THE PARTICIPATION OF CANADA IN INTERNATIONAL AVIATION AGREEMENTS

by

Ian E. McPherson,
D.F.C., B.A., LL.B.

A Thesis presented to the Faculty of Graduate Studies and Research in candidacy for the degree of Master of Laws.

Institute of International Air Law, McGill University,
April, 1955.

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PART I

HISTORICAL DEVELOPMENT & PROCEDURAL REQUIREMENTS

HISTORICAL DEVELOPMENT:

The participation of Canada as an independent political entity in international agreements, is a comparatively new undertaking for our country, and one which, according to many authorities[1] was not foreseen by the Fathers of Confederation when drafting the British North America Act, 1867. However a study of this subject reveals that its progress is closely related to the general development of Canada into a sovereign state, and in this Part a brief historical review will be made, together with a summary of the various types of international agreements that can be entered into and the procedural steps required to consummate these agreements.

N.A.M. MacKenzie[2] wrote in 1925: "A study of the various documents relative to the Canadian constitution beginning with the Treaty of Utrecht in 1713 ..... down to the most recent amendments in 1915, yields little or nothing concerning treaty making and the effect of treaties when concluded, save Section 132, of the British North America Act ....."[3]

(1) 1937 A.C. 326 at p.349 -- Where Lord Atkin makes a comment to this effect.

(2) Now President of the University of British Columbia.

(3) "The Treaty Making Power in Canada" -- N.A.M.MacKenzie, American Journal of International Law, 1925, Vol. 19, p.489.

However, the same would not hold true today, and it is submitted that a perusal of the following pages will raise a doubt as to the validity of the statement even when it was made.

Although undoubtedly Section 132 of the British North America Act contains the only direct reference to treaties, there are other parts that are directly concerned therewith, for example, Section 9 which reads: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen", as well as the familiar Sections 91 and 92 dealing with the distribution of legislative powers. In addition to this the preamble clearly sets out the intent of the legislators that the new Dominion would have a "Constitution similar in principle to that of the United Kingdom."(1) This is most relevant for although it is admitted that where the preamble is found to be more extensive than the enacting part, it is equally inefficacious to control the effect of the latter when it is otherwise free from doubt the same does not hold true when the enacting part is ambiguous or even more so when it is silent.(2) From this it is contended that during the consideration of this whole subject it should be kept in mind that it was intended that the constitution of Canada would be similar to that of the United Kingdom.

(1) Preamble of 30 Vict. c.3

(2) Maxwell on The Interpretation of Statutes, 10th Edition, Sweet & Maxwell Ltd. 1953 p.48

In any event even if the Federal Executive had the power to conduct international negotiations and Parliament the power to implement them, little effort was made to exercise these powers for many years after Confederation, for initially any agreements that might concern Canada were made in the name of Her Britannic Majesty. The first of these in which the new Dominion took an active part was the Treaty of Washington, 1871. This Treaty was negotiated by a Joint High Commission and as one of the points for discussion was the fisheries lying off the Canadian coast, Sir John A. Macdonald, then Prime Minister, was made a member of the British Commission. However, it should be noted that Macdonald was appointed a plenipotentiary of Her Majesty under the Great Seal and received his instructions from the British Foreign Office.(1) As finally drafted, the agreement contained terms that required legislation to make them effective, and although there was a great deal of opposition to the terms themselves there does not appear to have been any controversy as to the authority of Parliament to pass the appropriate acts, in spite of the fact that the Empire was not set out as a party to the Treaty.(2)

At Washington, the Canadian representative's stand had been frequently over-ruled by his English colleagues and in

(1) A History of Canadian External Relations, G.P. deT. Glazebrook, Oxford University Press, 1950, p.124

(2) Treaty Relations of the British Commonwealth of Nations, Robert B. Stewart, The Macmillan Company, 1939, p.55, footnote 25.

subsequent commercial treaties Canada found itself bound by British treaties in which it had taken no part in negotiating. In this it and the other Colonies strongly objected and in 1877 the British Government instituted a policy whereby the self-governing colonies were to be given an opportunity to adhere to or be specifically excepted from treaty terms, in addition to this the British Government permitted Canada to take a more active part in the discussions. For example, in 1893 Sir Charles Tupper (1) as co-plenipotentiary with the British Ambassador in Paris led the negotiation of and put his signature to, the agreement between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the President of the French Republic. Although this treaty was made between the Heads of States, it was styled "An agreement between Great Britain and France, for regulating the Commercial Relations between Canada and France in respect of Customs Tariffs."

One should not form the impression that there was a wide resentment at this manner of conducting Canada's international affairs. On the contrary at the Colonial Conference, 1894, George E. Foster expressed complete satisfaction with

(1) Then High Commissioner of Canada in London. This office was created by an Act of the Dominion (43 Vict. c.11) after the Mother Country agreed to its creation. This in itself was indicative of the changing status of Canada in the Empire.

the system[1] and with one important exception the general relationship between the United Kingdom and Canada and the procedure followed remained the same until the Great War. In 1909 following an Australian example, a Department of External Affairs was established by an Act of Parliament[2] its functions to include the handling of both international and intercolonial regulations. The Secretary of State was to be the head of the Department and as such conduct all official communications between the Government of Canada and the government of any other country in connection with the external affairs of Canada. However, even the creation of the new Department made little practical change in the manner of conducting international negotiations and for many years its activities were generally restricted to that of a central office in the Canadian Government for matters such as this.

THE TREATY OF VERSAILLES

On the cessation of hostilities in 1918 Canada sent a strong delegation to represent her at the peace talks in Paris. It was led by the Right Honourable Sir Robert Borden, Prime Minister and Secretary of State for External Affairs, and with him were the Honourable C. J. Doherty, Minister of Justice, the Right Honourable Sir George Foster, Minister of Trade and Commerce, and the Honourable A.L. Sifton, Minister of Customs and

(1) Colonial Conference, 1894, Proceedings C.7553, p.77

(2) 8-9 Edw. VII c.13

Inland Revenue.[1] Their activities with respect to matters pertaining to aviation will be considered in more detail later in this study under the heading "The Paris Convention" and therefore consideration will be restricted at this time to the further development of Canadian independence in international affairs. It was felt in Canada that as that country had exerted a considerable effort during the war years the time was ripe for it to assert itself with respect to its international status both within the Empire and internationally. In this Sir Robert Borden led the way, insisting that the plenipotentiaries of the Dominions should sign the Peace Treaties and subsidiary Conventions. He was supported by the delegates from the other Dominions, and on March 12th their views were embodied in a memorandum which after setting out the general intent of the parties stated: "It is conceived that this proposal can be carried out with but slight alterations of previous Treaty forms. Thus:

(a) The usual recital of Heads of State in the Preamble needs no alteration whatever, since the Dominions are adequately included in the present formal description of the King, namely, 'His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India.'

(b) The recital in the Preamble of the names of the Plenipotentiaries appointed by the High Contracting Parties for the purpose of concluding the treaty would include the names of the Dominion Plenipotentiaries immediately after the names of the Plenipotentiaries appointed by the United Kingdom. Under the general

(1) History of Canadian External Relations, G.P. de T. Glazebrook, Oxford University Press, 1950

heading 'The British Empire', the sub-headings 'The United Kingdom', 'The Dominion of Canada' ..... etc., would be used as headings to distinguish the various Plenipotentiaries.

(c) It would then follow that the Dominion Plenipotentiaries would sign according to the same scheme."

It was then submitted that this form of draft should be brought to the attention of the Commission of the Peace Conference.(1)

The United Kingdom authorities apparently did not object to this too strongly and Full Powers to the Canadian and other Dominion Plenipotentiaries were issued by the King. One can therefore appreciate the chagrin of the Dominions when it was found subsequently that the form prescribed had not been followed, as will be revealed when the Paris Convention is examined.

