Bank and Canadian Commercial Bank, along with the future of Air Canada and the steel industry. Thus, we believe he was considered a set of “safe hands” into which to place such a politically charged inquiry. Another aspect of Justice Estey’s reputation may have made him appear suited for the job – his plainspokenness. He had a reputation for speaking his mind and doing it in a clear, concise manner. He also did not suffer fools easily. These traits might have been expected to appeal to farmers, and their initial reaction to his appointment seems to bear this out.

Furthermore, he was obviously a very prestigious civil servant given his time as a Supreme Court Justice, so the federal government could not be accused of failing to take the review seriously. At the time of his appointment, much was made of him having been born, raised and educated in Saskatchewan. However, it seems clear that while he was very proud of his Saskatchewan roots, he was very much from Saskatchewan rather than of Saskatchewan. At the time of the review, he had not lived in Saskatchewan for 50 years; he left a teaching post at the University of Saskatchewan law school in 1947 for Toronto.

His corporate law experience in Ontario, both before and after his time on the bench, could not have properly prepared him to handle the complex issues of competition and regulation in the Western rail transportation industry. In Toronto he was exposed to corporate competition of a different sort – the corporate strategizing...
that allows one to gain a competitive advantage on one’s rivals. It is our belief that Justice Estey thought that the changes he eventually suggested regarding deregulation of the rail transportation system would be sufficient to induce corporate competitive strategizing between the railroads, and that this would be sufficient to keep shipping costs low as low as possible for farmers. The accuracy of his interpretation of competition in this industry will be addressed later in this article when the review is formally assessed. This view of the possibility of beneficial competition between the two major Canadian railroads over grain did not sit well with supporters of the position that railroads in this market most often behaved as non-competitive monopolists, and, as such, removing safeguards like rate regulation should be regarded with considerable suspicion.

As a result, Justice Estey was painted in many circles as being part of the Central Canadian establishment – which for his detractors meant that at best he was indifferent to the plight of Western Canadians and at worst in league with the railways to take advantage of Western farmers. His critics were quick to brand him a “scion of the eastern establishment” (Larson, 1999, 3) and to suggest that “connections he developed or work he did during his legal career made him predisposed to favour the railways’ point of view” (Ewins, 1999b). According to Saskatchewan Wheat Pool Vice President Marvin Wiens, Estey “argued exactly what the railroads are arguing, that if you introduce competition and remove the rate cap, the total freight costs to farmers would decline” (Ewins, 1999c). In this regard, Justice Estey was not able to exploit his Prairie roots to the degree he, or the government, might have hoped. According to Beingesser (2000),

“Bud” Estey was billed as the boy from Saskatchewan, albeit a boy who made good, but shortly after his appointment, it became clear that Bud Estey’s roots in western Canada never made it past the hardpan. (p. 4)

In sum, Justice Estey appears to have been chosen to conduct the GHTS review largely because of his prestige, his experience in managing complex inquiries and his personality rather than for any particular knowledge or insight into the grain transportation industry or the landscape of farm politics on the Prairies. The reader should keep this point in mind when we review his contribution to the state of Canadian transportation later in this article. As we have seen, his lack of topical expertise also left him open to criticism, some of it quite vitriolic.

These issues leave unanswered the question of why Justice Estey chose to undertake the review in the first place. He was, after all, seventy-nine years old when he accepted the appointment and was becoming increasingly hard of hearing.³ He had already had a long and distinguished career and had nothing to prove to anyone, yet he
accepted the tight deadlines put on the review and threw himself into a schedule that
would have taxed a man half his age. He could not have been so naïve as to believe
that he would not make enemies and could avoid sharp (sometimes personal) criticism
no matter what he concluded, given the politically charged nature of the topic of
GHTS reform. What he did possess, however, was a strong sense of public duty, and
he was a strong Canadian nationalist. As an example, when speaking of his father’s
acceptance of the appointment to the Supreme Court, his son Bill Estey is quoted as saying,

He felt that when the prime minister calls and asks you do something, you
had better have a good reason not to do it. (Markin, 2002)

Presumably, this sense of duty also extended to calls from the Minister of
Transport.

