

GOVERNMENT CONTROL OF AVIATION IN CANADA

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INTRODUCTION

The twentieth century has seen the realization of many of man's oldest dreams by means of new inventions and the perfection of old ones. The radio, the telephone, the automobile, the airplane, television and the more recent harnessing of atomic energy have changed the way of life and the habits of the present generations. Of these, the greatest and, perhaps, the most important in the first half of the century is without any doubt the realization of controlled flight.

While experiments with lighter than air aircrafts were successfully carried out during the nineteenth century, it is only in the beginning of this century that man first succeeded to fly in a self powered, heavier than air machine. On December 17, 1903, at Kitty Hawk, North Carolina, Orville Wright made his first successful flight, - it lasted twelve seconds, - in a machine which he and his brother had built with the help of Octave Chanute, a French engineer. 1/ The modern airplane was born.

1/ Percheron M.; L'Aviation Francaise 1940.

Air law as a subject matter of legislation was inexistent at that time and it is characteristic that in Aeronautics, unlike the situation in other fields of law, Municipal Law came after and was derived to a large extent from International Law.

In the beginning of the twentieth century, there was hardly any national legislation regulating flight of aircraft 2/ though legal theoreticists 3/ of many countries had already dealt with some of the basic problems of International Air Law either on their own initiative or as members of the institute of International law. There were also conferences on Air Law before and at the beginning of the century 4/ which were convened by International bodies such as the Institute of International Law 5/ where general principles for the regulation of flight were studied.

The words of Lycklama a Nijeholt 6/ are very applicable to that period:

"WHILST the technical expert from one century to another was engaged in investigating the problem of the navigation of the air, the jurist could afford to look on calm and unmoved as one experiment after another failed."

2/ We might mention the first air law ordinance in the form of a decree of the Paris police authorities in 1784 requiring the obtaining of a permit for balloon flights. This was followed in 1819 by further regulation of balloon flights. See Hotchkiss, The Law of Aviation, 2nd ed. (1938) p.4.

3/ Fauchille, Nys, Bluntschli, Meyer and others. See bibliography, Lycklama a Nijeholt, Air Sovereignty 1910. Appendix B.

4/ Conferences met in Paris in 1889 and 1890, in Milan in 1906 and in Nancy in 1909. See Hotchkiss, The Law of Aviation, 2nd ed. 1938 p.5

5/ Fauchille, Code of International Air Law, 1902. See Hotchkiss op.cit p.1.

6/ Op.cit. p.1

It is true that prior to World War I there was no real necessity for international conventions and a fortiori national legislation, though the determination of rights of states in respect of air sovereignty and other basic problems were seriously considered. Following the flight of Bleriot across the English Channel in 1909 nations began to see the necessity of regulating aviation on an international level and in the same year the International Committee of Aviation Law was founded in Paris 7/.

The failure of the 1910 Conference on Aerial Navigation which met in Paris reflects the attitude of that period.

World War I which followed four years later forced nations to recognize the great possibilities of aviation both in war and in peace and prepared the ground for the Convention Relating to the Regulation of Aerial Navigation usually referred to as the Paris Convention 1919. 8/

The Paris Convention 1919

The Convention which was signed by twenty-seven nations on October 13th, 1919, apart from dealing with various technical matters established broad legal principles which were to govern the relations between contracting states. The most important are as follows: A) National sovereignty over territorial air space; B) the right of innocent passage over territory of other

7/ Shawcross and Beaumont, *op. cit.* p.4

8/ The Paris Convention has now been superseded by the Chicago Convention 1944. It was denounced by the Canadian Government as of April 4, 1947. For contents of Paris Convention 1919 see Appendix C containing list of titles.

contracting states; C) the right to designate prohibited areas; D) the right to close its air frontiers in time of peace in exceptional circumstances; E) the right to make special agreements with non-contracting states provided such agreements do not infringe the rights of other contracting states; F) the right of states to control local traffic between points in their territory.

It will be sufficient for our purposes to mention these principles without going into any great detail as to their application in practice. 9/

Although the Paris Convention did not achieve universal acceptance, thirty-eight states became parties to it and for over twenty years it was the most important document on the subject of International Air Law and the basis for much national legislation on Air Law. Many of the principles of the Convention were incorporated in national laws of contracting and non-contracting States and even to-day principles of the Chicago Convention 1944 can be traced back to the Paris Convention 1919.

World War I was, no doubt, largely responsible for the fantastic growth of aviation and the perfection of the airplane. Following the war and the signing of the Paris Convention, with the continued progressive development of aviation national laws began to emerge and states eventually assumed complete control

9/ The Chicago Convention will be studied in greater detail.

over all phases of aeronautics.

Canadian aviation law has followed very much the same pattern of development and until 1919 there was no statute law in respect of aeronautics. In that year, however, Canada became a party to the Paris Convention and the Air Board Act,10/, was enacted to give effect to the Convention. This was the first Canadian statute on the subject and with little modification sections 3 and 4 of the Act are still contained in the present Aeronautics Act. 11/

Sources of Canadian Aviation Law

International Law

The Paris Convention 1919, 12/, and the Havana Convention 1928, 13/, have now been replaced by the Chicago Convention 1944 which was drawn up at the end of World War II. It contains the charter of the International Civil Aviation Organization 14/. The Chicago Convention applies to Canada since April 4, 1947.

10/ 8 - 9 Geo.V. Ch.11.

11/ 1927 R.S.C., Ch.3.

12/ The Convention was accepted by most European nations, the United Kingdom and Commonwealth, but was never ratified by the United States of America who had taken an important part in the preparation of it.

13/ The Pan American Conference at Havana in 1928 was ratified by the United States and some fifteen South American States. It contained many provisions similar to the Paris Convention on the American Continent, though Canada was not a party to it.

14/ I.C.A.O. was set up by Part II of the Chicago Convention,

Among the other conventions on International Air Law, the following have been accepted by Canada and are now part of our law.

- A) The Warsaw Convention 1929;
- B) The International Sanitary Conventions for Aerial Navigation, 1933-1944.

Apart from the above air law conventions Canadian Aviation Law may also be incidentally affected by conventions dealing with other subjects such as the Postal and Telecommunications Conventions or other conventions of a general nature. It should be remembered that while in some cases Aviation Law is governed by special regulation, the general principles of International Law still apply to Air Law unless specifically replaced by Air Law principles.

Further since the International Air Law Conventions do not regulate all phases of aviation - their purpose being to set out broad principles to be followed by States in the exercise of their sovereignty - an important part of the law may also be found in bilateral treaties and agreements supplementing the existing conventions. Many such treaties have been concluded by Canada in respect of the operations of foreign air carriers in Canada and Canadian air carriers in foreign countries.

12/.

12/ Such agreements are necessary in view of article 1 of the Chicago Convention and particularly article 6 which requires scheduled foreign air carriers to obtain the permission of the authorities of the state to operate commercial air services.

Federal Law

The most important federal statute dealing with aviation is the Aeronautics Act 13/ which, with later amendments, 14/ forms the basis of Canadian Aviation Law. The regulations, rules, orders and circulars enacted under the Act are also of great importance since they contain the application of the principles enunciated in broad terms in the Aeronautics Act. The Carriage by Air Act, 1939, 15/ provides for the implementation of the Warsaw Convention, 1929.

Provincial Law

Since the decision in the Aeronautics case 16/ and the more recent judgment of the Supreme Court of Canada in the Johannesson case 17/ the Provinces have not attempted to any large extent to legislate on the subject of aeronautics, so that the field of aeronautics has been almost entirely left to the Federal Parliament. In all Provinces, except Quebec, the common law would govern the relationships between the parties in case of damage to passengers, goods or third parties.

13/ R.S.C. 1927 Ch.3,

14/ 1944-45 c.28; 1945 (2 Sess.), c.9; 1950, c.23; 1950, c.50 s.10; 1952, c.14.

15/ 3 Geo.VI, c.12.

16/ in re Regulation and control of Aeronautics in Canada, 1932 A.C.54.

17/ Johannesson vs Municipality of West St. Paul (1952) 1 S.C.R. 292

There are few decisions on Aviation Law in Canada 18/ but until such time as a more impressive body of aviation case law is built up, definitive rules cannot be formulated. American and English decisions will, however, be of some use to us in the building up of our jurisprudence as will the decisions of other countries, particularly in interpreting the provisions of international conventions.

In the Province of Quebec where the civil law governs decisions of the French Courts might be useful, although it is possible that in the field of aviation decisions of common law jurisdictions might have more weight than they would have in ordinary cases.

18/ For list of Canadian aviation cases, see Appendix M.

CHAPTER I
INTERNATIONAL AIR LAW

The Chicago Convention 1944

By the end of World War II it became apparent that States would soon want to initiate international commercial air services and that aviation to achieve its full development would have to be regulated internationally. The world was divided into three groups, two of which were parties to separate international agreements. At that time the Paris Convention 1919 and the Havana Convention 1928 were the two most important international conventions regulating world civil aviation and it was rightly felt that new attempts should be made towards the creation of a central authority that would control civil aviation internationally. The existing conventions were lacking in many respects and a new revision of the principles on which they were based was necessary. The fact that Europe and America were parties to different conventions was one of the reasons for the new Conference. The future of civil aviation in the post war

world required the co-operation and understanding of all the leading nations.

Fifty-four nations were represented at the conference held in Chicago in 1944. The purpose of the conference was to revise and consolidate into one document the principles of the Paris and Havana Conventions, in a form acceptable to all. It also provided for the creation of a permanent international air authority.

Canada played a very active part at the conference and in the formulation of what is now the Chicago Convention. Under the able direction of the Honourable C.D. Howe, Minister of Munitions and Supply, the Canadian delegation prepared a draft Convention which was submitted to the conference and on which the final Convention was largely based. The Canadian delegation at the Conference acted as mediator between the United Kingdom and the United States trying to bring the two countries to a common point of view. Unfortunately they failed to reach agreement on the main issues with the result that the Chicago Convention did not solve the problem of international commerce between nations and it is still necessary to regulate international transport by separate bilateral agreements.

The Five Freedoms

- (1) The privilege to fly across the territory of other states without landing.

- (2) The privilege to land in other states for non-traffic purposes.
- (3) The privilege to put down in other states passengers, mail and cargo taken on in the territory of origin of the service.
- (4) The privilege to take on in other states passengers, mail and cargo destined for the territory of the origin of the service.
- (5) The privilege to take on in other states passengers, mail and cargo destined for the territory of any other state and the privilege to put down at any point passengers, mail and cargo coming from any such territory.

Prior to the conference there was general agreement that some international organization must be set up to regulate and control international world aviation. This principle was recognized and accepted by all. The points which had to be determined were as follows:-

- (a) The freedoms to be granted in the Convention.
- (b) The method of regulating traffic and the powers of the international air authority.
- (c) The method of establishing rates.

While the United States and the United Kingdom both agreed on the necessity of establishing an international air organization they could not agree on the powers which this organization should have. The United States favoured an organization which was to concern itself largely with technical and economic matters and which was to have only advisory power, whereas the United Kingdom proposal suggested the establishment of an international authority with very broad powers in respect of routes, frequency of services, rates, licensing of international operators and all

technical matters of civil aviation. Also while the United States were ready to grant the Five Freedoms, the United Kingdom was only prepared to grant Freedoms One and Two. Canada on the other hand subject to the establishment of a strong international regulatory body was prepared to grant the first four Freedoms.

After long discussions, the Conference failed to reach agreement on a workable method of economic control of international air transport. As a result of this, it was decided not to include the Freedoms in the Convention itself and two separate agreements were prepared, The Air Transit Agreement commonly known as the Two Freedoms Agreement, and the Air Transport Agreement, also known as the Five Freedoms Agreement.

In spite of the failure of the Chicago Convention to provide for the economic regulations of international air transport the Convention was very successful in other respects and it is still the most important document of International Air Law.

The Chicago Convention as finally prepared covers the entire field of air --- navigation.

The Convention provides:-

ARTICLE I. "The contracting states recognize that every State has complete and exclusive sovereignty over the air space above its territory."

ARTICLE II. "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

These principles had already been introduced in very much the same form in the Paris Convention 1919, 19/, and they were again accepted in 1944.

The most important provisions of the Convention for our purposes are those dealing with rights of flight over and into the territory of contracting States. In this respect the Convention has clearly defined the rights of States inter se even if the final provisions fell short of expectations. Article 5 dealing with non-scheduled services grants in theory to the aircraft of other contracting States engaged in other than scheduled international air services the privileges of the four Freedoms "Subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

19/ Article 1 of the Paris Convention provides:-

"The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.
For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies and the territorial waters adjacent thereto."

This last reservation is so broad that in effect the words "regulations, conditions or limitations" could be interpreted to mean almost anything and might even include the right to prohibit.

ARTICLE 5. "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes - without the necessity of obtaining prior permission and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes or to obtain special permission for such flight. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

In practice the United States, the United Kingdom and Canada require foreign air carriers to obtain a permit to operate

non-scheduled flights in or over their territory. 20/.

With respect to scheduled air services the provisions of the Convention are very strict:

ARTICLE 6. "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

This is, perhaps, the most important limitation in the Convention. The only method which States can use to overcome this restriction is by bilateral treaties between nations or by their adherence to the air transit or air transport agreements. While many States have accepted to be bound by the Air Transit Agreement including the United States and the United Kingdom and Commonwealth few have ratified the Air Transport Agreement which was in fact denounced by the United States on July 25th, 1946. Because of this situation the operations of scheduled commercial air services have been established by bilateral treaties. Canada has participated in many such arrangements and it is today the basis of all such operations.

20/ Procedure in U.S. - See Shawcross and Beaumont *On Air Law* 2nd ed. p.200.
Procedure in U.K. - See Shawcross and Beaumont *op. cit.* p.178 note (f).
Procedure in Canada. - See Air Transport Board Circular 9/51 Respecting the Operation of Non-Scheduled Commercial Air Services into Canada by Foreign Air Carriers.

ARTICLE 7. CABOTAGE.

"Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State."

In view of what has been said above about the Five Freedoms, this section needs little explanation. If States cannot agree on the first two Freedoms without putting in limitations and reservations, it is not surprising that they will not allow foreign carriers to compete in the domestic market. In one sense, however, Article 7 is an improvement on Article 17 of the Paris Convention under the terms of which a State could discriminate in the granting of privileges of cabotage in its territory.

The Convention also provides for the creation of an international body, the International Civil Aviation Organization which was established and has been functioning ever since. According to Article 44 of the Convention the objectives of the Organization are: "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:-

- a) Insure the safe and orderly growth of international civil aviation throughout the world;
- b) Encourage the arts of aircraft design and operation for peaceful purposes;
- c) Encourage the development of airways, airports and air navigation facilities for international civil aviation;
- d) Meet the needs of the people of the world for safe, regular and economical air transport;
- e) Prevent economic waste caused by unreasonable competition;
- f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- g) Avoid discrimination between contracting States;
- h) Promote safety of flight in international air navigation;
- i) Promote generally the development of all aspects of international civil aeronautics."

The organization is composed of a council and an assembly and provision is made for the appointment of an air navigation commission. The organization has advisory and consultative capacities only and a large part of its work is of a technical nature.

The International Air Services Transit Agreement 1944

This agreement was signed by Canada on February 10th, 1945. ^{21/}

^{21/} The agreement has permitted the establishment of international air routes which could not be established under the provisions of the Chicago Convention alone.