Space does not permit a detailed study of the form which the Treaty of Versailles and the other Peace Treaties took, suffice it to say that a precedent was established in specifically naming the delegates from the Dominions as such, and having the Dominion representative under the authority of his Full Power sign the Treaties on behalf of His Majesty for and in respect of that Dominion. In addition His Majesty did not ratify the Treaty until the Dominion Parliaments had passed resolutions approving such action.(2)

(1) Canada in the Commonwealth; From Conflict to Cooperation, Sir Robert Borden, Oxford University Press, 1929, p.110

(2) Treaty Relations of the British Commonwealth of Nations, Robert B. Stewart, The MacMillan Co., 1939, pp.143-150

THE HALIBUT TREATY

There is little doubt that the effective participation of the Dominions in the Great War of 1914-18 played a considerable part in the Imperial Government reaching the decision to permit the said Dominions to act independently to a degree in the subsequent peace negotiations. There is, however, some doubt as to whether this decision had the wholehearted backing of Her Majesty's advisers in Great Britain; this contention is based, amongst other things, on an incident or series of incidents that arose in 1923, which were the subject of an article by Horace E. Read, published in the Canadian Bar Review.(1)

At the American-Canadian Fisheries Conference of 1918 it was decided that a certain closed period should be imposed on halibut fishing in the North Pacific Ocean and consequently in 1922 the American Secretary of State presented a draft Convention to the British Ambassador at Washington which was headed "Convention between the United States of America and Great Britain Concerning Halibut Fisheries". Upon considering the contents of the Convention the Canadian Government informed the British Ambassador, inter alia, that, as Canada was the interested party in the Empire, the words "Dominion of Canada" be substituted for the words "Great Britain". The British Ambassador refrained from passing this suggestion along to the United States Government, giving the reason that as the object of the treaty would

(1) Canada as a Treaty-Maker -- Horace E. Read, Canadian Bar Review, Volume V, 1927, p.228 and p.301

be plainly expressed in the preamble thereof the suggested amendment would be unnecessary; in doing so he had acted on instructions from His Majesty's Government at Westminster. As a result of this action the said Convention has since been given a series of descriptive titles by the various interested parties, but in Canada it is usually referred to as the Halibut Treaty.

The next incident with respect to the negotiating of this treaty which tends to make one suspicious of the bona fides of the Imperial Government's magnanimous gesture in 1919 revolves around the appointment of Canada's plenipotentiary and his signing powers. On January 16, 1923 the Governor-General telegraphed the Secretary of State for the Colonies requesting on behalf of the Canadian Government that the Secretary of State for Foreign Affairs be informed that it was the desire of that Government that the necessary Full Powers be given to the Honourable Ernest Lapointe to enable him to sign the Convention on behalf of the Dominion. It was only after two subsequent telegrams had been despatched that the requested Full Powers were issued. After further exchange of telegrams the British Ambassador in Washington, on the pretext that it was necessary in view of the imminent rising of the U.S. Senate, inquired whether he could sign the Convention on behalf of Canada. The Canadian Government then reiterated that as the Convention was of no concern to Great Britain and solely concerned Canada that signature on behalf of Canada by Mr. Lapointe, who had Full Powers, should be sufficient and it was only then that the Imperial Government

agreed that the signature of Mr. Lapointe alone would suffice.

This incident is considered by many legal authorities to have been the turning point in the understanding between the Canadian Government and the Imperial Government with respect to international agreements. This contention is apparently based primarily on the fact that a Canadian plenipotentiary was granted Full Powers for the negotiation and signing of the Convention and that he in fact was the only signing party. It should be borne in mind, however, that according to his Full Powers Mr. Lapointe was a plenipotentiary of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and, unlike the Full Powers that the Canadians were granted for the signing of the Treaty of Versailles in 1919 there was nothing to show that he signed in respect of the Dominion of Canada only. Nevertheless apart from this procedural aspect, which will be considered in more detail later, the exchange of communications in this matter perhaps brought it forcibly to the attention of the Imperial Government that the Dominions and especially Canada were no longer prepared to have the former interfere in international negotiations which the Dominions considered to be solely their own business, and this undoubtedly played a prominent part in the subsequent Imperial Conference held at the end of 1923.

THE IMPERIAL CONFERENCES

The Committee of the Imperial Conference of 1923 drew up a resolution which was unanimously approved and which set out the policy and procedure that would govern treaty-making within the Empire. It was generally agreed that all parts of the Empire that were to be affected or interested in any way should be kept fully informed of the negotiation of treaties in order that they could intervene at any time they felt that it was necessary. In addition to this the following rules were established:

> "Signature
>
> (a) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representatives should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.
>
> (b) Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.
>
> (c) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.
>
> Ratification
>
> The existing practice in connection with the ratification of treaties should be maintained." (1)

(1) Canada, Sessional Papers, 1924 nos. 37 and 37a

It should perhaps be pointed out here that where British constitutional law applies the treaty-making power is a part of the Royal Prerogative. Originally the King used his own discretion in entering into treaties. Then, as the Monarch's actual power began to wane he began acting on the advice of his Ministers. This same practice is followed today in the case of a Heads of States agreement, and when the inter-governmental form is used the King's Government is the nominal party and even in the case of an exchange of notes it is the King's Minister who signs the agreement.(1) With this in mind it can be seen that as long as the resolutions of the Conference of 1923 were adhered to the Dominions had extremely broad powers with respect to international treaties.

Further clarification of the international position of the Dominions was made at the Imperial Conference of 1926. Here it was recommended that all treaties other than agreements between Governments should be made in the name of Heads of States and if the treaty was signed on behalf of any or all of the Governments of the Empire the treaty should be made in the name of the King "as the symbol of the special relationship between the different parts of the Empire",(2) and the British political units on whose behalf the treaty was signed should be listed. In the case of a treaty applying to only one part of the Empire it was to be stated to be made by the

(1) International Agreements, J. E. Read, 1948 Canadian Bar Review, p.529

(2) Imperial Conference 1926 -- Summary of Proceedings, C.M.D. 2768 pp.22-23

King on behalf of that part. In addition to this it was agreed that the signatures to the treaty should be attached with respect to each one of the units listed in the preamble. It should be observed that this was very similar to the form requested by Sir Robert Borden in 1919, with the exception that the party to the convention would be the Head of the State rather than the British Empire. In fact the convention condemned the latter form and recommended that the Heads of State formula be used in the future. This recommendation was conveyed to the League of Nations.(1) In addition to these changes it was also suggested that the procedure with respect to notification amongst Empire countries, that had been established in 1923, should be followed in international agreements other than treaties. It was also agreed, which is most important in this study, that treaties concluded in the name of the King on behalf of the members of the Empire were not to be regarded as regulating, inter se, the rights and obligations of those territories and consequently it was recommended that the Heads of State formula should be avoided when it was intended that the agreement was to be effective between the different members of the Empire.(2)

The next Imperial Conference was held in 1930 and apart from generally approving the decisions reached in 1926, this Conference did not materially affect the position with

(1) League of Nations, Official Journal, Vol. VIII (1927) p.377

(2) Ibid p.23

respect to the negotiation of international agreements. Then followed the famous Statute of Westminister, 1931. This Statute, with certain exceptions, abolished all control over the Dominions by Imperial enactments. However it did not directly alter the treaty-making powers of the Dominions, and with respect to Canada it stated specifically that the powers conferred by it upon Parliament or the Provincial Legislatures should be restricted to the enactment of laws in relation to matters within the confidence of those bodies under the British North America Act.(1) From that time there do not appear to have been any major changes developed with respect to the handling of international negotiations by Canada. However, as to the actual mechanics of negotiating an agreement, of which more will be said later, attention should be brought in passing to the Seals Act(2) which authorized the Governor-in-Council to make orders and regulations relating to Royal Seals, and similar devices, and the use thereof, subject to the approval of Her Majesty and the Letters Patent Constituting the Office of Governor General of Canada.(3)

Competence

(1) 22 Geo. V, c.4, Section 7(3)

(2) 1952 R.S.C. c.247

(3) 1952 R.S.C. Vol. VI p.305

FORMS and PROCEDURES

As the reader has no doubt already gathered there is no set form that must be followed in the negotiation of international agreements, nor is the terminology used in describing them consistent. The word "treaty" which is perhaps the most popular term used to describe arrangements of this type is derived from the French verb "traiter" which means to negotiate. Thus originally the expression "treaty" was applied to the negotiation. As French was unchallenged for many years as the universal language of diplomacy it is natural that that language played a predominant part in supplying the terminology used in international affairs. However, recently, possibly due to the more active participation of the United States of America and the Dominions in world affairs many English terms are now being used. A representative, although by no means exhaustive list would include the following: treaty, convention, additional article, acte final, declaration, agreement, arrangement, protocol, proces-verbal, exchange of notes, compromis d'arbitrage, ratification, adhesion and accession. It will be immediately noted that many of these terms not only are used as a title for the document but in fact describe the purpose thereof. Although no rule of thumb can be given by which to predetermine accurately the contents of documents with the aforesaid titles it is safe to say that they are set out above in the general order of their importance; recently however the terms "treaty"

and "convention" have become almost synonymous although the former is more generally used when the Heads of States form is employed.