The industry reaction to his report was entirely predictable. In essence, Estey
recommended sweeping changes to the institutions of the grain marketing, handling
and transportation system. Those who favoured change thought he provided “both a
clear vision for an efficient transport system, and a workable set of recommendations
to realize that vision” (Western Canadian Wheat Growers Association, 1998), whereas
those who were not in favour of the changes he recommended vigorously attacked the
review. National Farmers Union spokesman Terry Boehm is reported to have said,
“I’m hoping it will be relegated to gathering dust” (White, 1999). Critically, Justice
Estey suggested a considerable diminution in the role of the Canadian Wheat Board.
Not surprisingly, the board’s response was, according to Ewins (1999a), “a blistering
critique of both the report and the author.”

In the aftermath of the release of the report, Justice Estey was not shy to reply to
his critics, particularly their allegations that he was biased toward the railways. With
his characteristic bluntness, he is reported to have said of those making such
allegations that “I think they’re a pack of idiots. I am beholden to nobody. That’s hot
air” (Ewins, 1999b). His response to criticism from the Canadian Wheat Board was
equally blunt, but tinged with his characteristic wit. According to Ewins (1999b),

He told the canola growers that the board’s response reminded him of a
hockey referee who once said the only way he could do his job was to tell
himself that he was the only sane person in the arena: “That’s my view of
the Wheat Board shouting away about my report.”

Estey viewed his set of recommendations as a holistic plan that would not
accomplish its mandate if diluted and implemented in piecemeal fashion. Justice Estey
was also not shy to criticize the legislation that the government eventually put in place
to implement his review or, more correctly, certain portions of it. When appearing
before the House of Commons Transport Committee in June 2000, his assessment of how the government had dealt with his report (via the subsequent Kroeger process) was “sharp, critical and disdainful” and he told the MPs that it was a “hopeless mess” (Wilson, 2000).

Assessing the Impact of the Estey Review

Given the criticism and Estey’s own doubts about the efficacy of the changes eventually put in place by the government, it is a worthwhile exercise to assess the likely impacts of Justice Estey’s last major contribution to Canadian public policy. In the Phase I report he submitted on May 29, 1998, Justice Estey identified fifteen important issues raised by stakeholders after extensive consultations across Canada. In the Phase II report of December 21, 1998, Estey made public his final recommendations, each one corresponding to an issue identified in the first phase. After a round of public and stakeholder discourse about the report, on May 15, 1999, Collenette asked Arthur Kroeger, a former deputy transport minister, to move forward and implement the proposals made by Estey. That final report, known as the Kroeger report, was submitted on October 5, 1999 (Transport Canada, 1999).

The history and regulation of grain movement in Canada is complicated. For its part, the Estey review is somewhat unique in this history because it sought to examine the performance of the grain handling and transportation system as a whole, rather than focus on individual components. Another unique quality of the report is that Justice Estey’s vision for the future of the grain handling and transportation system favoured competition and market signals as determinants of economic allocations at every stage of the grain supply chain. Ultimately, the transportation and agricultural communities will judge the importance of Estey’s work by its long-term influence on Canadian grain handling policy. Several of Estey’s key recommendations were operationalised officially through Bill C-34 of 1999. Bill C-34 included policies to help diminish the centralized role of the CWB in grain transportation. More importantly, Bill C-34 contained his recommendation to create a revenue cap on the railways as a safeguard against the ability to exercise market power. While his other critical recommendation on rail competition through infrastructure access was not part of Bill C-34, this idea survived as part of the regulatory policy discourse and is testimony to his perspicacity. However, not all of his recommendations, including that of a reduced role for the Canadian Wheat Board in grain transportation logistics, have proven to be tractable.