In this agreement the contracting States grant to the other contracting States the following privileges in respect of international scheduled air services: a) the privilege to fly across their territory without landing and, b) the privilege to land for non-traffic purposes. 22/. By section 2 the exercise of these privileges must be in accordance with the provisions of the Chicago Convention and under Section 3 a State that has granted the second Freedom may, provided this is done without discrimination require the carrier to offer reasonable commercial services at such stopping point. A contracting State may also designate the route to be followed by such air service and the airport which may be used. 23/ It may also impose "just and reasonable" charges for the use of airports and other facilities.

The Warsaw Convention 1929

The purpose of the Convention is to regulate in a uniform manner the relationships between air carriers and passengers or shippers of goods in international carriage as defined in the Convention. 24/

22/ Article 1 section 1.

23/ Article 1 section 4.

24/ Convention For the Unification of Certain Rules Relating to International Carriage by Air.

ARTICLE 1 (2) provides:

"For the purposes of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage, or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention."

A contract of carriage which qualifies under the above article is subject to the rules of the Convention and the ordinary rules of liability of the carrier for damage are replaced by special rules set out under the Convention. The second chapter regulates the form of traffic documents which must be used by air carriers, the passenger ticket, the luggage ticket and the air consignment note. If certain traffic document requirements of the Convention are not fulfilled the carrier cannot avail himself of the provisions which allow him to exclude or limit his liability.

The general rule of liability under the Convention is that the carrier is liable for damage in the event of the death or injury to a passenger and destruction or damage to registered luggage or goods belonging to the passenger or shipper. The passenger or shipper need not prove the negligence or fault

of the carrier. In the case of injury or death of a passenger the carrier is liable only 25/ "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." In the case of destruction or damage to goods or registered luggage, the carrier is liable 26/ "if the occurrence which caused the damage so sustained took place during the carriage by air." Carriage by air is defined 27/ as "the period during which the luggage or goods are in charge of the carrier, whether in/^{an} aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever." The defences available to the carrier are set out in articles 20 and 21 which provide as follows:

ARTICLE 20 (1)

"The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

ARTICLE 20 (2)

"In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

25/ Article 17

26/ Article 18 (1)

27/ Article 18 (2)

ARTICLE 21 "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

In practice it is very difficult for a carrier to bring himself within the exception of Article 20 (1) since in most aircraft accidents it can seriously be argued that if "all necessary measures" had been taken, the accident would not have happened. The question of proving the cause of the accident is also made more difficult by the fact that in many cases, the aircraft itself is destroyed or lost and there are no survivors to tell the tale.

In respect of Article 21, for the same reasons, the provisions might not apply to an accident resulting in the death of the passengers and the destruction of the aircraft, although in case of injury to a passenger proof could more easily be made of the passenger's negligence and the carrier might, in fact, succeed in denying liability.

The system of liability of the Convention places on the carrier the burden of proving absence of fault thus establishing a rebuttable presumption of fault against him which presumption because of the quasi impossibility for the carrier to exculpate himself is almost equivalent to absolute liability. On the other hand the liability of the carrier for each passenger is limited to the sum of One

hundred and twenty-five thousand (125,000) Poincarre francs, approximately \$8,300 in Canadian currency and to 250 francs per kilogram for damage to checked baggage and cargo unless a higher value has been declared and supplementary charges have been paid. There is also a further provision 28/ taking away from the carrier the right to limit or exclude his liability under the Convention, if the damage is caused by his wilful misconduct 29/ or such default on his part or on the part of his agent acting within the scope of his employment, equivalent to wilful misconduct.

The Warsaw Convention was signed by twenty-four nations on October 12th, 1929. Canada was not the signatory of the Convention at that time and, in fact, it does not seem that Canada had any interest in the Convention until 1939 when the Carriage by Air Act 30/ was enacted. This Act provided that the Convention incorporated in the Act as the First Schedule thereof would, as from such day as the Governor in Council might certify by proclamation, have the force of law in Canada.

28/ Article 25.

29/ The official Convention was originally drafted in the French language and in the English text "wilful misconduct" was used as a translation for "dol".

30/ 3 Geo. VI ch.12. Assented to May 2nd, 1939, proclaimed in force July 1st, 1947.

On June 10th, 1947 Canada adhered to the Convention under the provisions of Article 38 and on July 1st, 1947 the Carriage by Air Act was proclaimed in force 31/.

The Warsaw Convention raises interesting problems under the Canadian Constitution in view of the preamble to the Carriage by Air Act providing for the application of the Convention to carriage by air which is not international within the meaning of the Convention. 32/

31/ Canada Gazette vol. 81 p.2085

32/ See discussion of this problem in chapter 2 "The Constitutional Problem". Also J.C. Cooper, Canada and the Warsaw Convention 1953, 13 R. du B. p.68.

CHAPTER II

THE CONSTITUTIONAL PROBLEM

"A federal State is a political contrivance intended to reconcile national unity and power with the maintainance of state rights." 33/

In such a State sovereignty is divided between the central parliament and local States or legislatures; whatever concerns the nation as a whole is placed under the control of the national government, while all matters not primarily of common interest remain in the hands of the local legislatures.

According to Dicey 34/ the three leading characteristics of a completely developed federalism are:

- (a) supremacy of the constitution;
- (b) distribution of powers; and
- (c) the authority of the courts to act as interpreters of the constitution.

33/ Dicey, Law of the Constitution, 8th ed. p.139.

34/ Dicey, op. cit. p.140

Applying this test to our own country we can say that in Canada, politically at least, we have a federal system although it is doubtful whether the Canadian constitution is federal with strong unitary tendencies or unitary with strong federal exceptions. 35/. The courts, however, have helped to clarify the nature of Canadian federalism and have held:-

- (a) the Dominion parliament is not a delegation from the Imperial parliament or from the Provinces. 36/
- (b) the Provincial parliaments are not delegations from the Imperial parliament. 37/.
- (c) the Provincial parliaments are not delegations from the Dominion parliament. 38/.

Canada, therefore, is in essence a federation 39/ in which the Federal Government and Provincial Governments exercise co-ordinate authority, both sovereign in the exercise of the powers given to them by the constitution. The distribution of powers in the Canadian constitution is found largely in Sections 91 and 92 of the B.N.A. Act, which was first enacted

35/ Wheare, Federal Government, 2nd ed. 1947 p.20

36/ A.G. for Canada vs. Cain 1906 A.C. 542

37/ Hodge vs Reg.(1883) 9 A.C. 117

38/ Liquidator of the Maritime Bank of Canada vs. Receiver General of New Brunswick, 1892 A.C. 437

39/ See Kennedy, the Constitution of Canada, 2nd ed. 1938 at p.406

on March 29, 1867. (See Appendix A)

2 Because of the principle of the rule of law, judicial decisions are of the utmost importance in the interpretation of the B.N.A. Act, and particularly of sections 91 and 92. This rule which gives to the courts the duty and function of acting as interpreters of the constitution may be partly responsible for the uncertainty in the law created by random decisions of the courts on constitutional problems. While the courts have jurisdiction to decide any problem placed before them, they cannot on their own initiative declare a statute valid or invalid. They can only adjudicate after the case has been brought before them in an ordinary court action or, in the case of the Supreme Court of Canada, by special jurisdiction in matters referred to it by the Governor in Council. 40/. This means of reference to the Supreme Court has proved of great use in many cases but because of the absence of facts on which such decisions can be based, they tend to be theoretical and general.

The role of the courts in interpreting a constitution such as ours is admittedly difficult.

In 1867 the modus vivendi of Canadians was very different to what it is today. The B.N.A. Act, as drafted, provided for a simple distribution of powers between the federal

40/ The Supreme Court Act, R.S.C. 1927 ch.35 section 55

7 and provincial legislatures, which covered the then known subject matters of legislation. Since that time with the progress and advances of the period, new inventions, new methods of transport, with changing conditions of life and new social theories, new subject matters of legislation have appeared which cannot expressly or impliedly be attributed to the Federal parliament or to the provincial legislatures under sections 91 and 92 of the B.N.A. Act. The drafters of the B.N.A. Act 1867 did not foresee the coming of aviation, radio and television, and while it is true that all subject matters of legislation cannot and need not be enumerated in a constitution, the task of the courts is made more difficult because of these new subjects of legislation.

Two solutions are possible. Either the courts give the constitution a broad interpretation and allocate the new subject matters to the federal or to the provinces taking into consideration the intention of the fathers of confederation in the light of present conditions, or they interpret the constitution strictly as an ordinary statute, in which case they must require an amendment. If the B.N.A. Act is not capable of interpretation to meet present requirements, we must either stretch it or amend it. The Canadian Constitution has been subjected to both these devices at the hands of the courts and it is doubtful, in view of the difficulty of coming to an agree-

ment as to methods of amending the B.N.A. Act, whether this device will ever be successfully used in Canada except, perhaps, with respect to subject matters fundamentally and outwardly federal or provincial in their nature.

Dominion-Provincial relations are not yet such as to give any real hope of agreement on distribution of powers in respect of new subject matters of legislation. Since 1867 the B.N.A. Act and, particularly, the provisions of sections 91 and 92 have been dissected and analysed by judicial interpretation and it is only in the light of these decisions that we can predict any trends in the interpretation of the powers of the Federal Parliament and of the Provincial Legislatures.

In 1919 the Parliament of Canada, to fulfill its obligations under the Paris Convention 41/ enacted the Air Board Act 42/ which with a later amendment 43/ was consolidated in the Revised Statutes of Canada 1927 as the Aeronautics Act 44/. It should be noted that the amendment referred to, the National Defence Act, did not change the substance of the Air Board Act.

41/ Conventions relating to the Regulation of Aerial Navigation 1919
42/ 8 - 9 Geo.V. ch.11 (1919)
43/ 12 - 13 Geo.V. ch.34 (1922)
44/ 1927 R.S.C. ch.3

Its only effect was by Section 3 of the Act to create a new department of government, the Department of National Defence, and by section 7(2) to transfer to the Minister of National Defence the powers of the Air Board.

SECTION 7(2). "The powers, duties and functions vested in The Air Board by the Air Board Act, chapter eleven of the Statutes of 1919 or by any order or regulation made thereunder shall be administered, exercised and performed by or under the direction of the Minister."

The Aeronautics Act gave the Federal Parliament all the powers necessary to implement the Paris Convention. This Convention was the result of discussions and conferences between twenty-seven nations and was the first successful attempt to regulate internationally civil aviation. 45/.

The Aeronautics Act 1927 and regulations thereunder remained in the Statute Books unquestioned until 1930 when the Canadian Government under Section 55 of the Supreme Court Act referred the matter of jurisdiction to the Supreme Court of Canada in the form of four questions as follows:-

- (1) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof under the Convention entitled "Convention Relating to the Regulation of Aerial Navigation"?
- (2) Is the Legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on

45/ See Appendix E for sections 3 and 4 of the Act

entirely within the limits of a province, necessary or proper for performing the obligations of Canada or for any Province thereof, under the Convention aforementioned within the meaning of Section 132 of the B.N.A. Act 1867?

- (3) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of Section 4 of the Aeronautics Act, R.S.C. 1927, c.3?
- (4) Has the Parliament of Canada legislative authority to sanction the making and enforcement in whole or in part of the regulations contained in the Air Regulations 1920, respecting:
 - (a) the granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences;
 - (b) the regulation, identification, inspection, certification and licensing of all aircraft; and
 - (c) the licensing, inspection and regulation of all aerodromes and air stations.?

The Supreme Court 46/ in a lengthy and detailed judgment decided that Parliament did not have exclusive legislative jurisdiction over the subject of aerial navigation which, prima facie, belongs to the Provinces by virtue of Section 92 of the B.N.A. Act. They also stated that the subject of Aerial Navigation did not come within Section 91 ss.10 of the B.N.A. Act, "Navigation & Shipping".

46/ In the matter of A Reference as to the Respective Legislative Powers under the British North America Act, 1867, of the Parliament of Canada and the Legislatures of the Provinces in Relation to the Regulations and Control of Aeronautics in Canada. 1930 S.C.R. 663

The judicial committee of the Privy Council 47/ reversing the judgment of the Supreme Court held that "substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion". Their Lordships after reviewing the terms of the Convention came to the conclusion that Parliament had the power under Section 132 of the B.N.A. Act to enact the Aeronautics Act and the Air Regulations. They did not attempt to place aeronautics under any particular section of 91 or 92 though they admitted that Parliament could draw authority from Sections 91(2) and 91(5).

"With regard to some of them, no doubt it would appear to be clear that the Dominion has power to legislate, for example under Section 91(2), for the regulation of Trade and Commerce, and under (5) for the Postal Services, but it is not necessary for the Dominion to piece together its powers under Section 91 in an endeavour to render them co-extensive with its duty under the Convention when Section 132 confers upon it full power to do all that is legislatively necessary for the purpose". 48/.

Discussing the claim of the Provinces Lord Sankey said at p.73:-

"Their Lordships do not think that aeronautics is a class of subject within Property and Civil Rights in the Provinces, although here again, ingenious arguments may show that some small part of it might be so included."

And at the end of the judgment at p.77:-

"There may be a small portion of the field which is not by virtue of specific words in the B.N.A. Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to such small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada."

47/ In re The Regulation and Control of Aeronautics in Canada.

48/ ibid at p.77

The judicial committee in this judgment, as stated by Lord Sankey, has applied the propositions formulated in the case of A.G. Canada vs A.G. BC, re Fisheries Act, 1914, 1930 1 D.L.R.194.

The effect of this decision was far reaching and for a while at least it was thought that aeronautics as a subject matter of legislative jurisdiction had been conclusively determined in favour of the federal parliament. This certainty, however, did not last very long. About four months later, in the Radio Case 49/ the Committee applied the decision of the Aeronautics Case to radio communications and held that the Parliament of Canada had exclusive legislative power to regulate and control radio communications in Canada.

At p.312 of the report Viscount Dunedin who delivered the judgment said:-

"Being, therefore, not mentioned explicitly in either s.91 or s.92, such legislation falls within the general words at the opening of s.91 which assign to the Government of the Dominion the power to make laws 'for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces.' In fine though agreeing that the Convention was not such a treaty as is defined in s.132 their Lordships think that it comes to the same thing."

Referring to the Aeronautics Case their Lordships said at p.313:-

49/ In re Regulation and Control of Radio Communications in Canada, 1932, A.C. 304

"The idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject."

The radio case, therefore, confirmed the decision in the Aeronautics Case and in fact went further in its recognition of the legislative powers of the Federal Parliament by virtue of the opening paragraph of s.91. Further, they imply that section 132 of the B.N.A. Act is not essential today to give the Dominion Parliament jurisdiction in treaty legislation, in view of the new position of Canada vis-a-vis Great Britain, and that in effect it cannot be expected that the B.N.A. Act should have provided for a situation unthought of at that time. They conclude that since the only way to enforce the provisions of the treaty is by Dominion legislation, the Dominion Act is valid.

The judicial committee in the Labour Case has re-interpreted the decisions in the Aeronautics case and the Radio case, and Lord Atkin, a member of the Board, in a statement 51/ which later became the subject of great discussion, restated the reasons for judgment in these two cases:-

"It appears highly probable that none of the members of the Supreme Court would have departed from their decisions in 1925 had it not been for the opinion of the Chief Justice that the Judgments of the Judicial Committee in the Aeronautics case and the Radio case constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of

"Canada. Their Lordships cannot take this view of those decisions. The Aeronautics case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sec. 132, therefore, clearly applied, and but for a remark at the end of the judgment which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion. The judgment in the Radio case appears to present more difficulty."