In passing it should be noted that there would appear to be a popular misuse of the term "bi-lateral" and "multi-lateral" when referring to treaties. According to A. D. McNair (1) a "bi-lateral" treaty contains obligations et cetera between two "sides" each consisting of one or more parties, whereas the term "bi-partite" treaty should be used when there are only two parties, regardless of the content of the treaty. Similarly the term "multi-partite" should be used when there are more than two parties, regardless of the content and the term "multi-lateral" used when there are more than two "sides", irrespective of the number of parties representing each "side". McNair also refers to a "unilateral" treaty, but it is suggested that the term is non sequitur in view of the derivation of the word treaty, as referred to above. In any event if the terms are being misued it is being done so generally as to constitute the popular usage and thus perhaps warrants acceptance.

With respect to the subject of this study it is suggested that of the aforesaid types of international agreement, the most important after treaties and conventions would be those described as "agreements" and "exchange of notes". Both these latter forms are often used for commercial agreements, such as those pertaining to aeronautics. Of these the "exchange of

(1) The Law of Treaties, Arnold Duncan McNair, Oxford at the Clarendon Press, 1938.

notes" is the more informal, Full Powers being dispensed with and generally the requirement for ratification. The agreement is arrived at by oral discussion and is recorded in the notes. The exchange is usually made on the same day between the Minister of Foreign Affairs of the host country and the diplomatic representative of the other country, as for example, its Ambassador.

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An internationally recognized authority[1] on the subject has prescribed the following to be the major parts of a treaty:

1. Preamble:
   (a) Names and titles of high contracting parties;
   (b) Statement of the purpose of the treaty;
   (c) Names and designations of the plenipotentiaries;
   (d) Paragraph stating that the plenipotentiaries have produced their Full Powers and that they have been found to be in good and due form and that the said plenipotentiaries have agreed to the following articles.
2. Articles; general, specific and those providing for execution.
3. Article providing for ratification and for the place and time for exchange of ratifications. (2)
4. Attestation clause.
5. Locality, date and signatures and seals.

CANADIAN PRACTICE

The actual procedure followed in reaching a binding international agreement depends, of course, upon the particular form selected to incorporate the desires of the various parties.

(1) A Guide to Diplomatic Practice, Sir Ernest Satow, Vol. 2 at p.815
(2) To this list I would suggest that clauses referring to denunciation should be added under heading 3.

However, in those between Heads of States, or between Governments, the following outline is indicative of the general procedure followed by Canada:(1)

(a) The appointment of the Canadian Plenipotentiary, done in the following manner:

(i) The determination by the responsible Ministers as to who will actually represent Canada.

(ii) The issuance of the Full Power to the Plenipotentiary.

(b) The negotiation of the treaty.

(c) Signing by the Canadian representatives and possibly attaching of a seal.

(d) Ratification of the treaty if required by the terms thereof, done in the following manner:

(i) Although not required constitutionally it is generally the practice in Canada to obtain a resolution of the Senate and of the Commons approving the treaty and authorizing ratification.

(ii) The issuance of the instrument of ratification and its deposit according to the terms of the treaty.

(e) Giving effect to the treaty in Canada.

(i) The passing of the appropriate legislation if necessary, of which more will be said later.

(1) The Ratification of International Treaties, Jose Settecanara, The Ottawa Publishing Company Limited 1949

THE FULL POWER

With respect to the issuance of the Full Power, the following procedure may be followed:(1)

"(a) If the document is to be passed under the Great Seal of the Realm, it is necessary to invoke the cooperation of the Commonwealth Relations Office; because the Great Seal of the Realm can only be used upon the authority of a warrant under the Sign Manual and Signet, the latter being a royal seal in the keeping of one of His Majesty's Principal Secretaries of State. The warrant sets forth on its face that it is at the request of the Government of Canada. Both the warrant and the full power are prepared in London by the British governmental authorities, and, in so doing, they consider that they are acting as agents for the Government of Canada and accept no political responsibility. This procedure is no longer in common use, but, theoretically, it is still available.

"(b) If the document is to be issued by the King and passed under the Great Seal of Canada or other seal coming within the Provisions of the Seals Act, it is prepared by the Department of External Affairs, together with a submission to His Majesty requesting him to approve the passing of the document under the seal in question. It is transmitted by the Governor-General to the Palace, and returned by the same channel, with the King's approval endorsed on the submission and the Sign Manual on the document. The document is passed under the Great Seal of Canada by the Secretary of State of Canada.

"(c) Under the new Letters Patent Constituting the Office of Governor-General of Canada, dated the 7th September and taking effect on the 1st October, 1947, the document may be issued by the Governor-General, in the name of and on behalf of the King, and passed under the Great Seal of Canada. The procedural steps would be greatly simplified, and confined to Ottawa."

When an agreement has taken the between Governments form, the formal style of Full Power may be dispensed with and a written authority signed by the Secretary of State for External Affairs,

(1) International Agreements, J.E.Read, 1948, Canadian Bar Review, 520 at p.523

with or without his Seal attached, substituted therefor.

RATIFICATION

Whether ratification of an international agreement is necessary, depends on the contents of the agreement itself. In the age when the Monarch was in actuality sovereign, the necessity for ratification was infrequent, for in issuing the Full Power to his Plenipotentiary, the Monarch was in effect agreeing to be bound by any decision reached by that Plenipotentiary in negotiating the agreement. However, as the legislative power increased over the years, it generally became the practice to submit the agreement to the elected body in one way or another for their approval, and then to ratify the convention. In Canada the general practice has developed of submitting all international agreements to the Houses of Parliament and with respect to the more important ones it is the custom to obtain a resolution from each House approving beforehand the ratification of an agreement. However, with respect to agreements of a more minor nature the practice is to merely table them in the Senate and Commons for the general information of the members.

IMPLEMENTATION

In the event that the contents of the agreement are contrary to the existing municipal law of the land which is a party to the agreement, it depends upon the constitution

of that country whether the agreement over-rules the said municipal law. For example, the Constitution of the United States of America (1) provides for "self-executing" treaties and in the event that the said treaties are ratified by a two-thirds majority of the Senate the contents thereof automatically form a part of the law of the land. The constitutions of Canada and Great Britain have no such provisions and therefore if a treaty is ratified by these countries before it is implemented by legislation it is binding on the country but does not override the municipal law if in conflict therewith. (2) "The rules of international law are part of the law of England, but only in so far as they can be proved, by legislation, judicial decision, or established usage, to have been received into English law." (3) The same may be said of Canada.

The Imperial Conference of 1926 had this in view when it laid down Rule "B" of the Resolution Concerning the Ratification of Treaties: "It is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government." (4)

(1) Article 6, Clause 2

(2) Treaty-making Procedure, a comparative study of the methods obtaining in different States compiled by Ralph Arnold, Oxford University Press, 1933.

(3) Halsbury Laws of England, Vol. 6 "The Crown in foreign relations" at p.504

(4) Imperial Conference, 1926 -- Summary of Proceedings C.M.D. 2768

THE INTER SE DOCTRINE

It is submitted that it has been conclusively shown in the preceding pages that Canada has the power and machinery for entering into international commitments. Consideration will now be given to the situation within the Commonwealth and Empire, that is to the relationship between the members thereof when they have become parties to international agreements either as part of the Empire or His Majesty's territories or as independent legal entities. It has been contended in the past that in the former two cases an agreement would not be effective between the members.