This article will not seek to detail all 15 recommendations contained in the 1998 Estey Review of the GHTS. Without trying to belittle the breadth of his review
process, we feel that several of his concerns and solutions were of topical importance (like hopper car allocation) and will soon be forgotten. What we provide is, rather, an overview of the impact of the recommendations that we feel represent Justice Estey’s most important long-term contributions to the GHTS and to Canadian transportation policy in general. These recommendations include the following:

1) a reduced role of the Canadian Wheat Board in the GHTS (recommendation 14);
2) a more commercial pricing environment for grain movement (recommendation 7);
3) increased competition in the rail sector (recommendation 8);
4) rail line abandonment on the Prairies (recommendation 10).

We will address each of these issues in turn. But first, we will provide some background on the Canadian grain handling and transportation system, along with a description of how the Estey review began. Only in this context can we understand the nature of the daunting task he faced at the time in providing useful input into such a diverse and mature industry.

The Grain Handling and Transportation System at the Time of the Review

In order to better understand how and why the Estey review was necessary, we refer the reader to figure 1, a stylized representation of the Canadian grain handling and transportation system at the time of the review. This diagram also helps place into context the role of the Canadian Wheat Board in the grain handling and transportation system at the time.

The process of grain handling and transportation begins with farmers growing and harvesting grain. Prior to the changes to the CWB that were put in place in 2012, once this seasonal task was completed, farmers would typically sell their product to the Canadian Wheat Board by delivering their grain to a grain elevator company that operated as an agent of the CWB. In many cases, farmers were faced with a choice of elevators to deliver their grain. In the stylized example of figure 1, we see that two farmers, B and C, have a choice to deliver grain to either elevator by truck. On the other hand, other farmers have little choice of elevator due to their location. The latter situation is the case for farms A and D in figure 1. Ultimately, elevator choice for farmers meant that grain companies competed for quality, type and volume of delivered grain.

There were any number of reasons why farmers might choose a particular grain company or elevator. These reasons included location (nearest elevator), more advantageous grading of grain by a particular grain company (yielding higher sales revenues for the farmer), loyalty to a particular grain company, better compensation
for farm trucking costs, etc. Elevators provide mass grain storage and obtain economies of scale in several ways. For instance, once delivered to the elevator, grain is cleaned and blended there before final sale. The quality of this process adds value – value divided between the farmer and the grain company.

Layered within the initial delivery process was the Canadian Wheat Board. In the Canadian GHTS at the time, the CWB was the sole marketer of Canadian grain in overseas markets. Without question, the CWB was the most important single party in the process of grain handling and distribution. As a significant world player in grain, the board was tasked with marketing Canadian grain so as to provide the highest net return to Canadian grain farmers. By virtue of this mandate, the CWB also exercised significant control over the GHTS (Tyrchniewicz et al., 1998).

**Figure 1** The Canadian Grain Handling and Transportation System at the Time of the Estey Review
The CWB accepted delivery of grain to a given elevator with an offer of a so-called “initial payment” for the grain, money paid by the grain company acting on behalf of the CWB. This payment was based loosely on grain type, grade, condition and the distance of the producer from the port (Schmitz and Furtan, 2000). As well, individual farmer marketing costs (such as transportation costs) were deducted from the initial payment. In figure 1 of our stylized grain handing system, the CWB is located functionally between the elevators and railways because, while the CWB did not directly control how farmers moved their grain to the elevators, it did exercise significant logistical control over where and how much grain moved through the system once grain was in the elevator. Typically the CWB would fulfill its overseas contracts by deciding how and when different grades of grain in different locations would need to be moved to port and packaged for final shipment to the customer.

In the final stage of the grain handling and transportation process, the railways and the CWB planned the collecting and loading of the processed bulk grain from elevators, and subsequently grain was transported to port position for final export. This collection and flow is represented in figure 1 as the rail line connecting the CWB to the port. For many years, the CWB and major Canadian railways negotiated logistics assignments and rates for grain movement. However, once the grain started moving through the system, the CWB alone was liable for demurrage fees if grain contracts were not met. As we shall discuss in some detail below, a major CWB rail service complaint in the winter of 1996-97 led indirectly to the Estey Review of the Canadian GHTS.