Lord Atkin then went on to explain that in the Radio case, the legislation did not fall under sections 91 or 92 and concludes that neither case decided "that legislation to perform a Canadian Treaty is exclusively within the Dominion Legislative power". 52/

In the Labour case, a completely new theory was formulated with respect to the fulfilment of treaty obligations.

See the judgment at p.348:-

"The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures."

The judicial committee decided in this case that Parliament has no special powers in legislating to fulfil treaty obligations. If the subject matter of the legislation falls within one of the enumerated heads of s.91 it will be of the competence of the Federal Parliament but if the subject matter of the legislation falls within one of the enumerated heads of s.92, the Federal Parliament cannot alone enact legislation to fulfil the obligations contained in the treaty; in such cases the co-operation

52/ Ibid at p.351

of the Provinces will be required.

"While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure." 53/

The decision of the judicial committee in the Labour case placed the Canadian Government in a most difficult position. It had the effect of restricting to a considerable extent the powers of the Federal Parliament. While the decision did not diminish the legislative powers of the Federal Government with respect to aviation, -because of the decision in the Aeronautics case - the door was shut for implementation of future treaties which might affect the classes of subjects assigned to the Provinces by Section 92 of the B.N.A. Act. At the same time as Canada had gained its new international status 54/ it had lost its power to give effect to its new obligations.

There were many comments and criticisms recorded after this decision by leading Canadian jurists, and while some accepted the interpretation of the judicial committee in the Labour case the general opinion was that the provisions of the B.N.A. Act were broad enough and flexible enough to meet the new situation.

The dictum of Lord Sankey, L.C., in *Edwards vs Attorney General of Canada* 55/ was never so popular:-

53/ Ibid at p.354

54/ By the Statute of Westminster - See Vol.XV Can. Bar Review p.401

55/ (1930) A.C.124 at p.136

"The B.N.A. Act has planted in Canada a living tree, capable of growth and expansion within its natural limits."

Jurisdiction of the Federal Parliament over Aeronautics

The general impression, after the decision in the Aeronautics case was that the entire subject of aeronautics had been allotted to the Federal Parliament. Sections 3 and 4 of the Aeronautics Act which contained most of the powers required to implement the Paris Convention, had been declared intra vires the Parliament of Canada. It is true that the courts had not placed the subject matter of aeronautics with any certainty, under any one of the heads of section 91 - they had mentioned, however, that some aspects of aerial navigation could no doubt be brought within section 91 under sub-sections 2 or 5 - but it was reasonable to assume at the time, that apart from section 132, the Dominion could draw some power in virtue of section 91 of the B.N.A. Act. It was felt that the judicial committee had not attached too much importance to section 91 because of the clear application of section 132 to the proposed legislation.

, It is submitted that the dictum of Lord Atkin in the Labour case did not in any way affect the competence of the Federal Parliament over the subject of aeronautics, though it certainly had an important effect on the right of Canada to implement by legislation international treaties in which Canada

did not sign as a member of the British Empire so as to bring itself under section 132 of the B.N.A. Act.

SECTION 132. "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as Part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign Countries."

The decision in the Labour case is of interest to us because of the part taken by Canada in later international conferences and our adherence to the Warsaw Convention and the Chicago Convention 1944. Since "the peace, order and good government clause" in the introductory paragraph of section 91 cannot replace section 132, in case of non-empire treaties, - as was first indicated in the Radio case, - it would seem that the principles enunciated in the Labour case, would govern and the powers of the Federal Parliament to implement a non-Empire treaty must of necessity, depend on the normal distribution of powers in sections 91 and 92 of the B.N.A. Act as indicated by Lord Atkin in the Labour case.

While there is little doubt that this was the constitutional position in 1937 and though it may have represented the true situation until very recently, it is submitted that the decision of the Supreme Court of Canada in the case of *Johannesson et al vs Rural Municipality of West St. Paul et al* 56/ contains strong indications of a broader and, perhaps, more practical

interpretation of the B.N.A. Act through reinterpretation of the jurisprudence as set by the judicial committee, which might possibly, if carried far enough, solve the Canadian Constitutional Problem.

The Johannesson Case

The respondent in this case, in pursuance of Section 921 of the Municipal Act 57/ had passed by-law number 292 purporting to prevent the erection and maintenance of aerodromes or places where airplanes are kept for hire or repair within certain limits of the municipality. The by-law also prohibited the erection, maintenance or installation of any machine shop for the testing and/or repairing of aircraft unless in either case a licence had first been obtained from the municipality.

In the court of first instance 58/ and in the Court of Appeal for Manitoba 59/ Section 921 of the Municipal Act and by-law 292 of the Municipality of West St. Paul, had been held intra vires. The Supreme Court, composed of a panel of seven judges, unanimously reversed the decision of the lower courts and held the Act and the by-law ultra vires, on the grounds that the subject matter of aeronautics is within the exclusive jurisdiction of Parliament.

The importance of this case is not solely in the final decision

57/ R.S.M. 1140 ch.141

58/ 1949, (3) D.L.R. 694

59/ 1950, (3) D.L.R. 101

of the point at issue though this may also help to support my contention, but rather in the detailed study and review by the individual members of the court of the fundamental principles of interpretation of the B.N.A. Act with respect to aeronautics.

The decision presents additional interest in the fact that it is the first official pronouncement of the Supreme Court on this subject as a court of final resort. 60/. It should also be noted that in this case five of the seven judges on the panel rendered a separate judgment and there were no dissensions. Without attaching too much weight on the above, and notwithstanding the fact that many of the dicta were clearly obiter, it is reasonable to assume that they indicate a trend which will be followed and applied in the future.

It is the opinion of the writer that the decision reinstates the Aeronautics case and the Radio case as originally interpreted before the decision in the Labour case.

In the course of the judgment the members of the court discussed the jurisdiction of the Federal Parliament under various sections of the B.N.A. Act.

The "peace, order and good government clause"

Four of the five judges discussed the powers of the Federal over aeronautics in virtue of the introductory paragraph

60/ Supreme Court Act, amendment of 1949 (Can. 2nd Sess.), c.37

of Section 91 and cited with approval observations of Viscount Simon in the Canada Temperance Federation case. 61/

"In their Lordships' opinion, the true test must be found in the real subject matter of the legislation; if it is such that it goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures."

See the Judgment of Estey J., at p.318 and that of Kellock J., at p.311 where he says:- "in my opinion, the subject of aerial navigation in Canada is a matter of national interest and importance, and was so held in 1932" and after citing the observations of Viscount Simon in the Canada Temperance Federation case (cited above), the learned judge continues:-

"This statement is a recognition of the situation which is well known and understood in this country. It was quite frankly and quite properly admitted by Mr. Fillmore for the respondent, whose argument was merely that the Dominion had not in fact legislated in the field of s.921 in the provincial statute.

Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the Provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive."

Mr. Justice Locke referring to the rapid growth of avia-

tion in Canada says at p.326:-

"It requires merely a statement of those well recognized facts to demonstrate that the field of aeronautics is one which concerns the country as a whole. It is an activity which to adopt the language of Lord Simon in the Attorney General for Ontario vs Canada Temperance Federation must from its inherent nature be a concern of the Dominion as a whole. The field of legislation is not in my opinion, capable of division in any practical way." 62/

Kerwin J., at p. 307 says:-

"The remarks of Viscount Simon in Attorney General for Ontario vs Canada Temperance Federation, must be read when considering the words of Lord Sankey in the Aeronautics case in another connection."

And he continues below:-

"If, therefore, the subject of aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic of Canada, it falls under the "Peace, Order and Good Government" clause of section 91 of the B.N.A. Act since aeronautics is not a subject matter confined to the provinces by Section 92."

It would seem that these clear expressions of opinion from the majority of the Supreme Court, would establish without any doubt that Parliament draws some of its power to legislate on the subject of aeronautics from the introductory paragraph of Section 91 of the B.N.A. Act though as will be seen later there may be an additional reserve of powers in Section 91 subsections 2, 5 and 7.

Rinfret C.J., Kerwin and Locke, J.J., discussed the considerations which influenced the decision of the judicial committee in the Aeronautics case.

Rinfret C.J., at p.303 states:-

"Notwithstanding that the international Convention under consideration in the Aeronautics case 1932 A.C.54 was denounced by the Government of Canada as of April 4, 1947, I entertain no doubt that the decision of the Judicial Committee is in its pith and substance, that the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament. In the language of their Lordships at p.77:- 'Aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion'".

Kerwin J., at p.307 takes the same attitude as the Chief Justice in the above cited passage:-

"Now even at the date of the Aeronautics case the judicial committee was influenced (i.e. in the determination of the main point) by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions."

Locke J., at p.328 states that even if many of the statements quoted in the Aeronautics case, the Radio case and the Canada Temperance Federation were unnecessary to the decision:- "they support what I consider to be the true view of this matter that the whole subject of aeronautics lies within the field assigned to Parliament as a matter affecting the peace, order and good government of Canada."

Again referring to the Aeronautics case Kellog J., and Kerwin J., emphasize the fact that the Aeronautics case was decided previously on section 132 of the B.N.A. Act.

Kellog J., at page 310:-

"It is true, as the judgment itself shows and as later pronouncements of the judicial committee have repeated that section 132 was the leading consideration in the judgment."

Kerwin J., at p.307 says:-

"At the moment all I am concerned with emphasizing is that the Aeronautics Act decided one thing, and one thing alone, and that is that the matter there discussed fell within the orbit of s.132 of the British North America Act."

If, therefore, the Aeronautics case was decided on section 132 of the B.N.A. Act, which section can no longer support the legislation, since the denunciation of the Paris Convention on April 4, 1947, unless the Canadian Parliament can draw legislative powers from some other source, e.g. the introductory paragraph of Section 91 or some of the enumerated heads of s.91, as suggested by the Privy Council in the Aeronautics case, the Radio case and the Canada Temperance Federation case, and unless the treaty power is given a broad interpretation, one independent from section 132, there may be doubt as to the validity of the present Aeronautics Act and the amendments thereto. The provisions of the Chicago Convention and the Warsaw Convention incorporated in the Statutes of Canada as the Carriage by Air Act 1939 63/ might also be of little value if the dicta in the labour case had been followed.

This, however, is not the case and the Supreme Court of

Canada has accepted the dictum of Viscount Dunedin in the Radio case at p.313. Rinfret J., in the present case referring to the Radio case has said:-

"But, moreover, the Convention on International Civil Aviation, signed at Chicago on December 7, 1944, has since become effective; and what was said in the Radio Reference by Viscount Dunedin at p.313 applies here. Although the Convention might not be looked upon as a treaty under Section 132 of the British North America Act, 'it comes to the same thing'". 64/

"To the extent, therefore, to which the subject matter of the Chicago Convention of 1944 falls within s.91, the language of Viscount Dunedin is equally apt. In my opinion, that subject matter is exclusively within Dominion jurisdiction."

Lock J., at p.323 after considering the denunciation of the Paris Convention and its replacement by the new Chicago Convention 1944 which contains substantially the same obligations, comes to the conclusion that the denunciation of the Paris Convention does not render the present legislation invalid.

"Apart from the fact that, as I understand the arguments addressed to us, it is not contended on behalf of any of the respondents that the Aeronautics Act is ultra vires of the Parliament of Canada or that it was without authority to sanction the air regulations in force at the time of the commencement of this legislation, if as was found by the judicial committee it was within the legislative competence of Parliament to enact ch.3, R.S.C.1927, it would not become invalid by this circumstance."

The fact that the Supreme Court has followed and applied the decision of the Judicial Committee in the recent Canada Temperance Federation case 65/ is significant. This case had in fact changed the scope of the "Peace, Order and good Government" clause from the emergency doctrine to the aspect doctrine and in effect, had decided that Parliament did not need to prove the existence of an emergency if the nature of the proposed legislation was in its pith and substance federal. The decision which facilitated the application of the "Peace, Order and good Government" clause by removing the criterion of emergency, as in other respects narrowed it by recognizing the importance of the aspect dealt with by the proposed legislation; so that if a matter is placed under the "Peace, Order and good Government" clause the federal Parliament should not infringe on the rights of the Provinces, since to come under the introductory paragraph the legislation must by reason of the aspect dealt with fall outside Section 92. 66/

65/

66/ In view of the decision in the following year in Co-operative Committee on Japanese Canadians v Attorney General for Canada 1947 A.C. 87, it is possible that the "Peace, Order and Good Government" clause can in fact be used to meet both situations, i.e. an emergency situation and the case of legislation which does not fall under either Sections 91 or 92 of the B.N.A. Act.

In any event by placing the subject matter of aeronautics within the introductory paragraph of Section 91, the Supreme Court has not strengthened to any great extent the position of the federal Parliament, though they have, in view of the decision in the Aeronautics case, provided an answer to the objection that Section 132 was the only basis for the decision of the Judicial Committee. However, since the "Peace, Order and good Government" clause no longer has the overriding effect which it had under the emergency doctrine, the Provinces might possibly argue that in legislating on aeronautics, the Dominion has only those powers necessary to carry out the federal aspect of the legislation. While this may not be too serious an argument in international and interprovincial carriage by air, the objection might be stronger in respect of intraprovincial carriage. It should be remembered that the Supreme Court in the Aeronautics case had come to the conclusion that the rights of the federal Parliament were "paramount" and not "exclusive" and that it is the Judicial Committee on the basis of Section 132 of the B.N.A. Act that had made them exclusive.

In discussing the respective powers of the federal and provincial legislatures we must also keep in mind the interpretation given to the "Trade and Commerce" clause and "Property and Civil Rights" in Sections 91 and 92 respectively of the

B.N.A. Act. In this respect the "Trade and Commerce" clause has been given a very strict interpretation while "Property and Civil Rights" has been interpreted broadly and it could possibly be argued that the power of the federal Parliament over aeronautics is not such as to permit complete economic control of carriers engaged solely in local or intraprovincial air transport. While the Dominion can without any restriction regulate air navigation throughout the Canadian air space and establish standard rules governing the flight of aircraft engaged in international, interprovincial or even intraprovincial carriage, for security purposes and to fulfil treaty obligations under multilateral or bilateral agreements there would seem to be some doubt as to the right of the federal to exercise full economic control over intraprovincial carriers engaged in commercial operations.

Section 4 of the Aeronautics Act which gives to the Minister the power to make regulations "to control and regulate air navigation over Canada and the territorial waters of Canada" provides that the Minister may also regulate inter alia:

Sub-section (d) "The conditions under which aircraft may be used or operated;"

Sub-section (e) "The conditions under which goods, mails and passengers may be transported in aircraft and under which any act may be performed in or from aircraft or under which aircraft may be employed;"

These sections would seem to be the basis for the regulation of the conditions of carriage, tariffs and tolls by the Air Transport Board in the Commercial Air Services Regulations 1950 which provide in Sections 12 to 18 for the complete economic regulation of commercial air services. 67/ The exercise of these powers in the present regulations raises interesting problems of jurisdiction between Parliament and the Provinces. In effect, the Air Transport Board decides whether the conditions of carriage are acceptable and even has the power to prescribe new conditions if the conditions are not in the discretion of the Board "just and reasonable".