The whole problem arises out of the question of whether the inter se doctrine applies to the relationship between the various members of the Commonwealth. The essence of this doctrine is that the relations between members of the Commonwealth are sui generis and are more intimate than relations between members of the international community generally, it being contended that because of the common allegiance to the Crown the general character of international relations is impossible.(1) It has already been shown that at the Imperial Conference of 1926 it was agreed that a treaty concluded in the name of the King on behalf of the members of the British Commonwealth "must not be regarded as regulating inter se the rights and obligations of the various territories on

(1) Treaty Relations of the British Commonwealth of Nations, Robert B. Stewart -- Macmillan 1939 at p.328

behalf of which it has been signed in the name of the King" even if no provision to that effect was included in the treaty. At the same time it was agreed that when the agreements were to apply between Commonwealth members the form of treaty between Heads of States was to be avoided.(1) At the Imperial Conference of 1930 the trend developed as to the divisibility of the Crown(2) and the Summary of Proceedings of the Imperial Conference of 1937 contained the following: "..... each member of the Commonwealth takes part in a multi-lateral treaty as an individual entity, and in the absence of express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any other member."(3) In spite of this McNair wrote in 1938: "When multi-partite agreements are concluded by the King on behalf of such parts of his Empire as participate the obligations ensuing from the treaty are obligations by the King on behalf of each part of the empire towards each of the foreign units with which he contracts and vice-versa. No obligations ensue from such a treaty between the different parts of the Empire on whose behalf the King contracted, because the King did not contract with himself but with the Heads of Foreign States."(4) McNair apparently felt that it is the intention that governs and that if Commonwealth

(1) See page 13

(2) Imperial Conference, 1930, Summary of Proceedings, C.M.D. 3717

(3) Imperial Conference, 1937, Summary of Proceedings, C.M.D. 5482, p.27

(4) The Law of Treaties, Arnold Duncan McNair, Oxford at the Clarendon Press, p.81

countries use the between Heads of States form, this indicates what the intention is, namely, not to be binding inter se. Further, if the between Governments form is used and if the subject matter of the agreement is an obligation that one Government in the Empire could undertake to another Empire government then there is the presumption that it was intended to be binding between them. However he apparently feels that the obligation between the nations within the Commonwealth would be governed by intra-imperial law, not by international law.

It is submitted that although there are conditions under which it is very uncertain what the actual relationship between members of the Empire subject to a treaty may be, there is no reason why these doubts should be allowed to prevail and no excuse for permitting them to arise with respect to future international agreements. In support of the latter statement reference need only be made to the procedures prescribed at the Imperial Conferences of the twenties and thirties, and as to the former the necessary relief can be attained by following the formula used with respect to the Warsaw Convention which is gone into in detail in Part III.

PART II

THE CONSTITUTIONAL ASPECTS

GENERAL

As was seen in Part I the development of Canada as an independent treaty-making power was long and arduous. In this Part an attempt will be made to show that this external struggle was paralleled by an internal struggle which today, in many respects, is no closer to solution than at the time of Confederation.

One of the principles underlying a Federation such as Canada is that there is a distribution of legislative powers between the individual units making up the whole and the whole itself and to this Canada is no exception. This distribution of powers is set out in Sections 91 and 92 of the British North America Act, 1867.(1) The former is headed "Powers of the Parliament" and the latter "Exclusive Powers of Provincial Legislatures".

Almost continually since the Act was passed the Courts of Canada and the Judicial Committee of the Privy Council have been called upon to interpret the aforesaid Sections. These appeals to the Courts have come from two sources: first of all individuals in Canada have found them a very useful means of challenging legislation which it was felt was detrimental to their personal endeavours, but by far the most significant appeals arise out of the continual struggle that has existed since Confederation between the individual Provinces and the Federal Government for legis-

(1) Imperial 30-31 Victoria C.3

lative jurisdiction over various matters. Certain Provincial Acts contain clauses which prescribe that if a constitutional question is going to be raised in an action the Provincial and Federal Attorneys-General shall be notified in order that they may decide whether they wish to intervene.(1) Accordingly it will frequently be found that the Attorney General for the legislative body the act of which is being challenged as being unconstitutional intervenes in an attempt to show that the questioned legislation was indeed intra vires of that body. In other cases Attorneys-General of the Provinces have instigated the action challenging the constitutionality of Federal legislation.(2)

Yet another procedure used to bring the question of constitutionality of legislation before the Courts is that whereby either the Lieutenant-Governor-in-Council of the Province or the Governor-in-Council puts the question to the relevant Court pursuant to the sections of the act setting up the Court which provide for such a procedure. The various Courts have not generally approved of this reference procedure and have frequently referred to or paraphrased the statement of Viscount Haldane when he referred to it thus: "The business of the Supreme Court of Canada is to do what is laid down as its duty by the

(1) For example the "Constitutional Questions Determination Act" 1948 R.S.B.C. c.66

(2) A.G. of N.B. v. C.P.R. et al and A.G. of Can. 1925 2 D.L.R. 732

the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied."(1) Nevertheless it will be seen that of the two Canadian cases raising the question of aeronautics with respect to the British North America Act that have reached the Supreme Court, one was brought before it in this manner.(2)

It would be presumptuous indeed to attempt herein a general survey of the relevant legislative fields of the Provinces and the Federal Parliament in view of the fact that some of the best legal minds of this country and the United Kingdom have given it their continual attention for almost ninety years. However, in order to fully appreciate the problems that confront the Government of Canada when it decides to enter into international aviation agreements a brief consideration at least must

(1) A.G. for B.C. v. A.G. for Can. 1914 A.C. 153 at p.162

(2) Re Aerial Navigation - 1931, 1 D.L.R. 13.

be given to the legal ramifications with respect thereto that arise out of the restrictions placed on Parliament by the British North America Act, 1867. Fortunately these problems have been given the consideration of both the Judicial Committee of the Privy Council and the Supreme Court of Canada in cases pertaining solely to aeronautics. It is therefore felt that the best way in which to predict the future of legislation dealing with aeronautics would be to examine the said cases carefully.

THE AERONAUTICS CASE.

Later in this study, under the heading "The Paris Convention" a detailed examination is made of the manner in which Canada became a party to the Convention Relating to the Regulation of Aerial Navigation. However for the purposes of this Part it is sufficient to say that on June 1, 1922 the Convention was ratified on behalf of the British Empire. In apparent anticipation of this Parliament enacted the Air Board Act[1] to which Royal assent was given on June 6, 1919; this Act was later encompassed in the Aeronautics Act.[2] Subsequently at the Dominion-Provincial Conference of 1927, Louis Taschereau, Premier

(1) 1919 9-10 Geo. V c.11

(2) 1927 R.S.C. c.3

of Quebec, questioned the validity of the Act.[1]

Pursuant to the aforesaid the Governor-in-Council under Section 55 of the Supreme Court Act, referred the following questions to the Supreme Court:[2]

1. "Have the Parliament and Government of Canada exclusive 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 legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province, necessary or proper for performing the obligations of Canada, or of any Province thereof, under the Convention aforementioned, within the meaning of s.132 of the British North America Act, 1867?"

3. "Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s.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:

(1) Precis of Discussions, Dominion-Provincial Conference, November 3-10, 1927, King's Printer 1928. Official Precis (1) Thursday morning, November 3, 1927:

"Item 4 of the Agenda dealing with the regulation of aircraft and flying operations was the first subject for discussion and was disposed of during the morning's sitting. With respect to this item the question was raised as to the jurisdiction of the federal authority over aircraft and flying operations and as to the interpretation of the word 'navigation' in the British North America Act. At the present time the Dominion Government licenses pilots and has a general control over flying operations. It was decided that the question of jurisdiction should be referred to the Supreme Court for adjudication." p.9

(2) Re Aerial Navigation, 1931 1 D.L.R. 13 at p.40

(a) The granting of certificates or licenses authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licenses;

(b) The regulation, identification, inspection, certification and licensing of all aircraft; and

(c) The licensing, inspection and regulation of all airdromes and air stations?"

The Court that heard the argument consisted of Chief Justice Anglin and Puisne Judges Duff, Newcomb, Rinfret, Lamont, Smith and Cannon. The retirement in June of last year of Chief Justice Rinfret marked the departure of the last of those eminent jurists from the bench, nevertheless it is only with great respect that I suggest that their subsequent answers to the aforementioned questions tended to obscure rather than clarify the situation. Their Lordships showed a great versatility and resourcefulness in the methods that they used in reaching their final conclusions. Mr. Justice Newcomb started his judgment by referring to the aforesaid obiter dicta of Viscount Haldane in Attorney General for British Columbia v. Attorney General for Canada re B.C. Fisheries.(1) However, his contention with respect to questions put to the Court under Section 55 of the Supreme Court Act was not supported by the Chief Justice for, after referring to the judgment of Mr. Justice Newcomb, he said "in the present instance I do not find in the questions submitted enough that is objectionable to justify the adoption of that course."(2) Nevertheless it is suggested that the

(1) See page 27

(2) Re Aerial Navigation 1931 1 D.L.R. 13, at p.14

objection voiced by Mr. Justice Newcomb lay subconsciously in the minds of the other members of the Court and was partially responsible for the somewhat extraordinary and divergent opinions voiced by those learned gentlemen. It is felt that in the light of subsequent judgments it is unnecessary and would be of little value to individually analyse here each judgment as given by the members of the Supreme Court. However, at the risk of overlooking the subtle and sometimes not so subtle reasons upon which their Lordships based their individual opinions a generalization thereof will be made.