**The Scope and Mandate of the Estey Process**

The terms of reference of the Estey Grain Handling and Transportation Review were established by the Minister of Transport at the onset of the process (Transport Canada, 1996). The terms convey in some detail the events that led to the commissioning of the review. They also contain a history of the relationship between grain movement and the railroads in Canada, up to and including the repeal of the Western Grain Transportation Act (WGTA) in 1995, and the subsequent modifications contained in the Canadian Transportation Act (CTA) in 1996. These policies (including a move to a distance-based rate cap – or limit – on the cost of rail grain movements) eliminated a significant amount of government intervention in grain transportation. Furthermore, these policies were completed under the premise that reliance on market forces in the GHTS would facilitate efficiency gains throughout the system.
In spite of the prevailing optimism that accompanied the passing of the CTA in 1996, the terms of reference for the Estey review referred to the continued perception that at the time of the review there were still significant problems in the GHTS. Foremost, the system participants were gravely concerned about the lack of accountability and reliability on the part of other firms in the supply chain, particularly the railroads (Transport Canada, 1996).

Against this policy background, the single event that focussed calls for an Estey-style review of the GHTS was the April 14, 1997 appeal by the Canadian Wheat Board to the Canadian Transportation Agency regarding alleged breach of service obligations for grain movement by both Class I railways. The Canadian Wheat Board initiated its complaint based upon level-of-service provisions in the extant Canadian Transportation Act. Ultimately, the goal of this action in the context of the act was to determine rail carrier accountability and then proceed to legal recourse based upon the ruling.

In his final report, Estey acknowledged that the CWB level-of-service complaint was the primary impetus for the Estey review and that the legislative process was founded upon this complaint. The first stage of the Estey review was designed as a fact-finding exercise, while the second stage of the review process was intended to develop a package of recommendations to help improve the GHTS. Interestingly, the terms of reference for Estey were initially clear that the latter would not begin until after completion of the CWB case and ruling. As it turned out, this sequence of events was changed, and this fact likely affected the outcome of the subsequent Kroeger process.

Not surprisingly, the major consensus achieved among stakeholders in the preliminary Estey fact-finding process was the view that the system still needed to be made more accountable to both shippers and carriers in order to improve efficiency along the supply chain from farm to export port (known as port position) (Estey, 1998). Most system participants also agreed that achieving this goal would necessitate even more reliance on market-based transactions within the GHTS. Given that Justice Estey so readily perceived this consensus indicates that the majority of system participants still believed that the railroads were the primary source of efficiency and accountability problems within the GHTS.

**Fulfilling Estey? The 1999 Kroeger Process and Bill C-34**

With government support of Estey’s review and recommendations, the Kroeger process began with the expectation that all of Estey’s recommendations could be distilled into a package of workable regulations. There was a government-imposed...
deadline: the regulations were to be implemented before the end of the year 2000. As mentioned above, it is important to note that Justice Estey had continuously stressed that his set of 15 recommendations was to be implemented as a complete package, or else his vision of market-oriented re-organization in the GHTS would not be realized.

The result of the Kroeger process was a revision to the act in the form of Bill C-34, which was applied to the GHTS starting in the 2000-01 crop year.

As a direct result of Estey’s work, Bill C-34 contained modifications to three key factors that have strongly influenced the evolution of the Canadian GHTS. These factors are rail line abandonment; the role of the CWB in grain handling and shipping; and freight rate controls. The first of these is actually the stricter enforcement of a set of revisions to the abandonment provisions contained in the 1996 act. These modifications were a response to mounting evidence that producers did not receive a reasonable share of railway productivity gains directly attributable to accelerated rail line abandonment in the late 1990s (Estey, 1998). The new provisions outline the structure for the rail line abandonment process more precisely, making it more difficult for a railway to abandon potentially viable branch lines. In fact, rail line abandonment slowed considerably in Canada after Bill C-34, but it is possible that the railways had already completed the most important of their abandonment plans.