See also
"Property and Civil Rights" should be broad enough to include conditions of contract whether it be in air transport or in other forms of transport. The question would seem to be: Can Parliament because of its power to control generally the subject matter of aeronautics override the provisions of the law of contract and invade the domain of the Provinces. It is true that, as the Aeronautics case and the Johannesson case have decided, Parliament has exclusive jurisdiction over aeronautics, but it is questionable whether this means that Parliament can legislate on everything which incidentally affects aeronautics. If this were carried much further, it

67/ See Section 4(1)(d) and (e) of the Air Board Act.

would mean that Parliament could regulate such things as the conditions of a contract of sale of an aircraft, contracts for the hypothecation of aircraft, the aircraft industry or even the civil rights of passengers. 68/

How far can Parliament interfere with "Property and Civil Rights" in the exercise of its powers? While it is no longer possible to ask what portion of aeronautics belongs to the Provinces, the real problem is in the determination of the boundaries of the subject matter for legislative purposes. The carrier who transports goods or passengers from one locality to another locality in the Province is in very much the same position as a trucker or a bus owner and to him it is an ordinary commercial operation performed in the exercise of a trade for the purpose of making a profit.

Is the regulation of the conditions of carriage, of tariffs and tolls in local air transportation necessary to the exercise of parliament's powers over aeronautics? Is it possible that the exercise of these powers by Parliament could be more in the nature of legislation on the subject of trade and commerce? The Johanneson case does not provide an answer to these questions and until such time as they can be brought before the courts for adjudication, no definite answer can

68/ CwP.R.vs Attorney General for British Columbia 1950 A.C.122

be given.

In 1939 the Carriage by Air Act 69/ was enacted to provide for the implementation of the Warsaw Convention 1929, 70/ which established a new system of liabilities between carriers and passengers or shippers of goods. The provisions of the Convention in respect of liability for death of a passenger have been incorporated in the Act by Section 2.4.

"Any liability imposed by Article seventeen of the said First Schedule on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger under any law in force in Canada and the provisions set out in the Second Schedule to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced."

In the second schedule to the Act, the determination of the persons who can take action is left to the law of the Province where the action is taken:

Section 2. "An action to enforce the liability may be brought by any person who, under the law in force in the Province in which action is brought, is entitled to act or is recognized as the personal representative of the passenger; or by any person for whose benefit the liability is under the last preceding paragraph enforceable; or by any person who, under the law in force in the Province in which action is brought, is entitled to act or is recognized as a representative for any one or more of the persons for whose benefit the liability is, under the last preceding paragraph, enforceable."

69/ 1939 3 Geo.VI ch.12

70/ Supra ch.1 p.18

The preamble of the Carriage by Air Act contains an interesting provision which if put into effect will no doubt raise constitutional difficulties:

"WHEREAS it is also expedient to make provision for applying the rules contained in the said Convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the Convention: Therefore His Majesty, by and with the advice, and consent of the Senate and House of Commons of Canada, enacts as follows:"

These words would seem to imply two things; either it is the intention of Parliament to apply the provisions of the Convention to carriage which is not international under the Convention but is still international carriage in the ordinary meaning of the words, such as carriage between a contracting State and a non-contracting State or carriage between two territories subject to the same sovereignty but without the necessity of an agreed stopping place in another territory, or it is intended to apply the rules of the Convention to national carriage as compared with international carriage. In the latter case there might be some doubt as to the validity of the legislation in view of what has been said above in respect of intra-provincial carriage.

CHAPTER III

THE CANADIAN ADMINISTRATIVE SYSTEM

THE AERONAUTICS ACT 1927

The Federal Parliament first exercised its legislative power over aeronautics in 1919 by the enactment of the Air Board Act, which by later amendment became the Aeronautics Act, 1927. Since 1927, there have been a number of amendments and to-day The Aeronautics Act is truly the charter of Civil Aviation in Canada. It should be noted, however, that although the Aeronautics Act can hardly be compared with the old Air Board Act in scope or subject matter, sections 3 and 4, which contained the fundamental principles of the Paris Convention have been retained and with some later additions and modifications have become Part I of the Aeronautics Act. The Act is divided into three parts as follows:-

PART I which contains the general powers and duties of the Minister;

PART II a completely new section introduced in 1944 which provided for the creation of the Air Transport Board, its powers, functions and procedure;

PART III a purely administrative section dealing with employment of officers and procedure.

PART I (Section 2 to 6)

, By Section 2 of the Act the responsibility for regulation of civil aeronautics is vested in the Minister of Transport. Under the present Act the entire responsibility is in the Minister of Transport who is responsible directly to the Cabinet. 71/

Section 3 gives the Minister very broad powers 72/ and to cite but a few, he has the duty:-

(a) to supervise all matters connected with aeronautics;

(e) to operate such services as the Governor in Council may approve;

71/ See Appendix I

72/ See Appendix E

- (f) to prescribe aerial routes;
- (1) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada and for the control and operation of aircraft registered in Canada wherever such aircraft may be.

Section 4 (1) restates section 3 (1) with some fine distinctions. In this Section the Minister may make regulations "to control and regulate air navigation". This is followed by an enumeration which includes licensing pilots; registration, identification, inspection, certification of all aircraft; prohibition of navigation over certain areas; aerodromes; aerial routes; etc.

It would seem that the difference in wording of section 3 (1) "control or operation of aeronautics" and that of section 4 (i) "to control and regulate air navigation" is not too important. Since the power to make regulations with respect to aeronautics generally, is given in sections 3 (1) it is of no consequence that in section 4 (i) the expression "air navigation" was used since air navigation is only a portion of the general subject of aeronautics and it

can be assumed that section 4 was enacted only to cover with certainty one aspect of aeronautics, i.e. air navigation.

By section 4 (2) the Minister may make orders or directions to carry out regulations enacted under section 4 (i). By sections 4 (3) and 4 (4) the sanctions of fine and/or imprisonment are imposed for breach of either regulations or orders and directions.

PART II (Sections 6 to 19)

Part II of the Aeronautics Act was enacted in 1944 by amendment 73/ and may be considered as the constitution of the Air Transport Board, a quasi judicial and quasi legislative body, with administrative functions and advisory capacities responsible to the Minister of Transport.

The Air Transport Board as a Judicial Body

The Air Transport Board was given in section 7(A) all the powers of a court of law. It can inquire into, hear and determine any matter involving a breach of any regulation, license, permit, order or direction under the Act or may make any order or give any direction with respect to matters under its jurisdiction Section 7A(1) (a) and (b).

Section 7A(2)

"The Board may order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board so far as is not consistent with this Act, any act, matter or thing which such person is or may be required to do under this Part, or any regulation, licence, permit, order or direction made thereunder by the Board

"and may forbid the doing or continuing of any act, matter or thing which is contrary to this Part or any such regulation, licence, permit, order or direction and shall, for the purposes of this section, have full jurisdiction to hear and determine all matters, whether of law or fact."

By Section 7A (3,4,5) the Board has in all matters necessary for the exercise of its jurisdiction, the powers, rights and privileges of a superior court of record and its decisions or orders, are made rules, decrees or orders of the Exchequer Court or any Superior Court of any Province enforceable in the same manner as rules, decrees or orders of such courts. As to procedure in such cases, the provisions of section 49 of the Railway Act 74/ may be followed. The Board is also given power to examine witnesses (section 7b(1)) upon oath, to order the production of books and documents or articles and issue commissions to take evidence in foreign countries. (section 7b(2)).

The Air Transport Board as an Advisory Body

The Air Transport Board may be required by the Minister to make surveys and investigations with respect to any phase of civil aviation in Canada (section 9) and shall make recommendations and shall advise the Minister in all matters relating to civil aviation (section 10).

The Air Transport Board as a legislative body

Section 11 gives the Air Transport Board, subject to the approval of the Governor in Council, the power to make regulations with respect to the enumerated sub-sections of section 11.^{75/} These include, among others, regulations with respect to (a) filing returns, (b) furnishing information as to ownership, transfer (c) classification of air carriers or commercial air services, (h) terms of licence.

The provisions of section 11 are not limitative; in section 11(1) the Board is given power to make regulations: "providing for the effective carrying out of the provisions of this part."

The above grant of authority is wide enough to include almost any phase of aeronautics, particularly, if we look at the powers of the Board in section 7A(1) and (2). Section 11(1) would seem to imply that the Board may make regulations with respect to any requirement of the Act. ^{76/}

The Air Transport Board as an Administrative Body

The Board under section 12 is responsible, subject to the approval of the Minister, for the issue of licences to

^{75/} (By reference, since the Air Transport Board has jurisdiction in section 7A(1)(A) to deal with any breach of a provision of the Act)

^{76/} See Appendix E

operate commercial air services as defined in section 6(d). While the Board is given a certain amount of discretion in the issue of licences by sub-section 12(3A) the policy of the government as laid down in broad terms in the Act must be followed. The provisions of section 12(2) and 12(4) are mandatory and the Board has no authority to vary them.

In the application of section 12(5) with respect to routes the Board would seem to have considerable discretion; it has the power to impose additional conditions respecting schedules, places of call, carriage of passengers and freight, insurance and carriage of mail.

It has to be noted that the Board may by sub-section 12(7) "issue a licence which differs from the licence applied for and may suspend, cancel or amend any licence or any part thereof where, in the opinion of the Board, public convenience and necessity so requires." and by section 12(9) "Where in the opinion of the Board, an air carrier has violated any of the conditions attached to his licence the Board may cancel or suspend the licence."

There is an appeal to the Minister from the decisions of the Board in both the above cases (section 12 sub-sections (8) and (10)).

Enforcement of Part II

The Board under section 11(k) may make regulations

"prescribing penalties, enforceable on summary conviction,
for -

- (i) contravention of or failure to comply with this part or any such regulations or any direction or order made by the Board pursuant to this Act or such regulations, or
- (ii) making any false statement or furnishing false information to or for the use or information of the Board, or
- (iii) making any false statement or furnishing false information when required to make a statement or furnish information pursuant to any regulation, direction or order of the Board;

such penalties not to exceed a fine of five thousand dollars or imprisonment for six months or both such fine and such imprisonment."

The above and the sanction for breach of conditions of a licence in 12(9) would seem to be sufficient to keep operators within the law.

We have seen from the foregoing study of the Aeronautics Act, the general types of powers granted to the Minister of Transport and to the Air Transport Board for the control of aeronautics in Canada. This short study of the basic provisions of the Act is not sufficient, however, to give us any clear idea of its operation in practice and it will, therefore, be necessary to see in what manner and to what extent the air authorities have exercised their powers of control and regulation.

Civil aviation 77/ in Canada is administered by two separate administrative bodies, the Air Transport Board and the Air Services Branch of the Department of Transport. While both are responsible to the Minister, the Air Transport Board is not part of the Department of Transport, but is an independent body responsible directly to the Minister.

By virtue of Part II of the Aeronautics Act, the Air Transport Board is charged with the commercial and economic regulation of Civil Aviation, whereas the Air Services Branch of the Department of Transport deals exclusively with the technical side of aeronautics under Part I of the Act.

Air Services Branch (D.O.T.)

The Air Services Branch, as already mentioned, deals exclusively with the technical side of aviation under Part I of the Aeronautics Act.

Since, however, Part I of the Act contains most of the powers of the Minister 78/ we cannot say that the Air Services Branch

77/ It should, perhaps, be noted here that while Part I of the Aeronautics Act deals with aeronautics generally, including military aircraft, the jurisdiction of the Air Transport Board under Part II extends only to civil aircraft (Section 6(2)).

78/ It is felt that section 3 is sufficient to give the Minister all powers necessary to control aeronautics and that section 4 only amplifies section 3(1).

administers Part I. It is concerned mainly with those subjects which fall under section 4 of the Act. The powers given by section 4 of the Act have been exercised by the Minister and form the subject matter of the Air Regulations, a body of rules governing the operation of aircraft, aerodromes, pilots and generally all aspects of the technical regulation of aviation.

The Air Regulations 1951

Aircraft Registration: (Part II Section 1).

The provisions with respect to registration are important since the nationality of the aircraft will depend on its registration. The purpose of registration requirements is no different here than it is in Maritime law or even with respect to motor vehicles. In order to exercise control over aircraft, we must be able to identify them. The nature of the instrumentality and the necessity of strict control require that aircraft be capable of rapid identification both for the protection of the public and of the owners.

In order to do this, it is provided that no aircraft can be flown unless it is registered and bears nationality and registration marks. (section 2.1.1). It is also provided that an aircraft to be registered in Canada must not be registered in any other State; certificates of registration are issued by

the Minister, but such certificates are not evidence of ownership in a civil proceeding where ownership is in issue. (Sections 2.1.4 and 2.1.6).

Aircraft Air worthiness (Section 2)

The Air Services Branch exercises strict control over all aircraft operating in the Canadian airspace whether they be registered in Canada or in some other state. An aircraft to be registered in Canada must have a certificate of airworthiness issued by the Minister (2.2.1). Aircraft of foreign registry must have a certificate of airworthiness from the proper authorities of the State of their registry (2.2.2). Since the attempts of I.C.A.O. at internationalization and standardization of these subjects the danger of giving recognition to the standards of foreign states is not too great. Much has been done in recent years in the technical field and many States have accepted the standards suggested by the International Civil Aviation Organization.

The provisions of Section 2 with respect to airworthiness are most important. The fact that the certificate can be suspended or cancelled (2.2.8) and that an aircraft can be inspected by officers of the Department at any time is a serious safeguard against negligence on the part of the operators.

In order to insure the carrying out of these provisions strict inspection and maintenance requirements have been laid

down and periodic tests, particularly in the case of scheduled commercial air services, are required. (2.2.10).

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Apart from the above provisions, the Air Regulations provide for a number of other subjects which cannot be dealt with in this paper. It will be sufficient for our purposes to enumerate some of the most important ones.

PART III (Section 3.1 to 3.17) covers aerodromes generally, licensing of airports, marking of airports, airport fees, access to airports.

PART IV (Sections 4.1 to 4.8) deals with licensing of personnel.

PART V contains, perhaps, the most important provisions of all, the Rules of the Air. They include Visual Flight Rules and Instrument Flight Rules and what would be equivalent to the rules of the road in Maritime law. In fact many of the rules would seem to be derived from Maritime law or the law with respect to motor vehicles and in some cases would seem to be a mixture of both.

Section 5.2.19: "When two aircraft are on converging courses at approximately the same altitude, the aircraft that has the other on its right shall give way except as follows:-

- (a) power driven heavier than air aircraft shall give way to airships, gliders and balloons;
- (b) airships shall give way to gliders and balloons;
- (c) gliders shall give way to balloons;
- (d) power-driven aircraft shall give way to aircraft which are seen to be towing aircraft or other objects."

Section 5.2.20: "When two aircraft are approaching head-on or approximately so and there is danger of collision, each shall alter its course to the right."

These rules remind us of the provisions of the law requiring the driver of a motor vehicle to protect his right at an intersection and that in Maritime law requiring a steamer to give precedence to a sailing vessel.

PART VI Air Traffic Control

This part gives the Minister the right to specifically control air traffic.

Section 6.1 "The Minister may specify those portions of the airspace and those airports where air traffic control will be provided, and may establish the agency which is to supervise the provision of such service; air traffic control shall be provided as may be directed by the Minister."

PART VII Commercial Air Service Operation

This part is enacted pursuant to section 4 (d and e) of Part I of the Aeronautics Act, 79/ and would seem to give

79/ See also section 12(4) of Part II of Aeronautics Act
Section 12(4) "Notwithstanding the issue....."

the Minister additional powers with respect to Commercial Air Service Operations.

PART VIII General provisions

Section I Art.8.1.1. "These regulations apply to all aircraft operating within Canada and aircraft bearing the nationality marks of Canada wherever they may be; provided that unless an aircraft of Canadian registry is within the territory of another state these regulations apply only insofar as they do not conflict with the regulations of such other State."

Section I Art. 8.1.11. "No aircraft of a State with which Canada has not concluded a convention relating to interstate flying shall fly over or alight in Canada except with the written permission of the Minister.