Messrs. Justice Newcomb, Smith and Cannon, with the support of the Chief Justice, agreed that the "Convention Relating to the Regulation of Aerial Navigation" was "a treaty between the Empire and foreign countries", as described in Section 132 of the British North America Act 1867. They also decided, however, that intra-provincial aviation fell within Subsection 13 of Section 92 of that Act (Property and Civil Rights in the Province). In this respect Mr. Justice Newcomb held: "It is not denied, and no reason has been suggested to doubt, that the convention is a treaty; but the language of s.132 does not require, either expressly or by necessary implication, nor, I think, does it suggest, that a Province should thereby suffer a diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity on the part of the Dominion, which, in relation to Provincial obligations, is no more than concurrent, so long as these are

not performed by the Province." (1) Mr. Justice Cannon took a similar view in this respect.

After considering an earlier treaty case Mr. Justice Smith stated: "It follows, in our opinion, that the Dominion Parliament has paramount jurisdiction to legislate for the performance of all treaty obligations, and that, while a Province may effectively legislate for that purpose in regard to any matter falling within s.92 of the British North America Act while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, [Emphasis supplied] will, when enacted, supersede that of the Provinces about such matters." (2)

Mr. Justice Duff, Rinfret and Lamont J.J. concurring, attempted at first to find the authority for the Dominion Parliament to pass such legislation under the subsections of Section 91 of the British North America Act, but came to the conclusion that such sweeping authority as set out in Section 4 of the Aeronautics Act could be derived from no section or sections of the British North America Act other than Section 132. (3) In this, however, he subsequently found that the sections of the Aeronautics Act in question and the regulations made pursuant thereto were not, however, "framed with a view to providing for the performance of obligations undertaken or to be undertaken by Canada in the Convention."

When the judgments of the Supreme Court were finally handed down it was found that the multiplicity there-

(1) Re Aerial Navigation 1931 1 D.L.R. 13 at p.32
(2) Ibid p.42
(3) Ibid p.23

of and of the reasons given in support of them left the interested parties in Canada in a bewildered and confused state of mind. Consequently the judgment dated October 7th, 1930, was taken by appeal before the Judicial Committee of the Privy Council in London. The judgment of that august body made up of Lord Sankey L.C., Viscount Duneden, Lord Atkin, Lord Russell of Killowan, and Lord McMillan, was handed down by the Lord Chancellor.(1) He summarized the answers of the Supreme Court to the aforesaid questions as follows:

> "To question 1 as framed, the Court unanimously answers 'No'."
>
> Re question 2: "The answer of the majority of the Court (Anglin C.J., Duff, Rinfret, Lamont, Smith and Cannon JJ.) is: 'construing the word 'generally' in the question as equivalent to 'in every respect' the answer is 'No'."
>
> Re question 3: "The answer of the majority of the Court (Anglin C.J., Duff, Newcomb, Rinfret, Lamont and Cannon J.J.) is: 'construing the question as meaning, 'Is the section mentioned, as it stands, validly enacted?' the answer is 'No'. But, if the question requires the Court to consider the matter in the enumerated sub-heads of s.4 of the statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the Judges."
>
> Re question 4: "The answers are to be ascertained from the individual opinions or reasons certified by the Judges." (2)

Of the aforesaid answers, only those to questions 1, 3 and 4 were appealed, the other being reserved in view of the ambiguous connotation of the word "generally".

Once again the judicial body made a point of

(1) 1932 A.C. 54

(2) 1932 A.C. 54 at p.55

expressing their reluctance to hear questions of this nature, that is questions put to it for decision pursuant to Section 55 of the Supreme Court Act of Canada and a subsequent appeal. His Lordship quoted the celebrated statement of Lord Haldane[1] with respect to this procedure and then continued: "The Board certainly has no desire, nor do they conceive it to be part of their function to act as draughtsmen for Canadian Acts of Parliament."[2] He then went on to point out some of the pitfalls that should be avoided in giving judicial interpretation to Acts of Parliament. "Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about enactment. .... Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially Federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed."[3] /Emphasis supplied/ With respect to

(1) See page 27

(2) 1932 A.C. 54 at p.67

(3) 1932 A.C. 54 at p.70

this said object he said "it must .... be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole."(1)

The Court then went on to discuss the specific problem at hand. His Lordship referred to the four propositions relative to the legislative competence of Canada and the Provinces respectively as established by the decisions of the Judicial Committee and set out in the case of Attorney General for Canada v. Attorney General for British Columbia.(2) He then said "It is obvious,

(1) 1932 A.C. 54 at p.71

(2) 1930 A.C. 111 at p.118, where the four propositions referred to above are set out as follows:

"(1.) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s.91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s.92: see Tennant v. Union Bank of Canada.(1)

"(2.) The general power of legislation conferred upon Parliament of the Dominion by s.91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s.92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see Attorney General for Ontario v. Attorney General for the Dominion. (2)

"(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s.91: see Attorney General of Ontario v. Attorney General for the Dominion (3); and Attorney General for Ontario v. Attorney General for the Dominion. (2)

"(4.) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see Grand Trunk Ry. of Canada v. Attorney General of Canada. (4)

(1) (1894) A.C. 31.
(2) (1896) A.C. 348.
(3) (1894) A.C. 189.
(4) (1907) A.C. 65.

therefore, that there may be cases of emergency where the Dominion is empowered to act for the whole. There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s.132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation."(1) However, in spite of this statement consideration was given by the Board to the question of whether aeronautics could be properly described as falling under the enumerated sub-headings of sections 91 or 92. Although it came to the conclusion that transport, as a subject, is dealt with in certain parts of both section 91 and section 92, it felt that neither of these sections dealt specifically with that branch of transport which is concerned with aeronautics, deciding at the same time that aeronautics generally was not a subject falling within the term Property and Civil Rights. Although further on in the judgment Lord Sankey pointed out that additional legislative powers in this respect resided in the Federal Parliament by virtue of Items 2, 5 and 7 of Section 91, it is contended that the following statement made by him generally conveys the feeling that the Board had in this matter: "Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis."(2) It was in this light that their Lordships then considered the various obligations which Canada, in signing the Convention, had agreed to undertake and after due consideration came to the conclusion

(1) 1932 A.C. 54 at p.73

(2) Ibid p.74

that the subject of aerial navigation was in a class which had attained such dimensions as to affect the body politic of the Dominion and consequently fell within the ambit of Section 91 in addition to the fact that the Convention was an Empire Treaty as foreseen in Section 132.[1] For these reasons their Lordships decided that it was competent for the Parliament of Canada to pass the Act and authorize the regulations in question and therefore that questions 1, 3 and 4 should be answered in the affirmative.

Once again the Privy Council had reversed a judgment of the Supreme Court of Canada in a matter of great importance. However, it is safe to say that this time the Privy Council received the general support of those members of the public interested in aviation in Canada and at the same time received the general condemnation of those die-hard advocates of provincial autonomy whose shrill cries still echo throughout the land. In an article on the same case John S. Ewart made this comment with respect to the Supreme Court decision - "We have, therefore, three unhelpful and dubious negatives; two puzzling uncertainties; and an indivisible subject divided among ten independent legislative jurisdictions. Truly, a sad, sad mess."[2] Then with respect to the subsequent Privy Council decision he wrote: "Very evidently one striking success in the handling of our constitution by the Judicial Committee is no guarantee that it will not be followed, perhaps immediately, by striking and bothersome failure."

(1) 1932 A.C. 54 at p.77

(2) The Aeronautics Case - Volume 9 Canadian Bar Review 1931, p.724 at p.725

THE RADIO CASE.