Secondly, as part of the effort to commercialize the traditional GHTS in accordance with the spirit of Estey, the CWB was obliged under Bill C-34 to bid or tender out a minimum of 25 percent of its primary grain deliveries and associated logistical services (in the 2000-01 crop year) via a bidding process involving the grain companies (Canadian Wheat Board, 2000). Under the memorandum of understanding, the tendered percentage in the subsequent crop year would rise to 50 percent if the program for 2001-02 were judged to be successful.

In retrospect, the first year of the program did not work as hoped, mostly due to disagreements between the grain companies and the CWB. Without question, the introduction of CWB tendering was a big step in the gradual commercialization of the GHTS. Whether the quasi-commercialization of CWB basis tendering produced, captured and distributed system efficiencies in a reasonable and sustainable fashion remained an open question.

Finally, recommendation 7 from the Estey review (as suggested to Estey by Canadian Pacific Railway) called for the removal of the 1996 policy of freight rate caps on Prairie grain movements. Bill C-34 replaced the rate cap with a policy called the maximum revenue entitlement (or revenue cap) as a mechanism to regulate railway pricing behaviour. As implemented, the revenue cap gave the railways a greater degree of pricing flexibility than under the rate cap, while still offering
farmers regulatory protection against undue price discrimination on the part of the railways. In fact, the revenue cap proved to be highly controversial. Some argue it has facilitated the drastic process of elevator consolidation on the Prairies by forcing producers to shift most grain shipments to long unit trains serving larger elevators (Nolan, 2002).

**The Continuing Rail Competition Controversy: Recommendation 8**

The most controversial among the recommendations in the Estey review was the one addressing the nature of competition in the Canadian railway industry (recommendation 8). Justice Estey obviously had a very clear idea about how to address this issue, and he wrote in his final report,

> It is recommended that the provisions of the CTA (*Canadian Transportation Act*) relating to various methods of seeking access to other connecting rail lines be simplified and clarified so as to better serve the national interest in obtaining competitive and efficient transportation by rail. The general object of this recommendation is the opening up of the Canadian rail system to competition by and between all competent railway operators, including short-line railways. Competency shall be determined by the Agency.

This new provision would offer open access to the existing CN (Canadian National) and CP (Canadian Pacific) lines provided that fair compensation is paid and that certain conditions are met. Fair compensation should, at a minimum, cover the costs of the owner of the railway lines but concomitantly ensure that the owner cannot block access by charging unreasonably high fees. Conditions imposed may include a requirement that would-be operators must carry adequate insurance and meet license, safety and other statutory requirements. (Estey, 1998, 36-37)

The repercussions of recommendation 8 are still being felt, and the recommendation will continue to generate controversy in transportation circles. A long policy battle between the railways and grain shippers over the exact interpretation of recommendation 8 was fought throughout the Kroeger process (Nolan and Drew, 2002). In the interim, Estey’s vision of rail competition was not part of the policy package that constituted Bill C-34. However, open access and rail competition in the spirit of Estey is an idea that refused to fade away. We note that a subsequent review of transportation policy in Canada (known as the 2001 Canadian Transportation Review) officially recommended a limited form of Estey’s vision of competitive access to the Canadian rail system.
Other Issues Raised by Estey in the Review that May Prove Critical in the Near Future

Justice Estey also realized that without major policy changes, further deterioration of the road network, especially in rural Saskatchewan, is imminent. The province of Saskatchewan possesses the most miles of road infrastructure per capita of any political jurisdiction in North America. The rationalization of the Prairie track network and the elevator system has meant that trucks need to travel increasing distances in order to deliver grain from the farm to the newly built high-throughput elevator system. Road maintenance has become a major issue in Saskatchewan and puts considerable strain on the provincial budget. Justice Estey pondered this point in the review and considered several novel suggestions to forestall this problem (including a satellite based road pricing system).