Section I Art. 8.1.11.1, "No aircraft shall engage in a commercial air service wholly within Canada unless it is registered in Canada as a commercial aircraft, or unless it is registered in a contracting state and special permission has been granted under these regulations."

Section 4 Art.8.4.1. "These regulations do not apply:-

- (a) to military aircraft of Her Majesty when manoeuvring under the authority of the Minister of National Defence;
- (b) to foreign military aircraft flying over or landing in Canada in accordance with the terms of any special permissions;
- (c) to other aircraft or to persons or airports to the extent to which they have been relieved by the Minister from compliance therewith."

The Air Service Branch of the Department of Transport prepare for enactment by the Minister subject to the approval

of the Governor in Council further regulations known as Air Navigation Orders 80/ which are supplementary orders exemplifying in greater detail the subjects contained in the Air Regulations 81/ 82/.

Apart from the Regulations and orders, the Air Services Branch also issues circulars and other documents of lesser importance. 83/

The authority for the enactment of any of the above enactments must to be valid be traced back to the Aeronautics Act and to the Minister. In their order of importance we find:-

1. The Air Regulations;
2. The Air Navigation Orders;
3. Circulars and other documents.

80/ Air Navigation orders must be published in the Canada Gazette.

81/ See Appendix G ANO-I-II re classification of aircraft (table)

82/ See Appendix B and D ANO I-III and ANO 8-V.

83/ See Information circular No. 0/19/51 re Security Control of Air Traffic.

THE AIR TRANSPORT BOARD

The functions of the Board 84/ as states in the first report of the Air Transport Board to the Minister of Reconstruction and Supply are as follows:-

- (1) To licence, regulate and control commercial air services in and over Canada.
- (2) Subject to the directions of the Minister, to make investigations and surveys relating to the operation and development of commercial air services in Canada and relating to such other matters in connection with civil aviation as the Minister may direct.
- (3) To make recommendations to the Minister with reference to any investigation or survey made by the Board and advise the Minister in the exercise of his duties and powers under the Aeronautics Act in all matters relating to civil aviation.

The powers and functions of the Air Transport Board under the Act have already been discussed at some length in our study of Part II of the Aeronautics Act 85/ and as was done in the case of the Air Services Branch of the Department of

84/ Report of the Air Transport Board for the period Sept.11-1944 to Dec.31-1946 (Report dated April 1947)

85/ R.S.C. 1927 ch.3

Transport, we shall now discuss the actual steps taken by the Board in the exercise of its powers, the extent of regulations and the manner in which the policy of the Canadian Government has been applied in practice.

The Air Transport Board is mainly concerned with the economic regulation of Civil Aviation. In order to effectively control civil aviation and particularly commercial aviation certain standards had to be established as to what would constitute commercial operations. We shall, therefore, study the definitions given in the Act 86/ of which three are of the greatest importance

SECTION 6:

- b) "Air Carrier" means any person who operates a commercial air service;
- d) "Commercial Air Service" means any use of aircraft in or over Canada for hire or reward;
- dd) "Hire or reward" means any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected for the use of an aircraft by a person who as owner, lessee, hirer, pilot or otherwise, has possession or control over the aircraft or has directed the movement of the aircraft.

Commercial Air Service having been defined 87/ section 15(1) of the act provides:-

86/ Part II section 6.

87/ Definition of Commercial Services before 1945 amendment
"Any undertaking for the transport of goods or passengers by aircraft for hire or reward."

"No person shall operate a commercial air service unless he holds a valid and subsisting licence issued under Section twelve."

With the above definition and the provisions of section 15 the entire field of commercial aviation is placed under the immediate jurisdiction of the Board, which is alone vested with the authority to issue licences.

AIR TRANSPORT BOARD LEGISLATION & PUBLICATIONS

Commercial Air Services Regulations

The Commercial Air Services Regulations are a body of rules enacted by the Air Transport Board under section 11, Part II of the Act, which provide for the general conditions under which air carriers may operate in Canada. The regulations prescribe the requirements of the Board and the guiding principles governing the operations of commercial Air Services.

Classification of Air Carriers

Air carriers are divided into four classes: Scheduled, non-scheduled, national and international. The non-scheduled air carriers are again subdivided in the case of national non-scheduled carriers into six classes and in the case of international non-scheduled carriers into five classes depending on the type and frequency of the service provided. 88/

88/ See Appendix 10 for the complete classification of the four groups as given in section 3.1 of the Regulations and definitions.

Section 3.1

- Class 1 Scheduled Air Carriers;
- " 2 Regular Specific Point Air Carriers;
- " 3 Irregular Specific Point Air Carriers;
- " 4 Charter Air Carriers;
- " 5 Contract Air Carriers;
- " 6 Flying Clubs;
- " 7 Specialty Air Carriers;
- " 8 International Scheduled Air Carriers;
- " 9 International non-scheduled Air-Carriers;

While each class is individually regulated and is subject to particular requirements, it will be sufficient for our purposes to study generally the requirements of the board with respect to the most important class of carrier, the scheduled carrier. The provisions with respect to the other groups are substantially the same, except for certain variations in the requirements dictated by the different types of services performed.

SCHEDULED AIR CARRIERS

The Air Transport Board by section 12 of the Regulations deals with classes 1 and 8, Scheduled Air Carriers and International Scheduled Air Carriers. The economic scope of this section is so wide that it would probably be easier to discuss those things which the Board does not regulate rather than

those which fall under regulation. The language of section 12 is all embracing and places the carrier at the complete mercy of the Board which has the power to determine in all cases whether the provisions of the section have been complied with.

The section regulates among other things, equipment, transportation, facilities and service (section 12.2) service schedules (section 12.3) tariffs and tolls, (section 12.4).

The carrier has the duty to file with the Board and keep open for possible inspection all service schedules (Section 12.3.1.) tariffs showing all tolls, terms and conditions of carriage, classifications, rules, regulations and services (Section 12.4.6.). The Board has absolute discretion with respect to the above.

Section 12.3.4.

"The Board may disallow any service schedule or any portion thereof which it considers undesirable or contrary to any provision of these regulations or the directions issued by the Board and may require the carrier to substitute a service schedule satisfactory to the Board in lieu thereof, or may prescribe other service in lieu of the service so disallowed."

Section 12.4.3.

"The Board may determine and prescribe what are just and reasonable individual or joint tolls, or may prescribe what is the maximum or minimum, or maximum and minimum toll to be charged, and what individual or joint classification, rule, regulation, terms and conditions of carriage, or practice shall prevail in respect of the services performed or to be performed by air carriers."

Section 12.4.8.

"Any tariff in force may subject to disallowance, suspension or change by the Board be amended, supplemented or superseded by a new tariff in accordance with these regulations and the directions issued by the Board."

The three subsections above cited will give an idea of the type of control exercised by the Board with respect to the commercial air services.

The conditions concerning discrimination are most interesting and were enacted to meet a very real problem in Canadian transportation largely dictated by the geography of the country. Section 12.6 is as follows:-

"No air carrier shall make, give or cause any undue or unreasonable preference or advantage to any particular person, airport, locality or description of traffic in air transportation, in any respect whatsoever, or subject any particular person, airport, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

General regulations

In order to effectively control air carriers and prevent them from doing indirectly what they cannot do directly the Board scrutinizes carefully all transactions respecting ownership, transfers, consolidations, mergers and leases of commercial air services. Carriers are required to file copies of agreements in respect to such transactions as well as state-

ments showing transfers of more than 5% of the number of issued shares of the capital stock in case of corporations and of the total capital interest of the partners in case of a partnership. (Section 10.3. and 4.)

Section 10.5 provides:-

"No transfer, consolidation, merger or lease, including acquisition of control or agreement for operation, of any commercial air service shall be carried out or be effective without the prior approval in writing of the Board."

These provisions would tend to prevent a carrier from sharing or even using the equipment of another carrier either to further his own interests or to take advantage of the licence of another carrier.

The provisions of section 10.3 and 4. are necessary to prevent the formation of monopolies in certain sections of the country or undue control of an air carrier by foreign interests.

Operations in other Classes

The placing of a carrier within one of the classes of carriers enumerated in section 3 gives to such carrier the rights and duties attached to that particular class subject to the provisions of his licence. To remove any doubt as to the rights of the carrier, section 6 provides that a carrier cannot operate in any class other than that to which he belongs.

The Board, however, may by amendment to any licence allow a carrier to operate in other classes, subject to certain rules.

Public Convenience and Necessity

This concept which had been introduced in the Transport Act of 1938 89/ and carried into Part II of the Aeronautics Act as section 12(3) is no longer mandatory except in the case of scheduled services. By section 12(3A) which is the result of two amendments 90/ to the Aeronautics Act, the Board may exempt from the operation of section 12(3) any class or group of air carriers except a scheduled commercial air service.

Section 12(3) provides:-

"The Board shall not issue such licence unless it is satisfied that the proposed commercial air service is and will be required by the present and future public convenience and necessity."

Pursuant to the provisions of section 12(3A) of the Aeronautics Act section 5.1. of the Commercial Air Services regulations was enacted.

Section 5.1

"Applicants for licences as air carriers to operate commercial air services in classes 2,3,4,5,6,7,8 and 9, shall be excluded from the operation of subsection 3 of section 12 of the Act, provided they satisfy the Board that the proposed commercial air service would be in the public interest."

89/ 2 Geo.VI chap.53 section 13(5)

90/ 9-10 Geo.VI chap.9 section 7.
14 Geo.VI Chap.23 section 7.

This amendment, which was recommended by the Air Transport Board after its first year of operation widened considerably the field of non-scheduled operations, and permitted the granting of a number of licences to new operators who could not qualify under the requirement of public convenience and necessity, but who could more easily establish that the proposed service was required in the public interest.

The Air Transport Board under the authority of the Act and of the regulations made thereunder can and does regulate in greater detail through the medium of general orders, rules and circulars.

The subject matter of the orders and rules is often the same as that of the Commercial Air Services Regulations and this sub-legislation serves to amplify the general requirements of the Regulations. Circulars, on the other hand, are generally issued for information purposes only and are not in themselves executive instruments; they are useful, however, in that they contain many of the procedural requirements of the Board 91/ and in some cases set out the policy of the Board with respect to certain subjects. 92/

91/ See Board circular 7/51 re Instructions as to preparation and filing of applications for licences to operate international scheduled commercial air services.

92/ See Board circular 11/51 and 12/51 re International Charter Air Services by Canadian Carriers and Policy in respect to Air Carrier's Liability.

To find out what the requirements of the Board are with respect to any particular problem, it is, therefore, necessary to look at all the enactments of the Board, including the circulars which might provide indications of the policy of the Board. There, again, as was the case with respect to the Air Regulations, the legislative authority must be traced back through the Commercial Air Services Regulations, Part II of the Aeronautics Act and section 3 of Part I of the Act to the Minister.

LIMITATION OF LIABILITY IN TRANSPORT OF PASSENGERS

Domestic air-carriers

The first Regulations respecting Commercial Air Services, made by the Air Transport Board on the 27th February, 1945, contained provisions with respect to tariffs and tolls similar to the provisions of the present regulations.

Section 5(2)(c) of the 1945 Regulations provides:

"The Board may determine and prescribe what are just and reasonable individual or joint tolls, or may prescribe what is the maximum or minimum toll to be charged, and what individual or joint classification, rule, regulation, terms and conditions of carriage, or practice shall prevail in respect of the services performed by air carriers."

With a slight modification, 93/ the above section is

93/ "or maximum and minimum" added to the 1945 section

reproduced as section 12.4.3. of the present Regulations. The concept of limitation of liability is closely associated with that of compulsory insurance and both have been dealt with by the Air Transport Board, 94/ although restrictions on limitation of liability seem to have been introduced at a later date and probably as a result of the decision in the Ginger Coote Case 95/.

This decision was an important step in the determination of the rights of Canadian air carriers to limit or exclude their common law liability to carry with "due care" in the case of passenger traffic. The case is important and it is felt that the subject of limitation of liability would not be fully dealt without a discussion of the decision of the judicial committee.

The question submitted for decision was whether conditions in a passenger ticket purporting to relieve the air carrier from all liability for damages caused by negligence or otherwise could be valid in Canada. The effect of the conditions was in fact to render the voyage at the entire risk of the passenger, the carrier assuming no liability under any circumstances. Lord Wright delivered the opinion of the Committee.

94/ Circular #7 of November 21-1947 requiring carriers to furnish security by way of insurance or otherwise to cover their liabilities to passengers, etc., and rescue work.

95/ Luddett vs Ginger Coote 1947 A.C.233

The judgment first discusses the law with respect to the liability of carriers generally. It distinguishes the carrier of passengers and the carrier of goods, applying the decision in the case of Redhead vs Midland Rly. Co., 96/ at p.240:

"It was there held that the liability of a general or public or common carrier of passengers is more limited than that of a common carrier of goods. By the custom of the realm a common carrier of goods was at common law 'bound to answer for the goods at all events..... The law charges this person thus instructed to carry goods against all events but acts of god and the enemies of the King'." 97/

"the carrier of passengers is not subject to a duty so stringent. His obligation at common law, as we held in the leading case just cited, is to carry 'with due care'".

There follows a discussion of Peck vs North Staffordshire Rly. Co., 98/ where the provisions of the Railway and Canal Traffic Act, 1854, imposed the condition that special contracts might be entered into provided they were in writing and were just and reasonable. In this respect Lord Wright said at p.241:

"But apart from the Act the general freedom possessed by carriers was unimpaired, and the Act clearly had no reference to the conveyance or passengers."

96/ 1869 L.R. 4 Q.B. 379

97/ ibid 382

98/ 10 H.L.C. 473

He explained the words of Blackburn J. 99/ where he had said:

"For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability are necessarily reasonable as regards the person having that option."

and points out that the above only applies to the carriage of goods and not to the carriage of passengers where carriers enjoy absolute freedom.

It follows, therefore, that there is absolute freedom in respect of carriage of passengers subject to such statutory restrictions as may be imposed. In this connection his Lordship has applied the case of Grand Trunk Rly. Co., of Canada vs Robinson 100/ where Haldane L.C. said:-

"But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract which may either enlarge, diminish or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents, either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him." 101/

Having thus stated the law, their Lordships decided there was nothing under Canadian Statute law to prevent such exclusion or limitation of liability.

99/ Ibid 512

100/ 1915 A.C. 740

101/ Ibid 747

Since the adoption on the 24th of May, 1951, of general order #3/51 all Air Transport Board licences are subject to uniform conditions with respect to compulsory insurance requirements and the minimum amount is fixed at \$20,000 per seat in the case of passenger liability. 102/

General order No.1/51 dealing with limitation of liability of Air Carriers engaged in the transportation of passengers on domestic services accepts this amount as the lowest limit of liability subject to certain conditions.

Section 1 provides: "It is, therefore, hereby ordered:

1. That the terms and conditions of carriage of air carriers authorized to operate commercial air services for the transportation of passengers between points in Canada shall not, without the prior approval of the Board, contain any provision that is intended to have or that has the effect of limiting the amount of liability of the said carriers when otherwise legally liable, for loss of life or injury to any passenger below the minimum per passenger amount of passenger liability insurance or security stipulated by the Board in the case of each licence issued;

Provided that this order shall not apply to the liability of a carrier to any passenger whose condition is such as to involve an unusual risk or hazard in regard to any loss or damage which would not have been sustained but for the age, mental or physical condition of such passenger, including in the case of a foreign pas-

102/ the other additional requirements are as follows:-

Public liability	\$20,000 one person
	40,000 total per aircraft

Property damage	\$5,000 per aircraft per accident.
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senger, any injury, illness or disability sustained by an unborn child".