Shortly after handing down its decision in the Aeronautics Case the Judicial Committee was faced with a similar appeal from a decision of the Supreme Court of Canada with respect to the legislative powers of the Parliament of Canada re The Regulation and Control of Radio Communication.(1) In 1927 Canada had become a party to the International Radio Telegraph Convention and the representatives of Canada had been appointed by the Governor-in-Council and were, with others, described in the preamble to the Convention as "the plenipotentiaries of the countries named". The Convention had been ratified on behalf of His Majesty's Government in Canada by an instrument signed by the Secretary of State for External Affairs of Canada which stated that the Convention had been "signed by the representatives of His Majesty's Government in Canada". The Supreme Court of Canada, on a reference, had, after consideration of radio operations decided, with two dissenting judgments, that the Parliament of Canada had jurisdiction to regulate and control it on the ground that it was one of the subjects of residuary powers under the general jurisdiction conferred on the Dominion by the opening paragraph of Section 91 of the British North America Act 1867.(2) The Privy Council immediately distinguished between this and the Aeronautics Case in that Viscount Duneden, who delivered the judgment of their Lordships, pointed out that the Convention in this case was not a treaty between the Empire, as such, and foreign countries, as required in Section 132 of the British

(1) 1932 A.C. 304

(2) 1931 S.C.R. 541

North America Act but was an agreement to which Canada was an independent party. However their Lordships again refused to use the jig-saw puzzle procedure, i.e. attempting to make the facts fit into the sub-headings of Sections 91 and 92 of the Act, and once again turned to Section 132 to support the jurisdiction of the Federal Parliament. Lord Duneden pointed out that in 1867 the present situation could not be visualized and, therefore, although the Convention was not such a treaty as was defined in Section 132 "it comes to the same thing".(1) However, the Board went further in this case in that in support of Section 132 they also held that the subject-matter came within the powers of the Federal Parliament under that part of Section 91 that gives to Parliament jurisdiction over matters which are for the peace, order and good government of Canada. Unfortunately it did not stop there but also held that broadcasting fell within the description of "telegraphs .... connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province." This of course put it outside provincial jurisdiction according to Section 92(10)(a) and consequently in the Federal field pursuant to Section 91(29). In any event this judgment no doubt brought a sign of relief to the lips of Mr. Ewart and his supporters. However, such relief was to prove to be premature.

(1) 1932 A.C. 304 at p.312

THE SOCIAL LEGISLATION REFERENCES.

Brief as is this study of judicial decisions with respect to the legislative power of the Federal Parliament to implement treaties, it would be wholly inadequate if it did not give some consideration to those questions, commonly known as "The Social Legislation References", put to the Supreme Court and subsequently decided upon by the Privy Council. In 1935 the Parliament of Canada had enacted the following legislation, The Weekly Rest in Industrial Undertakings Act,(1) The Minimum Wages Act,(2) and The Limitation of Hours of Work Act.(3) The Governor-in-Council had then by Order dated November 5th, 1935, referred certain questions to the Supreme Court of Canada, asking whether the aforesaid Acts or any provisions thereof were ultra vires of the Parliament of Canada. These Acts attempted to implement into the law of Canada certain provisions of the Conventions adopted by the International Labour Organization of the League of Nations in accordance with that part of the Treaty of Versailles dealing with labour problems, these Conventions having been ratified by Canada. The Supreme Court was evenly divided in their answers, three Judges holding that the statutes were intra vires and three that they were ultra vires. The Attorney

(1) 1935 25-26 Geo. V c.14

(2) 1935 25-26 Geo. V c.44

(3) 1935 25-26 Geo. V c.63

General for Canada, acting on behalf of the Federal Government appealed these decisions and on January 28th, 1937, after hearing the case of the Dominion and that of the Provinces presented by some of the leading constitutional law authorities in Canada the judgment of the Privy Council was delivered by Lord Atkin.(1)

His Lordship prefaced the judgment of the Board with a resumé of the facts of the case and a brief explanation of the distinction, under the British system of government, between the formation and the performance of the obligations constituted by treaty. He then continued: "The first ground upon which Counsel for the Dominion sought to base the validity of the legislation was s.132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the Radio case, and their Lordships do not think that the proposition admits of any doubt .... While it is true, as was pointed out in the Radio case, that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the uncontemplated event .... It appears that all the members of the Supreme Court

(1) 1937 A.C. 326

rejected the contention based on s.132, and their Lordships are in full agreement with them."(1) Lord Atkin then considered the controversial legislation in the light of Sections 91 and 92 of the British North America Act. He held that the Aeronautics Case was decided as it was because the legislation involved was enacted to perform obligations imposed by a treaty between the Empire and foreign countries and therefore Section 132 clearly applied. He brushed off that part of the judgment in the Aeronautics Case which held that the legislation was intra vires of the Federal Government because the subject matter had attained such dimensions as to affect the body politic of the Dominion(2) as being clearly obiter and therefore not relevant to the question under discussion.(3) As to the significance of the Radio Case he said "....when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s.92, or even within the enumerated classes in s.91. Part of the subject matter of the convention, namely - broadcasting, might come under an enumerated class, but if so it was under a heading 'Inter-provincial Telegraphs,' expressly excluded from s.92."(4)

After this ingenious interpretation of its previous decisions the Board held that the legislation in question was

(1) 1937 A.C. 326 at pp.349-50

(2) See page 37

(3) 1937 A.C. 326 at p.351

(4) Ibid p.351

ultra vires of the Federal Parliament, the subject matter being within the jurisdictional field of the Provinces under the separation of powers contained in the British North America Act. The nucleus of their Lordships' decision was perhaps based on the following theory: "There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive .... the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth."(1) However, having rendered this far-reaching decision, Lord Atkin, perhaps being aware of the seriousness thereof, made the following profound statement: "It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. 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

(1) 1937 A.C. 326 at p.352

structure."[1] He obviously was not familiar with Canadian politics.

This judgment raised more controversy in Canada than any other either prior to that date or since, in that it obviously affected the political, economic, social and legal status of the whole country. Although the protagonists of provincial rights held it as a great victory the advocates of a strong federal government and consequently of a united Canada held that it in effect tended to Balkanize the country and seriously curtail the development of Canada as a strong, independent and sovereign State. There is little doubt that this decision played a large part in the eventual abolishment of appeals to the Privy Council.[2] The forebodings of John S. Ewart had indeed been justified.

THE TEMPERANCE CASE.

During the war years the popular practice of challenging the constitutional validity of both Federal and Provincial legislation was generally superseded by the struggle for survival, but commensurate with the cessation of hostilities the old battle was taken up. On January 21st, 1946, the Judicial Committee of the Privy Council delivered its decision on an appeal from a decision of the Ontario Court of Appeal which had upheld the

(1) 1937 A.C. 326 at pp.353-354

(2) It is not intended to discuss here the pros and cons of this far-reaching decision; however a general discussion thereof by some of the most learned constitutional law authorities in Canada was published at the time in the Canadian Bar Review, Vol. XV, June 1937 No. 6.

validity of the Canada Temperance Act[1] on a reference to it by the Lieutenant-Governor-in-Council of Ontario.[2] This earlier decision had been given in 1939 but the appeal had been temporarily withheld during the war years.

In this case their Lordships looked for authority to one of the earliest constitutional law cases to come from Canada to the attention of the Board,[3] and in doing so they at the same time repudiated an interpretation given to that case by Lord Haldane in Toronto Electric Commissioners v. Snider.[4] Viscount Simon in delivering the judgment stated: "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 interests 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 upon matters specially reserved to the Provincial Legislatures."[5] In upholding the finding in the Russell Case the Board thought it necessary that the following statement be made: "Their Lord-

(1) 1927 R.S.C. c.196

(2) 1946 2 D.L.R. 1

(3) Russell v. The Queen 1882 7 A.C. 829

(4) 1925 A.C. 396

(5) 1946 2 D.L.R. 1 at p.5

ships do not doubt that in tending humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments ..... But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by Governments and subjects."(1) This would at first appear to be in conflict with their decision that the Snider Case would not govern in this particular situation. However, a closer study of their judgment will make it clear that they felt that their predecessors had read more into the decision in the Russell Case than was actually there. In that case, in reference to peace, order and good government, the judgment had read in part: "That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law."(2)

This last judgment was of course hailed by the advocates of a more central form of government for Canada and decried by the provincialists. Although the circumstances surrounding it were not identical to those considered in the Social Legislation References the ultimate decision was indicative of a trend in support of Federal legislation when the arguments were otherwise equal. Nevertheless the Federal Government, perhaps recollecting the warning given by John S. Ewart some fifteen years before,(3)

(1) 1946 2 D.L.R. 1 at p. 6

(2) Russell v. The Queen 1882 7 A.C. 829 at p.839

(3) See page 37

soon took steps to see that the validity of Canadian legislation would not depend in the future on the passing moods of the Judicial Committee of the Privy Council. During its Second Session of 1949 the Parliament of Canada passed the Act to Amend the Supreme Court Act.(1) Section 3 thereof reads inter alia: "The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and a judgment of the Court shall, in all cases, be final and conclusive." The section then proceeds to abolish any appeals or petitions to His Majesty in Council and thereby makes the Supreme Court of Canada the Court of last resort for all proceedings within and for Canada, including those dealing with constitutional issues. As the Act came into force by way of a Proclamation of the Governor-in-Council of December 23, 1949 actions instigated before that date can go to the Privy Council.