The status of the ports of Prince Rupert, B.C. and Churchill, Manitoba merited special mention in the Estey review as recommendation 1. The large investments that had been made at both ports (especially at Prince Rupert) relative to the volume of grain traffic flowing through them were a source of concern to the federal government (Estey, 1998). Anecdotally, there would appear to be a potential societal benefit in increasing the use of Prince Rupert as a grain handling port because of congestion at the Port of Vancouver. Testimony by Prince Rupert Grain Ltd. in the Ferroequus access case (Annand and Nolan, 2002), however, suggested that Prince Rupert, at the time, handled all the grain traffic it needed. With respect to Churchill, the Canadian Wheat Board attempted to shift some grain traffic there under its freight adjustment factor (FAF) program.13

Conclusion

The strength of the Estey report was its focus on the relationships between the various groups in the grain handling and transport system of that time, and how these relationships ought to be changed in the future. The core of Estey’s analysis was the observation that the workings of the grain handling and transportation system depended crucially on the contractual relationships among four groups: farmers, grain companies, railways and the Canadian Wheat Board. Justice Estey concluded that the set of contractual relationships at that time were not conducive to optimal system performance and that this performance could be enhanced if those relationships could be suitably modified.

On the other hand, the weakness of the Estey review was that his suggested changes to the contractual relationships between farmers, elevators, railways and the CWB ultimately proved very difficult – in some cases impossible – to implement.
part, this was because he failed to anticipate the degree of attachment some farmers (and other vested interests) had to the existing set of arrangements and institutions. Further, the complexity of moving a commodity such as grain from farm to market made the development of a more efficient and equitable system a very difficult task. In sum, Willard Estey performed a valuable service by taking the time to clearly identify relevant issues and problems in the GHTS. Kroeger’s Bill C-34 proved to be an unfulfilling compromise of Estey’s complete package of recommendations. Its institutional compromise left the GHTS struggling on for another decade. A line was finally drawn under the existing institutional structure with the reform of the CWB, which came into effect for crop harvested in 2012. The inherent tensions in the relationships between farmers, grain handling companies and railways that Justice Estey grappled with in his last major contribution to Canada remain.
References


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Transport Canada (1999) Letter from the grain handling and transportation facilitator.


Endnotes

1. There are many versions of this story; this one can be found in Bell (1999).
2. Justice Estey’s Master’s thesis at Harvard was on railway administration (Estey, 1946). In later years, he was also involved in several telecommunications cases. We surmise that over time he maintained and developed an informal interest in network-based industries.
3. A number of observers commented on the difficult effects of Justice Estey’s hearing loss on the public consultation process – see for example Beingesser (2000).
4. There has been some criticism that the work surrounding the Crow rate debate failed to address grain handling and transportation as a holistic system – see Klein and Kerr (1996).
5. In the winter of 1996-97, there were a series of delays in grain deliveries to Vancouver. Officially, the CWB charged that the delays caused substantial financial losses due to their inability to meet contract commitments.
6. In the United States, a Class I railway is defined as a railway which earns more than approximately US$250 million in revenues. In Canada, only Canadian Pacific and Canadian National fall into this category (Conference Board, 2000).
7. The final Canadian Transport Agency decision ordered that “CP be prohibited from discriminating against grain” in the provision of railway service.
9. This situation is not unique to Canada. Koo, Tolliver and Bitzan (1993) find that the effects of shipper captivity on North Dakota (unregulated) grain freight rates are substantial.
10. Bill C-34 also includes changes to the process of final offer arbitration (FOA) as mentioned by Estey in recommendation 9 in the review, but this will not be discussed further in this article.
11. This is because the railways were allowed to set prices on individual portions of their system subject only to a limit on the total revenue they can collect rather than having a cap on each segment.
12. The evidence suggests that, for many movements, the railways are still pricing in a similar manner (according to distance) as under the rate cap regime (Riegle, 2001). While inertia may be a factor, it is not entirely clear why this has continued to be the case.
13. FAF was an incentive payment program that adjusted payments to farmers based on where they delivered and the destination of their grain. The FAF program essentially tried to leave farmers indifferent between sending their grain to any grain handling port in Canada.