Section 2 of the same Order provides for the disallowance of the tariff provisions of such carriers in conflict with the above section.

It should be recognized, however, that even without the provisions of General Order 1/51, the fixing of minimum compulsory passenger liability insurance in itself had very much the same effect. The carrier who is forced to take insurance is no longer interested in trying to limit his liability below the insurance coverage he has purchased. 103/ So that in effect we might say that the introduction of compulsory insurance was equivalent to denying the air carrier the right to limit his liability. In the present case the limit is high enough that there would be little advantage for the carrier to attempt to limit his liability to the minimum amount of \$20,000. The proviso of section 1 of the Order relieving the carrier from the provisions of the Order in case of passengers afflicted with certain infirmities or illness can probably be justified and might in fact contribute to the reduction of the rates of premium of the insurer. It would

103/ There may be an argument contra to the effect that if there were no restrictions on limitation of liability this might affect the rate of premiums set by the insurer.

seem to me, however, that in practice a carrier might in a number of circumstances have difficulty in proving the physical condition of the passenger in case of a claim by such passenger or by his heirs, if he should decide to take advantage of the clause limiting his liability.

LEASE AND CHARTER OF AIRCRAFT

Charter and lease of aircraft and the relationship between the parties to the air charter agreement and third parties have been important subjects of discussion in recent years. Charter of aircraft was not considered an urgent problem until very recently when governments and operators began to realize the increasing importance of charter operations in air transportation. While there is no international legislation governing lease and charter, the various governments have found it necessary to regulate such operations, because of the successful use of charter and lease as a means of evading the national laws dealing with standards, tariffs, routes, rates and conditions of carriage.

The Air Transport Board in virtue of the authority conferred by the Aeronautics Act exercises strict control over all leases and agreements for the operation of commercial air services. The principle as stated in the Commercial Air Ser-

vices Regulations 104/ is further amplified in circular #5/51 "Renting and hiring of Aircraft".

Under the provisions of the Board all leases of aircraft must comply with the following requirements:-

1. The lessee must assume custody of the aircraft and full responsibility for its operations and maintenance during the terms of the agreement.
2. The lessee must man the aircraft with persons in his own employ.
3. The rental must be on a basis unrelated to the revenue to be derived from the aircraft.

The above conditions are all mandatory and serve to distinguish between a contract of lease and one of charter. Only when it fulfils the above requirements does a contract of lease exist. These conditions are imposed to prevent operators from evading the general requirements with respect to commercial air services which could have easily happened by the use of lease or charter. The sanction in case of breach of these regulations is a powerful one, the lessor^{/is} deemed to be operating a "commercial air service" and is placed under the immediate control of the Board. 105/ Furthermore as operator of a commercial air service, a carrier must assume the responsibility for

104/ Section 10.5. "No transfer, consolidation, merger or lease including acquisition of control or agreement for operation or any commercial air service shall be carried out or be effecting without the prior approval in writing of the Board."

105/ Aeronautics Act, Part II section 15. "No person shall operate a commercial air service unless he holds a valid and subsisting licence issued under section 12."

damages to passengers, goods and third parties and he is subjected to the provisions concerning compulsory insurance. 106/

Under Canadian law lease of aircraft does not present much of a problem. In a true lease, the lessee is operator and unless he can establish a claim against the lessor arising from the contract of lease, there is no interference on the part of the law. The lessor in the absence of common law liability disappears entirely from the picture. It is interesting to note that in private lease, when the lessee is using the aircraft for his own purposes and not for hire or reward, he escapes further regulation by the Board.

When the hired aircraft is for use in the operation of a commercial air service as defined in the Act 107/ additional conditions are imposed on the lessee. 108/ He must make sure that the aircraft is covered by insurance 109/,

106/ See General Order #3/51 in the matter of Aviation Liability Insurance.

107/ The Aeronautics Act - Part II Section 6(d). "Any use of aircraft in or over Canada 'for hire or reward'".

108/ Circular #5/51 Sections 2.2.1, 2.2.2., 2.2.3.

109/ See General Order 5/51 "In the matter of aviation Liability Insurance".

which can be done by endorsement to the Lessor or to the Lessee's insurance policy. He must file tariffs and obtain an endorsement to his operating certificate; a copy of the lease must also be filed or submitted to the Department of Transport.

These additional conditions have necessarily been imposed for the protection of the public when the lessee is operating a "commercial air service" as defined above. With the definition of "hire or reward" in the Act 110/ as "any payment, consideration, gratuity or benefit directly or indirectly charged, demanded, received or collected for the use of an aircraft by a person who as owner, lessee, hirer, pilot or otherwise has possession of or control over the aircraft or has directed the movement of the aircraft," there is hardly any possibility that a carrier will ever succeed in evading the law.

The effect of the legislation is to render it impossible for a person not licenced to operate a commercial air service to operate a leased aircraft for hire or reward.

110/ The Aeronautics Act - Part II Section 6(dd).

FOREIGN AIR CARRIERS

Because of the principle of sovereignty over national air space accepted in the Chicago Convention and the failure of the Conference to agree on the freedoms which should be granted to foreign air carriers, the position with respect to international air carriage is still a difficult one. Contracting States have reserved to themselves the right to control international scheduled operations in their territory and though in theory they have granted the first two freedoms to non-scheduled international air carriers, in practice the permission of the State flown over is still required. 111/

The International Air Services Transit Agreement 1944 has solved part of the problem. The agreement which was signed by a large number of States granted ~~the~~ two first freedoms and made it possible to open and operate international air routes. Since, however, commercial privileges are not included in the Agreement of the Convention it is still necessary for States to negotiate bilateral agreements in respect of scheduled commercial air services and for non-scheduled operators to obtain permission from the State in which they intend to operate. 112/

111/ Supra Chapter I p.14

112/ See Information Circulars 9/51 Respecting the Operation of non-scheduled Commercial Air Services into Canada by Foreign Air Carriers and 17/52 re Application for Permits - International Non-scheduled Charter Air Carriers.

Non Scheduled Foreign Carriers in Canada

"All foreign non-scheduled air carriers must obtain authorization from the Air Transport Board and be in possession of an air operating certificate from the Department of Transport (AIR) before operating any form of commercial air service into Canada." 113/

Foreign non-scheduled air carriers are divided into two groups:

(1) Air Carrier registered in States with which Canada has commercial air agreements; and (2) Air Carriers registered in States with which Canada has no commercial air agreements.

Both groups are required to furnish in the application which they must make to the Air Transport Board for authorization to operate in Canada, information with respect to: (a) ownership of the aircraft 114/, (b) proof of authority from the government of the applicant's country to operate a commercial air service; (c) the tolls to be charged and the terms and conditions of carriage; (d) proof that the applicant carries the minimum liability insurance required from Canadian carriers. If the Board is satisfied with the information furnished by the applicant, the carriers will be placed on the "approved list" of non-scheduled foreign air carriers. 115/ In case of carriers registered in States with which Canada has no commercial

113/ See Supra Ch.II p.65 Part VIII of the Air Regulations.

114/ If the applicant is a company it must give the names of the principal officers, the status of the Company in its own country, and whether substantial ownership and effective control rests in the citizen's of the applicant's country.

115/ This general information must be given to place the carrier on the approved list after which he is only required to furnish details of proposed flights.

air agreement, negotiations through the Department of Internal Affairs may also be necessary.

After a foreign carrier has been placed on the Approved List he is still required before each flight or series of flights to furnish to the Board details of the intended operations as follows: 116/

- a) Whether charter or other type of non-scheduled flight;
- b) Number of passengers and/or nature of cargo;
- c) Origin and destination of flight.

Apart from these requirements the carrier must obtain authorization from the Department of Transport whose duty it is to verify the technical eligibility of the carrier under Canadian standards. It is also understood that having obtained such authorizations the carrier must comply with the various customs, immigration and health requirements of the Canadian authorities. 117/

Scheduled Foreign Air Carriers in Canada

The Canadian Government has signed bilateral agreements

116/ Information Circular 9/51 sections 1.4.6.1. to 1.4.6.6.

117/ For Canadian policy in respect of non-scheduled international commercial Air Services - See Appendix J.

with various countries in respect of scheduled international commercial air services. 118/.

The clauses of these agreements and the form employed are substantially the same for all countries though differences may exist by reason of the frequency of services and the routes allotted.

The agreements usually provide for reciprocal grants of the first four freedoms.

Provision is made for the fixing of tariffs and tolls in a manner satisfactory to both contracting parties due regard being paid to conditions prevailing in each contracting State.

The agreements provide that each contracting State will designate one or more of its airlines to operate such services and it is understood that only such designated airlines are allowed to operate international scheduled services between the two countries.

118/ See Canada Treaty Series

- Canada - U.S.A., Air Transport Agreement, C.T.S. 1949, No.14
 - Canada - U.S.A., Exchange of Notes C.T.S. 1949, No.15
 - Canada - U.K. Agreement & Exchange of notes C.T.S. 1949 No.21
 - Canada-New Zealand Air Transport Agreement C.T.S. 1950, No.14
 - Canada - Australia Exchange of Notes C.T.S. 1951, No.26
 - Canada - Ireland Exchange of Notes C.T.S. 1951, No.11
 - Canada - Denmark Agreement for Air Services C.T.S. 1949, No.24
 - Canada - Norway Agreement for Air Services C.T.S. 1950, No. 1
 - Canada - Belgium Agreement for Air Services C.T.S. 1949, No.22
 - Canada - France Agreement for Air Services C.T.S. 1950, No.13
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The parties to the Air Transport Agreements usually include clauses to prevent discriminatory practices with respect to various things such as charges for the use of airports and other navigation facilities; such charges not to be higher than would be paid by national aircraft engaged in similar international services. Provision is also made with respect to customs duties and inspection fees for spare parts, fuels and lubricants which should not be higher than the duties paid by national airlines. Contracting States also agree not to give a preference to their own airlines against the airlines of the other State in the application of their customs, immigration, quarantine and similar regulations or in the use of airports, airways or other facilities.

In case of dispute between the parties relating to conditions of the agreement provision is made for the settlement of such disputes, in cases where they cannot be settled by negotiation, by referring them to the Council of I.C.A.O., in accordance with the procedure of Article 84 of the Chicago Convention or to the International Court of Justice. 119/

Although the Chicago Convention has not been successful in its attempt to regulate international commercial air services, as a result of the United States' proposal for standard clauses in all aviation agreements, signatory states have undertaken to refrain from including in bilateral air agreements provisions

119/ See Appendix K for typical Air Transport Agreement.

which would give undue precedence to any other State or airline or to discriminate against the airlines of any other States. This system has been reasonably successful to date and will, no doubt, continue until such time as States can agree on a standard and universal solution.

CONTROL OF THE CANADIAN AIR SPACE

Article I of the Chicago Convention 120/ recognizes the complete and exclusive sovereignty of States in the air space above their territories. In view of the opinion expressed by a leading author 121/ who has done considerable research and study with respect to the origin of the concept of the sovereignty of States in the national air space, it would appear that the adoption in the Chicago and the Paris Conventions of the principle of sovereignty has only confirmed an existing rule of comity.

120/ Supra p. 12

121/ Although the question was seriously debated at the beginning of the century, there is little doubt now that States have, even in remote times, asserted their rights in the air space. See J.C. Cooper, Roman Law and The Maxim "Cujus est solum" in **International Air Law**. Institute of International Air Law, McGill University, Publication No.1.

With the rapid development of commercial aviation and the consequent increase in the number of air services, particularly in urban districts, it is now essential to regulate air traffic within certain areas for the protection of the public and to promote greater safety of navigation. Part VI of the Air Regulations 1951 contains provisions respecting Air Traffic Control.

Section 6.1. "The Minister may specify those portions of the airspace and those airports where air traffic control will be provided, and may establish the agency, which is to supervise the provisions of such service; air traffic control shall be provided as may be directed by the Minister."

Section 6.2. "No aircraft shall be flown in accordance with the instrument flight rules within control areas or control zones unless air traffic control has been provided with information on the movement of each such aircraft, such information being in the form as may be directed by the Minister."

Section 6.3. "No aircraft shall be subject to the control of more than one air traffic control unit at any given time."

The United States, in December 1950, and Canada in May 1951, by the adoption of new regulations, assumed special jurisdiction for security purposes in the air spaces over defined areas within and adjoining their respective territory^{122/}

^{122/} In U.S.A. Part 620, Regulation of the Administrator, security control of air traffic.
In Canada Information Circular No.0/19/51, issued by the Director of Air Services, Department of Transport, Air Services Branch, Civil Aviation Division..

These areas were called "Air Defence Identification Zones" 123/. The purpose of the legislation in both countries is the same "National Security" and both seek to achieve it by the same general method, the creation of controlled zones within which aircraft must comply with certain requirements. While there are differences between the Canadian and United States Regulations these are not too serious and it would appear that the regulations of both countries were drafted in co-operation, as a step in the joint defence of the North American Continent against possible aggression.

The validity of the United States regulation from the viewpoint of International Law depends, to some extent, on the fact that the littoral state, while assuming partial jurisdiction over a portion of the high seas, is not interfering with the freedom of the air space over the high seas. In fact, according to Section 620.12(b) 2 of the United States regulation, unless an aircraft is destined for the United States, the regulations do not apply, since foreign aircraft are requested to submit only "prior to entering the United States". Thus an aircraft on a flight from Cuba to New Brunswick, though passing through the Atlantic Coastal ADIZ, would not be required to submit to the provisions of Part 620 if it passed outside the territorial air space of the United States.

123/ Abbreviations:- V.S. zones (ADIZ)
Canadian zones (CADIZ)

There is no such condition in Section 2.1 of the Canadian regulations. Canada assumes jurisdiction as soon as the aircraft enters a CADIZ. No question of destination arises. Admittedly, the Canadian Air Defence Identification Zones extending over portions of the high seas are not as wide as those of the United States Atlantic Coastal ADIZ, but the sea is just as much high sea thirty miles, as it is two hundred miles from the coast.

An aircraft flying from the Miquelon Islands to New York on a course parallel to the coast of Nova Scotia, at a distance of twenty miles from the coast and at an altitude of five thousand feet, would be passing through the eastern CADIZ and the Atlantic Coastal ADIZ. In such a case, and it has already happened in practice, Canada would assume jurisdiction, and the unidentified aircraft would probably find itself escorted by Canadian military aircraft.

Looking at the two sets of regulations, therefore, we find that the Canadian regulation, though they appear milder, in that they do not attempt to control such a large portion of air space over the high seas, are in fact stricter than the American regulations. In Part V, Section 1, of the Canadian Air Regulations, 1951, at subsection 5.1.2, it is said:-

"Aircraft shall while over the high seas comply with the provisions of annex 2 "Rules of the Air" to the Convention on international Civil Aviation (1944), and any amendment thereto."

It may be difficult to reconcile Canada's attitude in the application of these regulations with Article 12 of the Chicago Convention 124/ and the principle of freedom of the seas though it is generally agreed that the concept of self preservation will, in certain cases, displace the doctrine of freedom of the seas.

124/ Article 12 of the Chicago Convention reads:-

"Each contracting state undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that of every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting state undertakes to keep its own regulations in those respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."

CONCLUSION

CANADIAN POLICY RE ECONOMIC REGULATION OF AIR TRANSPORT

Canadian policy on air transportation has continuously evolved to meet the needs of changing economic conditions and technical advances, though by reason of certain factors beyond our powers, the general pattern of development has remained substantially the same. We are limited in the development of our air routes by the fact that the bulk of settled territory lies in a narrow belt stretching across the country, and that the density of the population along this band is low and unequally distributed. The vast undeveloped regions to the north with a low traffic potential and the proximity of the United States border to the south have prevented the development of a well balanced network of routes. Instead we have a main trunk route from east to west with branches to the north and south serving the most populated areas off the main routes.