THE JOHANNESSEN CASE.

The next case to be considered is, apart from the so-called Aeronautics Case, the only one that deals specifically with aeronautics. In 1948 the Rural Municipality of West St. Paul in Manitoba passed a by-law which attempted to control the erection or construction of an aerodrome within its environs. This by-law was allegedly authorized by Section 921 of the Municipal Act of the Province of Manitoba,(2) which reads as follows:

(1) 13 Geo. VI c.37

(2) R.S.M. 1940 c.141

> "Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain."

The constitutionality of the legislation was challenged and the owner of the property asked the Court for a declaration that the said section of the Municipal Act was ultra vires and that the by-law of the Municipality thereunder was therefore null and void.(1) The Applicant based his application on the Aeronautics Case and argued that once the Dominion Government had legislated with respect to aeronautics and specifically with respect to aerodromes the authority of the Dominion Government in the field was exclusive and that the provisions of the Dominion legislation supersede any legislation by the Province in any way touching the subject. After considering the Aeronautics Case and subsequent findings of the Privy Council, Mr. Justice Campbell, who heard the application, stated: "The cases in which the Aerial Navigation case has been discussed and explained clearly establish this proposition - that insofar as aeronautics are concerned, it is not a subject which falls within the legislative competence of the Dominion except insofar as it is necessary for the Dominion to deal with the matter in order to carry out the terms of the 'Convention relating to the regulation of Aerial Navigation'."(2) His chief authority for this contention was the judgment of Lord Atkin in the Social Legis-

(1) Re By-Law No. 292 of West St. Paul Rural Municipality 1949 3 D.L.R. 694

(2) 1949 3 D.L.R. 694 at p.700

lation References,[1] and after observing that Section 132 was of little effect today due to the fact that treaties are no longer entered into between the Empire and foreign countries, he went on to say: "It, therefore, follows that insofar as aeronautics is concerned, the power of the Dominion to deal with this matter is limited to the enactment of such legislation as may be necessary to implement obligations under the Convention and thus the double-aspect rule does not apply."[2] Then perhaps feeling some doubt as to the validity of his last statement, Mr. Justice Campbell argued that even if the Dominion had power under Section 132 of the British North America Act, or under the heads of Section 91 thereof, and if the double aspect rule did apply the Dominion had not in any event occupied the field, pointing out that the regulations made under the Aeronautics Act referred to zoning requirements that the Dominion had not effected.[3] In raising this point he apparently was attempting to give ground for invoking the doctrine set out in Forbes v. Attorney General for Manitoba,[4] which according to His Lordship held: "In instances which fall within the double-aspect rule, in order that Dominion legislation will prevail over provincial legislation, there must be a conflict between the Dominion and provincial legislation."[5] Finally, based on the law as set out in his judgment which was para-

(1) See page 42

(2) 1949 3 D.L.R. 694 at p.703

(3) Ibid p. 705

(4) 1937 1 D.L.R. 283

(5) 1949 3 D.L.R. 694 at 706

phrased as aforesaid, His Lordship held that Section 921 of the Municipal Act was intra vires of the legislature of the Province of Manitoba.

Fortunately this judgment of Campbell J. was appealed and the full Manitoba Court of Appeal consisting of McPherson, C.J.M., Richards, Coyne, Dysart and Adamson, J.J.A. delivered their decision on February 27th, 1950.(1) In this the majority of the Court varied slightly but generally upheld the judgment of the trial Court. The Chief Justice and Mr. Justice Richards concurred in the judgments delivered by Mr. Justice Dysart and Mr. Justice Adamson, however, Coyne, J.A., dissented, and delivered a long decision in support of his contention.

Both Dysart and Adamson, J.J.A. took comfort in the fact that the Federal Government took no part in the proceedings, although entitled to intervene when the constitutionality of legislation is being tried. In this respect the former stated: "It is of significance that the Dominion, although duly notified of the application, declined to take any part in the proceedings, either in the Court below or in this Court. Inferentially, the Dominion does not wish to assert the authority which the applicant claims for it. The contest, as it now stands, is between a private citizen and the Province."(2)

The majority decision was based primarily on the contention that the locating and construction of an aerodrome was of a local and private nature and therefore fell within the legislative

(1) 1950 3 D.L.R. 101

(2) Ibid p.123

jurisdiction of the Provinces. Dysart, J.A. referred to the four propositions of the Privy Council with respect to separation of powers as set out in its opinion in Re Fisheries Act, 1914.(1) He then went on to say "In conclusion: the rights over the land in question and over the use to which that land may be put, are purely property and civil rights and matters of local interest. As such they fall within the exclusive legislative field assigned to Manitoba by s.92 of the British North America Act and are not to be trenched upon by Dominion legislation further than is necessary in the national interest."(2) Adamson, J.A. in attempting apparently to justify the overlapping of the Dominion legislative field by Provincial legislation said: "The general rule is that provincial laws of general application apply to persons and companies exercising powers or carrying out projects which come under Dominion jurisdiction, so long as such provincial laws do not nullify or impair the Dominion jurisdiction."(3)

Mr. Justice Coyne, in the writer's opinion, gave the matter considerably more attention and thought than his learned brethren. In concurring in the Appellant's contention he went into the Aeronautics Case decision very carefully and came to the conclusion that the later decisions(4) of the Privy Council,

(1) 1930 1 D.L.R. 194 at pp.196-7 and see page 35 footnote 2

(2) 1950 3 D.L.R. 101 at p.129

(3) Ibid p.131

(4) See Labour Conventions Case

which contained references to the Aeronautics Case, did not reverse or vary the Aeronautics Judgment in respect of aerial navigation in Canada. He stressed that the Aeronautics Act which was the subject of controversy in the Aeronautics reference, was passed three years before the Paris Convention came into "being" (sic) and made no reference thereto, whereas the three Statutes at issue in the Labour Conventions Case made specific reference in their preambles to the Convention they were intended to implement.(1) In doing so it was his intention to show that aeronautics fell within the sole legislative jurisdiction of the Federal Parliament, whether or not the Aeronautics Act was passed to implement the Paris Convention and subsequently was intra vires of that body under Section 132 of the British North America Act. In support of his disapproval of the reference in the Labour decision to the Aeronautics Case he referred to the recently delivered judgment of the Privy Council in the Temperance Case.(2)

In rejecting the argument advanced that the Federal Parliament's powers to legislate with respect to aeronautics only went as far as legislation that was intended to implement international treaties to which the Empire was a party, His Lordship said: "The respondents argue that the Aeronautics judgment only gives Parliament jurisdiction over aeronautics so far as required to implement the Convention and from that

(1) 1950 3 D.L.R. 101 at p.112

(2) See page 46

standpoint they proceed to examine the Convention to determine the jurisdiction and to interpret and apply the Act. In my view it is no longer necessary or proper to look at the Convention for any of these purposes. There is no legislation making the Convention law in Canada. In itself it has no bearing on domestic aviation questions. It has no bearing in law here at all unless and except so far as the Federal authorities have seen or see fit to make provisions in our Air Regulations similar to those in the Convention, and then only by virtue of the Regulations." (1) After further consideration he came to the conclusion that: "Aeronautics is indivisible, like peace itself, and is unsuited to be parcelled out in Canada among eleven independent legislative jurisdictions, Parliament and provincial Legislatures." (2) And in support of this he concluded: "Local views and interests cannot be allowed to frustrate the interests of the country as a whole. That is a fundamental of nationality, and of Confederation." (3)

Unlike the aeronautics and radio references that were made to the Supreme Court of Canada many years earlier the appeal in this case was based on actual litigation between two parties and their Lordships could no longer express the sentiments held by Mr. Justice Newcomb in the earlier Aeronautics Case with respect to hypothetical cases brought to the Court for decision. (4)

(1) 1950 3 D.L.R. 101 at p.104

(2) Ibid p.109

(3) Ibid p.121

(4) See page 30

This time the Court consisted of Chief Justice Rinfret, who alone remained of the learned judges who had heard the earlier aeronautics case, and Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright, J.J. Five judgments were delivered, all of which allowed the appeal, and it should be noted that unlike the Trial Judge and the Manitoba Court of Appeals, the Court in this case had the advantage of hearing the representations of the Attorney General for Canada in support of the contention that the by-law and the Manitoba legislation were ultra vires.