When the Trans-Canada Airlines Act was enacted in 1937 Canadian operators were in a precarious position. As a result of uncontrolled competition many of the small operators had been forced out of business and those who remained were on the verge of bankruptcy.

During World War II little progress was made and aviation remained at a standstill. In 1944 it was decided to establish a new agency to direct the post-war development of civil aviation and prevent cut-throat competition which had so far hampered the progress of commercial air transport.

The Air Transport Board soon after its formation proceeded to make a complete study of the conditions of air operators in Canada. A review of all licences, and an economic survey of the Dominion of Canada from the transportation point of view was made. Board members made personal inspections of airports, equipment used, services rendered, to acquaint themselves with the facilities available and the desirability of affecting changes. Board hearings were held in various centers at which licencees and other interested parties were given the opportunity to make representations and submit evidence with respect to the routes covered by their licences and the services which they performed.

The recommendations of the Board are contained in a

Report 125/ made to the Minister in 1947, and this report forms the basis upon which future Canadian economic policy was formulated.

Financial Assistance

There has been no direct subsidization of air carriers in Canada and until very recently no provision had been made by the Government to give financial assistance to operators of commercial air services.

In 1952, however, the industrial development bank Act 126/ was amended 127/ to permit direct loans to operators of Commercial Air Services. This will, no doubt, be of great help to operators particularly to assist them in purchasing additional aircraft or equipment. In order to further encourage carriers in the purchase of new aircraft, provisions with respect to depreciation have been changed from 30% to 40%. 128/.

125/ Report of The Air Transport Board for the period September 11, 1944 to December 31, 1946.

126/ 1944-45 8-9 Geo.VI ch.44

127/ 1952 1 Elizabeth II Ch.30

128/ According to the diminishing value method, which means that an operator can depreciate up to 64% of the value of an aircraft in two years

Competition

The general policy of the Canadian Government with respect to competition has been very rigid, since the formation of the Air Transport Board, particularly with respect to scheduled air services, although there is some indication 129/ that the Board may in the near future permit reasonable competition with regard to regional scheduled services. The present policy is substantially as follows:-

International Carriage:- There is no competition between Canadian carriers operating scheduled international services. The Atlantic area is served by T.C.A. and the Pacific area by C.P.A. Since all such operations are based on bilateral agreements between countries, carriers of various States are already competing with each other and it is highly improbable that international licences will be granted to other Canadian carriers.

Domestic Carriage:- Because of the relatively small amount of international traffic T.C.A. is still alone in the operation of such services. This policy would seem reasonable at the present time. Since operators of scheduled air services are required to provide regular services under all circumstances, they must be assured of all the traffic on the route which they

129/ See Address by Hon. Lionel Chevrier, Seigniory Club, November 10, 1952

are serving.

In respect of non-scheduled services, the Government has encouraged their development particularly in the northern regions but will not allow them to endanger the position of scheduled commercial air services.

Rates

Although the Air Transport Board has the power to exercise control over rates of domestic carriers the Board has not exercised this power in practice except in unusual cases when it was obvious that the rates were "unjust or uneconomic". 130/

In spite of difficulties with the present system it is unlikely that the Board will ever assume the task of fixing the rates of domestic air carriers largely because of the difficulty of applying a single rate structure throughout Canada where conditions vary so widely.

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Since the formation of the Air Transport Board commercial aviation in Canada has moved constantly forward and in the short period since the end of World War II the operating revenues of Canadian domestic carriers have more than trebled. The Canadian Government in the framing of

130/ The position of private commercial aviation in Canada, an Address by J.R. Baldwin, Chairman, Air Transport Board, delivered October 25th, 1949

its policy with respect to commercial air services has profited by the experience of the pre-war period, and there is no doubt that the success which has been achieved is the result of the formulation of a sound economic policy carefully supervised and applied by competent administrative agency. The future development of Canadian commercial aviation will depend to a large extent on the flexibility of Canadian Policy which should never be too rigid to prevent adjustments in line with changing conditions.

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APPENDIX A

THE BRITISH NORTH AMERICA ACT, 1867

Distribution of Legislative
Powers

SECTION 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms in this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
- 2A. Unemployment Insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between two Provinces.

14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

SECTION 92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

1. The Amendment from Time to Time, notwithstanding anything

anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.

2. Direct Taxation within the Province in order to Raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:-
 - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

SECTION 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.

APPENDIX B

AIR NAVIGATION ORDER I-III

SOR/52-5

AERONAUTICS ACT - AIR NAVIGATION ORDERS, SERIES III, No.1

Under the authority of subsection (2) of section 4 of the Aeronautics Act and The Air Regulations, Part III, subsection 3.8, the attached Air Navigation Order is issued and titled:

"OPERATING CONDITIONS AERODROMES, UNLICENSED".

LIONEL CHEVRIER,
Minister of Transport.

3rd January, 1952.

AIR NAVIGATION ORDERS

SERIES III, NO.1

OPERATING CONDITIONS AERODROMES, UNLICENSED.

1. When markings are placed on areas of land or water that may be used as aerodromes but have not been licensed, the said markings shall be in accordance with the following:
 - 1.1 Wind cone - coloured international orange only.
 - 1.2 Boundary markers - coloured international orange only.
 - 1.3 Unserviceable area markers - red flags.

APPENDIX C

THE CONVENTION OF PARIS, 1919

Convention relating to the Regulation
of Aerial Navigation

Chapter	I:	General Principles
Chapter	II:	Nationality of Aircraft
Chapter	III:	Certificates of Airworthiness and Competency
Chapter	IV:	Admission to Air Navigation above Foreign Territory
Chapter	V:	Rules of Departure, Way, and Landing
Chapter	VI:	Prohibited Transport
Chapter	VII:	State Aircraft
Chapter	VIII:	The I.C.A.N.
Chapter	IX:	Final Provisions
Annex	A:	Classification and definitions; Marking; Registration; Call Signs
Annex	B:	Certificate of Airworthiness
Annex	C:	Log Books
Annex	D:	Rules as to Lights and Signals; Rules as to Air Traffic
Annex	E:	Licensing and Competency of Personnel
Annex	F:	Aeronautical Maps and Ground Markings
Annex	G:	Collection and Dissemination of Meteorological Information
Annex	H:	Customs.

APPENDIX D

AIR NAVIGATION ORDER 8-V

SOR/52-82

Aeronautics Act-Air Navigation Orders, Series V,
No.8

Under the authority of subsection (2) of section 4 of the Aeronautics Act and The Air Regulations, Part V, subsection 5.4.10.1, the attached Air Navigation Order is hereby made and issued:

Air Navigation Orders

Series V. No.8

Weather Minima, Alternate Airports

1. An airport in a control area or a control zone shall not be included in a flight plan as an alternate to the airport of first intended landing unless current forecasts indicate that the ceiling and visibility at such airport will, at the expected time of arrival, be at or above the weather minima specified in The Canada Air Pilot, or elsewhere specified by the Minister, for that airport when so used.

2. Where the weather minima specified in The Canada Air Pilot for an airport when used as an alternate to the airport of first intended landing show the ceiling as 800 feet and the visibility as 2 miles, the following minima for that airport only may be applied:

Ceiling - 800 feet - visibility 2 miles, or

Ceiling - 900 feet - visibility $1\frac{1}{2}$ miles, or

Ceiling -1,000 feet - visibility 1 mile.

February 26, 1952.

LIONEL CHEVRIER,
Minister of Transport.

APPENDIX E

AERONAUTICS ACT

SECTION 3. It shall be the duty of the Minister:

- (a) to supervise all matters connected with aeronautics;
- (b) to undertake, and to co-operate with persons undertaking such projects, technical research, study or investigation as in his opinion will promote the development of aeronautics in Canada; (1950, c.23, s.2)
- (c) to construct and maintain all Government aerodromes and air stations, including all plant, machinery and buildings necessary for their efficient equipment and upkeep;
- (d) to control and manage all aircraft and equipment necessary for the conduct of any of His Majesty's services;
- (e) to operate such services as the Governor in Council may approve;
- (f) to prescribe aerial routes;
- (g) to co-operate with other officers of His Majesty, and to assist in the carrying out of any services under their jurisdiction which may require aerial work of any nature, and to collaborate with the officers employed in existing air services of His Majesty in such extension of their present work as the development of aeronautics may require;
- (h) to take such action as may be necessary to secure, by international regulation or otherwise, the rights of His Majesty in respect of His Government of Canada, in international air traffic; (1950, c.23, s.2).
- (i) to co-operate with the officers of his Department on all questions relating to the air defence of Canada;
- (j) to co-operate with the Air Staffs or authorities of other governments or countries for any purposes pertaining to air services;

(k)

- (k) to investigate, examine and report on the operation and development of commercial air services within or partly within Canada or the limits of the territorial waters of Canada; (1950, c.23, s.2).
- (l) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada and for the control or operation of aircraft registered in Canada wherever such aircraft may be; and (1950, c.23, s.2)
- (m) to perform such other duties as the Governor in Council may from time to time impose. (1919, c.11, s.3; 1922, c.34, s.7)

SECTION 4. (1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to: (1950, c.23, s.3)

- (a) licensing pilots and other persons engaged in the navigation of aircraft, and the suspension and revocation of such licences;
- (b) the registration, identification, inspection, certification and licensing of all aircraft;
- (c) the licensing, inspection and regulation of all aerodromes and air-stations;
- (d) the conditions under which aircraft may be used or operated; (1950, c.23, s.3).
- (e) the conditions under which goods, mails and passengers may be transported in aircraft and under which any act may be performed in or from aircraft or under which aircraft may be employed; (1950, c.23, s.3).
- (f) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulations, and either absolutely or subject to such exceptions or conditions as may be so specified;

- (g) the areas within which aircraft coming from any place outside of Canada are to land, and the conditions to be complied with by any such aircraft;
- (h) aerial routes, their use and control;
- (i) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada and of aircraft registered in Canada wherever such aircraft may be; (1950, c.23, s.3).

(2) Any regulations made under subsection (1) may authorize the Minister to make orders or directions with respect to such matters coming within this section as the regulations may prescribe. (1950, c.23, s.3).

(3) Every person who violates the provisions of a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year or to both fine and imprisonment. (1950, c.23, s.3).

(4) Every person who violates an order or direction of the Minister made under a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both fine and imprisonment. (1950, c.23, s.3).

APPENDIX F

REGULATIONS RESPECTING COMMERCIAL AIR SERVICES MADE BY THE AIR TRANSPORT BOARD UNDER THE AERONAUTICS ACT.

CLASSIFICATION OF AIR CARRIERS

Air carriers are classified as follows:

Class 1 - Scheduled Air Carriers

Air carriers who offer public transportation of persons, mails and/or goods by aircraft, serving designated points in accordance with a service schedule and at a toll per unit.

Class 2 - Regular specific point Air Carriers

Air carriers who offer public transportation of persons, mails and/or goods by aircraft serving designated points on a route pattern and with some degree of regularity, at a toll per unit.

Class 3 - Irregular Specific Point Air Carriers

Air carriers who offer public transportation of persons, mails and/or goods by aircraft, from a designated base, serving without any degree of regularity points within a defined area or a specific point or specific points, at a toll per unit.

Class 4 - Charter Air Carriers.

Air carriers who offer public transportation of persons, and/or goods by aircraft from a designated base, at a toll per mile or per hour for the charter of the entire aircraft, or at such other tolls as may be approved by the Board.

Class 5 - Contract Air Carriers.

Air carriers who transport persons and/or goods solely in accordance with one or more specific contracts.

Class 6 - Flying Clubs.

Air carriers incorporated as non-profit organizations for the primary purpose of furnishing flying training and recreational flying to Club members.

Class 7 - Specialty Air Carriers.

Air carriers who operate for purposes not provided for by any other Class.

Class 8 - International Scheduled Air Carriers.

Air carriers designated by the Government of any State to operate international scheduled air services between Canada and any other State, pursuant to an international Agreement or Agreements to which Canada is a party.

Class 9 - International Non-scheduled Air Carriers.

Air carriers who operate between Canada and any other State, any commercial air service authorized to be performed by air carriers in Classes 2, 3, 4, 5 and 7.

APPENDIX G

AIR NAVIGATION ORDER NO. I

Classification of Aircraft

Aircraft	:Lighter-than-air aircraft	:Non-power driven balloon	:Free balloon	:Spherical free balloon
			:	:Non-spherical free balloon
			:	:
			:	:Spherical captive balloon
			:Captive balloon	:Non-spherical captive balloon (a)
		:Power-driven	:	:Rigid airship
			:Airship	:Semi-rigid airship
			:	:Non-rigid airship
			:	:
			:	:
	:Heavier-than-air aircraft	:Non-power driven	:Glider	:Land glider
			:Kite (d)	:Sea glider (b)
			:	:
			:	:Landplane (c)
			:Aeroplane	:Seaplane (b)
		:Power driven	:	:Amphibian (b)
			:	:Land gyroplane (c)
			:Gyroplane	:Sea gyroplane (b)
			:	:Amphibian gyroplane (b)
			:	:
			:	:Land helicopter (c)
		:Ornithopter	:Helicopter	:Sea helicopter (b)
			:	:Amphibian helicopter (b)
			:	:
			:	:Land ornithopter (c)
			:	:Sea ornithopter (b)
			:	:Amphibian ornithopter (b)

- (a) Generally designated "kite-balloon".
- (b) "Float" or "boat" may be added as appropriate.
- (c) Includes aircraft equipped with ski-type landing gear (substitute "ski" for "land").
- (d) For the purpose of completeness only.

APPENDIX H
AIR BOARD ACT

SECTION 3. It shall be the duty of the Air Board:

- (a) to supervise all matters connected with aeronautics;
- (b) to study the development of Aeronautics in Canada and in other countries and to undertake such technical research as may be requisite for the development of Aeronautics, and to co-operate with other institutions in carrying out such research;
- (c) to construct and maintain all Government aerodromes and air stations, including all plant, machinery and buildings necessary for their efficient equipment and upkeep;
- (d) to control and manage all aircraft and equipment necessary for the conduct of any of His Majesty's services;
- (e) to operate such services as the Governor in Council may approve;
- (f) to prescribe aerial routes;
- (g) to co-operate with other officers of His Majesty, and to assist in the carrying out of any services under their jurisdiction which may require aerial work of any nature, and to collaborate with the officers employed in existing air services of His Majesty in such extension of their present work as the development of aeronautics may require;
- (h) to take such action as may be necessary to secure, by international regulation or otherwise, the rights of His Majesty in respect of His Government of Canada, in international air routes;
- (i) to co-operate with the officers of the Department of Militia and Defence and of Naval Service on all questions relating to the air defence of Canada;
- (j) to co-operate with the Air staffs or authorities of other governments or countries for any purposes pertaining to air services;

- (k) to investigate, examine and report on all proposals of the institution of commercial air services within or partly within Canada or the limits of the territorial waters of Canada;
- (l) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada;
- (m) to perform such other duties as the Governor in Council may from time to time impose. 1919, c.11, s.3; 1922, c.34, s.7.

SECTION 4. (1) Subject to the approval of the Governor in Council, the Air Board may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and, without restricting the generality of the foregoing, may make regulations with respect to:

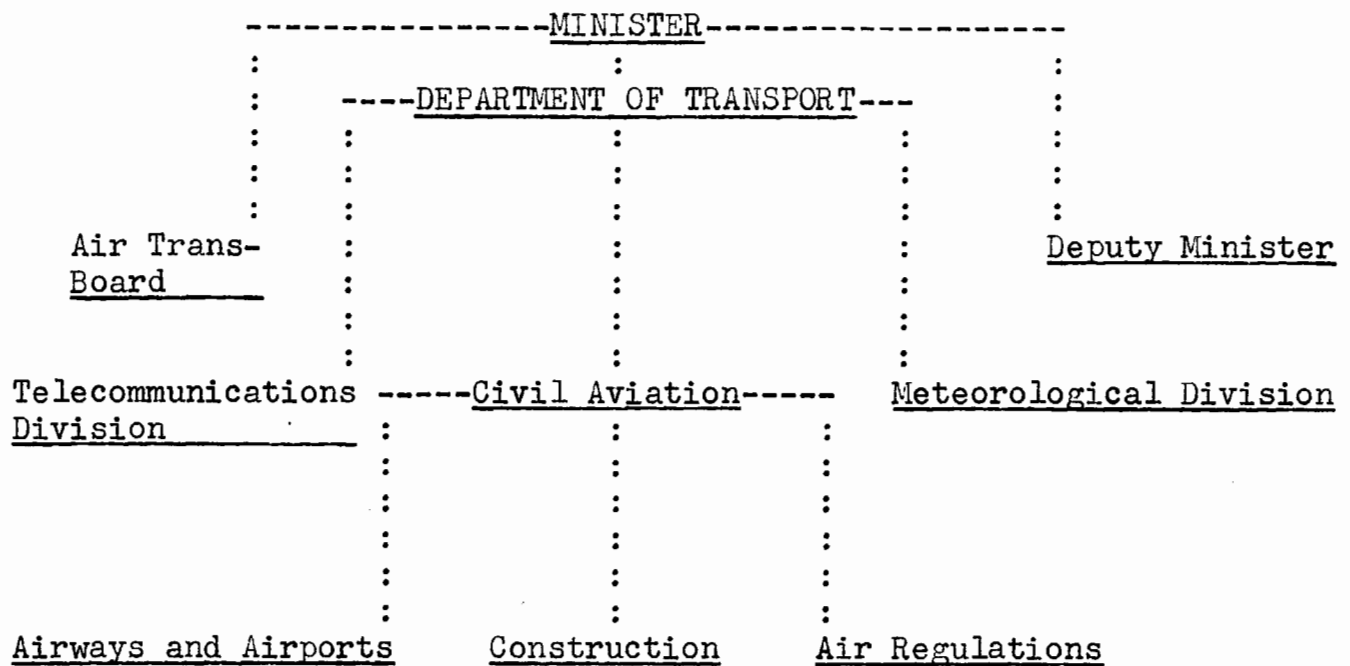
- (a) Licensing pilots and other persons engaged in the navigation of aircraft, and the suspension and revocation of such licenses;
- (b) the registration, identification, inspection, certification and licensing of all aircraft;
- (c) the licensing, inspection and regulation of all aerodromes and air-stations;
- (d) the conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial service whatsoever, and the licensing of any such services;
- (e) the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada or within the limits of the territorial waters of Canada, or may be transported over any part of such territory;
- (f) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulations, and either absolutely or subject to such exceptions or conditions as may be so specified;

- (g) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft;
- (h) aerial routes, their use and control;
- (i) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada;
- (j) organization, discipline, efficiency and good Government generally of the officers and men employed by the Air Board

(3) Every person who violates the provisions of a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars, or to imprisonment for a term not exceeding six months or to both fine and imprisonment.

APPENDIX I

ADMINISTRATIVE ORGANIZATION IN CANADA



APPENDIX J

THIS SUPPLEMENT OUTLINES THE POLICY WHICH IS FOLLOWED BY THE AIR TRANSPORT BOARD IN DEALING WITH APPLICATIONS FOR PERMIT TO OPERATE COMMERCIAL AIR SERVICES TO AND FROM CANADA BY FOREIGN AIR CARRIERS OTHER THAN AGREED SERVICES ON SPECIFIED ROUTES BY DESIGNATED AIRLINES.

1. When the proposed movement is between Canada and a country with which Canada has a bilateral air agreement providing for agreed air services between the two countries;

1.1 The Board believes that the appropriate designated air carriers of the two countries have primary rights to the carriage of traffic between those two countries and requires to be satisfied that one or other of such designated air carriers is not in a position to furnish the proposed transportation on a reasonable basis;

1.2 If the appropriate designated air carrier of one or other of the countries is not in a position to furnish the proposed transportation, the Board prefers that the traffic be carried by some other air carrier of one of the two countries;

1.3 If the Board is satisfied that one air carrier of one country or the other is unable to furnish the transportation on a reasonable basis; and if the Board is satisfied that the transportation applied for would be in the public interest, then it is prepared to grant a permit to the air carrier of a third country;

1.4 Any large movement involving frequency, regularity or volume, is reviewed with care. When the applicant is a carrier of a third country, the Board would refuse a permit unless satisfied that the traffic should be moved by air carrier of a third country and in such cases may require either association with an appropriate designated airline if any, or some other form of direct governmental sponsorship from one of the two countries involved;

1.5 In dealing with application from foreign air carriers under the foregoing principles, the Board takes into consideration primarily the position of the Canadian air carriers, assuming that the other country from, or to which the proposed movement is to take place, will protect the interests of its own carriers.

1.6 In all such cases the Board reviews the proposed charges and conditions of carriage to make such that they are just and reasonable.

2. When the proposed movement is between Canada and a country with which Canada has no bilateral agreement;

- 2.1 The Board requires to be satisfied that it is in the public interest that the transportation be furnished by an air carrier other than the designated air carriers whose combined services connect Canada and that country.
- 2.2 If the Board is so satisfied, preference would normally be given to carriage by either a Canadian carrier or a carrier of the country to or from which the traffic is moving. A reasonable liberal attitude is taken towards applications from the carriers of third countries for occasional flights. In the case of large or frequent movements however, the Board takes the general attitude indicated in 1.4 above.
- 2.3 A rate review on the basis indicated in 1.6 above also takes place.

APPENDIX K

AGREEMENT BETWEEN CANADA AND BELGIUM

FOR

AIR SERVICES

Preamble

The Government of Canada and the Government of Belgium (hereinafter called the Contracting Parties), having ratified the Convention on International Civil Aviation signed at Chicago on December 7, 1944, and desiring to conclude an agreement for the purpose of further promoting international commercial air services, have accordingly appointed authorized representatives who agree as follows:

Article 1

For the purpose of the present Agreement, and its Annex, except where the text provides otherwise:

(1) The term "aeronautical authorities" shall mean in the case of Belgium, Ministere des Communications, Administration de l'Aeronautique, 53, Boulevard du Redent, Brussels, and in the case of Canada, the Minister of Transport and the Air Transport Board or any person or agency authorized to perform the functions exercised at present by the said Minister and said Board.

(2) The term "Territory" shall have the meaning given to it by Article 2 of the Convention on International Civil Aviation, signed at Chicago on December 7, 1944.

(3) The definitions contained in Article 96 of the Convention on International Civil Aviation signed at Chicago on December 7, 1944, shall be applied to the present Agreement.

Article 2

Each contracting party grants to the other the rights specified in this Agreement and the Annex thereto for the purpose of establishing the air services therein described (hereinafter called the agreed services). Subject to Article 5, such services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted.

Article 3

(1) There shall be a fair and equal opportunity for the airlines of the Contracting Parties to operate between their respective territories the international air services described in this Agreement and its Annex.

(2) Either Contracting Party may permit the designated airline of the other Contracting Party reasonable discretion as regards the amount of capacity to be offered on the initiation of an agreed international air service and for a reasonable period thereafter.

(3) Neither Contracting Party will permit its designated airline to transfer traffic to another aircraft of that airline of a different capacity at the last intermediate point before arrival at the designated terminal in the territory of the other Contracting Party.

Article 4

(1) The tolls to be charged on the agreed services shall be fixed at reasonable levels, due regard being paid to all relevant factors such as cost of operation, competition, the characteristics of each service, and reasonable profit.

(2) Tolls to be charged on the agreed services by the designated airlines shall be agreed in the first instance between them, having due regard to the rates fixed by any tariff conference of airlines operating in the area. Any tariff so agreed will be subject to the approval of the aeronautical authorities of both of the Contracting Parties.

(3) Tariffs applicable to an agreed service shall be filed by the designated airlines at least thirty (30) days before the proposed effective date with the aeronautical authorities of both Contracting Parties in accordance with the respective regulations of those authorities provided that this period of thirty (30) days may be reduced in particular cases if so agreed by the aeronautical authorities of both Contracting Parties.

(4) If the aeronautical authorities of one of the Contracting Parties, on receipt of the filing referred to in sub-section (3) above is dissatisfied with a toll proposed by the airline of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiry of the first fifteen of the thirty days referred to, and the aeronautical authorities of the Contracting Parties shall endeavour to reach agreement on an appropriate toll. In the event that such agreement is reached, each Contracting Party will exercise its statutory authority to put such toll into effect as regards its airline.

(5) In the event of disagreement between the designated airlines, the aeronautical authorities of the Contracting Parties shall endeavour to reach an agreement. Should the aeronautical authorities, or, subsequently, the Contracting Parties themselves, fail to agree, the matter in dispute will be referred for settlement as provided for in Article 9 of this Agreement.

(6) If agreement has not been reached at the end of the thirty-day period referred to in sub-section (3) above, the disputed toll shall not become effective until the dispute shall have been settled.

Article 5.

(1) Subject to the provisions of sub-sections (2), (3), (4) of this Article, each of the agreed services may be put into operation as soon as the Contracting Party to whom the rights have been granted has designated an airline for the operation of the agreed services. The Contracting Party granting the rights shall, subject to sub-sections (2), (3), (4) of this Article, be bound to grant with a minimum of procedural delay the appropriate operating permission to the airline concerned.

(2) Each designated airline may be required to satisfy the competent aeronautical authorities of the Contracting Party granting the rights that it is qualified to fulfil the conditions prescribed under the laws and regulations normally applied by those authorities to the operations of international commercial air services, and that it is equipped and able to conduct its operation in a manner which will ensure a standard of safety equal to or higher than that contemplated by the International Civil Aviation Convention and Annexes thereto.

(3) Notwithstanding the other provisions of this Agreement, if either Contracting Party is not satisfied that substantial ownership and effective control of a designated airline are vested in nationals of the other Contracting Party, such Contracting Party may withhold or revoke permission conferred under this Agreement for such airline to operate the agreed services.

(4) Each Contracting Party reserves the right to withhold or revoke permission conferred under this Agreement for the operation of the agreed services by any designated airline of the other Contracting Party in case of failure by such airline to comply with the laws and regulations of the first Contracting Party or otherwise to fulfil the conditions under which the rights are granted in accordance with this Agreement.

(5) Certificates of competency and licences for personnel to be employed on the agreed services issued or rendered valid by one Contracting Party and still in force, shall be recognized as valid by the other Contracting Party.

(6) Each Contracting Party reserves the right to withdraw the designation of an airline and substitute the designation of another.

Article 6

Each Contracting Party shall grant to the designated airline of the other Contracting Party treatment not less favourable than it grants to its own international airlines in the application of its customs, immigration, quarantine, and similar regulations.

Article 7

If either of the Contracting Parties considers it desirable to modify any provision of this Agreement or its Annex, it shall notify the other Contracting Party of the desired modification and such modification may be made by direct agreement between the aeronautical authorities of both Contracting Parties to be confirmed by exchange of notes between the Contracting Parties.

Article 8

In the event of the conclusion of any general multilateral convention concerning air transport to which both Contracting Parties adhere, this Agreement shall be reviewed in consideration of the provisions of such Convention.

Article 9

Any dispute arising between the Contracting Parties as to the interpretation or application of this Agreement or of its Annex which cannot be settled through direct negotiations may be referred to the Council of the International Civil Aviation Organization, in accordance with the procedure described in Article 84 of the Convention on International Civil Aviation, signed at Chicago on December 7, 1944. However, the Contracting Parties may, by common consent, settle the dispute by referring it to the International Court of Justice. The Contracting Parties agree to abide by the decision given.

Article 10

Either Contracting Party may at any time give notice to

the other if it desires to terminate this Agreement. Such notice shall be simultaneously communicated to the International Civil Aviation Organization. If such notice is given, the Agreement will terminate twelve (12) months after the date of receipt of the notice by the other Contracting Party, unless the notice to terminate is withdrawn by agreement before the expiry of this period. In the absence of acknowledgement of receipt by the other Contracting Party, notice shall be deemed to have been received fourteen (14) days after the receipt of the notice by the International Civil Aviation Organization.

Article 11

This Agreement and all contracts connected therewith shall be registered with the International Civil Aviation Organization.

Article 12

This Agreement shall come into force on the date of signature.

In witness whereof the undersigned, duly authorized thereto, have signed this Agreement in duplicate in English and in French, both texts being equally authentic, at Ottawa, this 30th day of August, 1949.

For the Government of Canada:

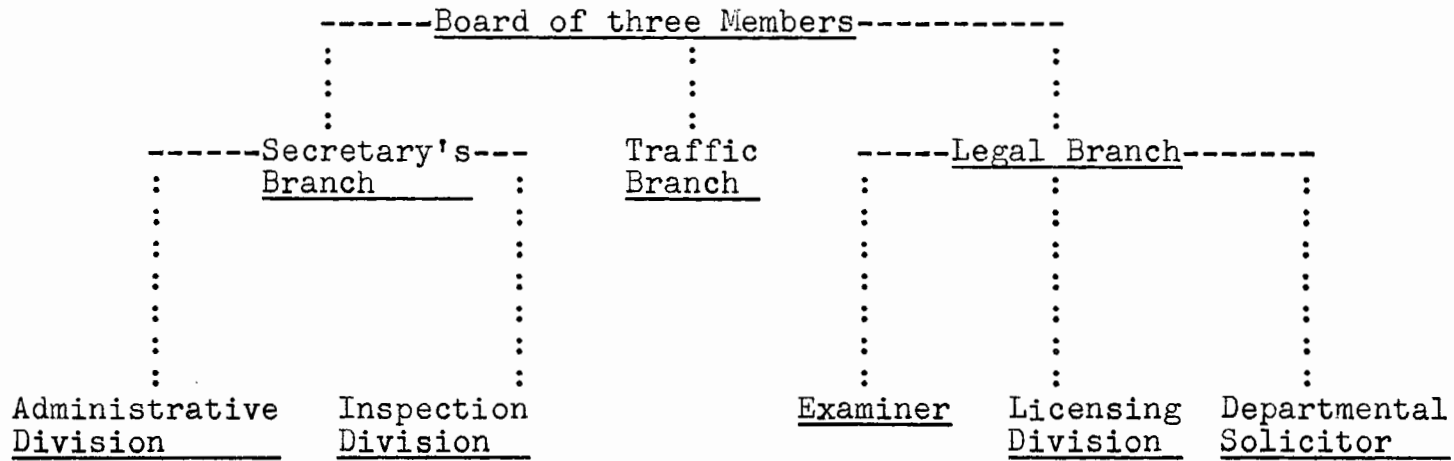
LIONEL CHEVRIER

For the Government of Belgium:

VICOMTE DU PARC

APPENDIX L

ORGANIZATION OF THE AIR TRANSPORT BOARD



APPENDIX M

TABLE OF CANADIAN AVIATION CASES

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