The Chief Justice started his brief judgment with the observation that the international convention which was under consideration in the Aeronautics Case was denounced by the Government of Canada as of April 4th, 1947. But he contended that nevertheless the decision of the Judicial Committee in that case was in its pith and substance to the effect that the whole field of aerial transportation came under the jurisdiction of the Dominion Parliament in that it had attained such dimensions as to affect the body politic of the Dominion. Having thus expressed himself he then, in one short paragraph, expressed an opinion which if subsequently followed by the Supreme Court of Canada in cases of this nature will be of far-reaching significance. "In those circumstances it would not matter that Parliament may not have occupied the field. But, moreover, the convention on International Civil Aviation, signed at Chicago on December 7th, 1944, has since become effective; and no doubt what was said in the Radio reference by Viscount Duneden ..... applies here. Although

the Convention might not be looked upon as a Treaty under s.132 of the B.N.A. Act, it comes to the same thing." (1) The Chief Justice had in effect stated that in his opinion under the British North America Act, the Federal Parliament had the right to implement, by federal legislation, obligations entered into through international agreements.

Mr. Justice Kerwin apparently did not have the same opinion of the decision given in the Aeronautics Case that the Chief Justice had for he stated most emphatically that the Aeronautics Case decided one thing, and one thing only, and that was that the matter there discussed fell within the ambit of Section 132 of the British North America Act and that the decision therein was based entirely upon that fact. He pointed out, as had the Chief Justice, that the Convention of Paris had been denounced by Canada and that consequently "Section 132 of the B.N.A. Act, therefore ceased to have any efficacy to permit Parliament to legislate upon the subject of aeronautics." (2) In this he again appears to have had an opinion somewhat contrary to that of Chief Justice Rinfret.

In view of the aforesaid, Kerwin J. found it necessary to base his contention that the Manitoba legislation was ultra vires of the Provincial Legislature on the grounds that aeronautics had attained such dimensions as to affect the body politic of Canada and therefore fell under the "Peace, Order and Good Govern-

(1) Johannessen et al v. Rural Municipality of West St. Paul et al 1951 4 D.L.R. 609 at p.610

(2) Ibid p.614

ment" part of Section 91 of the British North America Act.

The judgment of Taschereau and Estey J.J. was delivered by the latter. They noted that the Paris Convention was no longer in effect but tended to ignore the statement by Viscount Duneden in the Radio Reference to the effect that conventions other than Empire treaties might fall under Section 132 of the British North America Act. He said they preferred to base their judgment on that part of the Aeronautics Case decision which was later referred to by Lord Atkin in the Labour Conventions Case as obiter, that is that aeronautics falls within the exclusive jurisdiction of the Dominion as a matter affecting the body politic thereof and therefore: "Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the provincial Legislatures."(1)

Mr. Justice Kellock, in delivering his own judgment together with that of Cartwright, J. used the same argument, saying: "..... use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject-matter of aeronautics or aerial navigation as a whole ..... 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

(1) Johannessen et al v. Rural Municipality of West St. Paul et al 1951 4 D.L.R. 609 at p.621

(2) Ibid p.624

jurisdiction is exclusive."[1] It is to be regretted that these gentlemen gave no consideration to the treaty aspect of federal legislation.

Similarly, Locke, J. although taking cognizance of the fact that a new Convention had been entered into since the Aeronautics Act was passed came to the conclusion, without much recorded thought, that that did not affect the question to be determined. He then went on to point out that the subject-matter under discussion was obviously one which affected the Peace, Order and Good Government of Canada in view of its Dominion-wide application and one which could not be considered to be limited to within one Province, stating: "It (aeronautics) is an activity, which ..... 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."[2]

THE WINNER CASE

Before considering the significance of this Supreme Court decision together with the various judgments rendered in the previously discussed cases, it is felt that consideration should be given to the latest and what will be the last of the Privy Council decisions with respect to the jurisdictional limitations of the Federal Parliament and Provincial Legislatures when dealing with matters of transportation. This decision was

(1) Johannessen et al v. Rural Municipality of West St. Paul et al 1951 4 D.L.R. 609 at p.624

(2) Ibid p.633

rendered in a case which was heard before the said Board under the style of cause of Attorney General for Ontario and others vs. Israel Winner (doing business under the name and style of "Mackenzie Coach Lines")[1] and others. Briefly the facts were as follows:

The Respondent was the owner of a motor coach transportation company which was attempting to carry passengers to and from the City of Boston, Mass. through the State of Maine, U.S.A., to Glace Bay in the Province of Nova Scotia. This entailed travelling through the territory of the Province of New Brunswick, and the Respondent Winner had applied to the Motor Carrier Board of that Province for a license to operate accordingly. A license had been granted, however a term thereof prohibited Winner from embussing or debussing passengers in the Province after a certain date. The Respondent refused to admit the validity of this prohibition and further stated that he intended also to carry passengers from points within the said Province to other points therein. This had resulted in one of the Appellant's asking for an injunction to stop the Respondent from picking up or putting down passengers within the Province of New Brunswick.

The application for the injunction was made in the Chancery Division of the Supreme Court of New Brunswick and the presiding Judge, before giving his decision, propounded certain questions of law for the opinion of the Supreme Court of New

(1) 1954 2 W.L.R. 418

Brunswick, Appellate Division. It is not intended to discuss in any detail the decision of this body, suffice it to say that inter alia it determined that the power under which the Motor Carrier attempted to impose its restrictions on Winner could be validly bestowed upon it by the legislature of the Province. An appeal from this decision was subsequently taken to the Supreme Court of Canada.(1)

The Supreme Court composed of Rinfret, C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright, and Fauteux, J.J. pointed out that it was concerned not with a reference but with an action and consequently that the questions propounded for the consideration of the Appellate Division of the Supreme Court of New Brunswick involved the consideration of matters outside those involved in the decision of the dispute raised by the pleadings. Consequently the Chief Justice did not even consider the constitutional aspects in determining that the Motor Carrier Board had not the power to place the restrictions on the Respondent that it had attempted. Generally the rest of the Court came to the conclusion that it was not within the legislative powers of the Province of New Brunswick to prohibit the Respondent from bringing passengers into the Province and permitting them to alight, or from carrying passengers from any point in the Province to a point outside thereof. However, it was agreed that the Province did have the legislative jurisdiction to enact laws which would prohibit the Respondent from picking up passengers within the Province and transport-

(1) 1951 S.C.R. 887

ing them to other points within the Province.

This judgment of the Supreme Court was, by special leave, taken before the Judicial Committee of the Privy Council, where the judgment of their Lordships was delivered by Lord Porter on February 22, 1954.(1) After setting out the facts His Lordship stated: "The vital question for their Lordships' determination is what restrictions are or can be placed by the province of New Brunswick upon inter-state or international undertakings by reason of the provisions of the Motor Carrier Act, and whether the terms of the licence actually granted to Mr. Winner are authorized under that Act."(2)

It could be stated that the Appellants advanced four basic arguments with which to sustain their contention that the Provincial Government had power to regulate Mr. Winner's operations. However, one of these can be deemed to be completely irrelevant as far as this paper is concerned. Of the remaining three, the shortest, and in the writer's opinion the weakest, was based on a peculiar reading of Section 92(10) of the British North America Act. It was contended that the provincial legislature was empowered to make laws in relation to Local Works and Undertakings other than such Local Works and Undertakings as were specifically enumerated, and therefore, that, as Mr. Winner's work or undertaking was not local, it would not fall within the exception.

(1) 1954 2 W.L.R. 418 at p.423

(2) Ibid p.425

Their Lordships refused to accept this somewhat strained interpretation, pointing out that if it was applied a Province could not control a railway which fell wholly within the geographic boundaries of the Province in view of the fact that under Section 92(10)(a) railways were amongst the exceptions and being "local" and an exception it would fall outside the jurisdiction of the Province.(1)

The next argument was based on the method of reading Section 92(10)(a), it being argued that Mr. Winner's operation did not fall within the exception contained therein unless it was "a work and an undertaking", that is, that it consisted of a physical thing and also an act or series of acts. This too was rejected by their Lordships on several grounds, one of the best examples being that if such was the case the Provinces could also be deprived of legislative jurisdiction in all cases where the subject-matter did not come within the exceptions set out in sub-sections "a", "b" and "c" of Class 10 of Section 92 as the same phrase was used in giving the power as in defining the exception. They went on to give practical examples of how the interpretation requested by the Appellants would be absolutely impractical. In this respect they referred to lines of Steamships sailing between a Province and a British or foreign country, pointing out that these were operations without the existence of any works. However, from the point of view of this

(1) 1954 2 W.L.R. 418 at p.430

paper a most interesting reference was that to the Radio Case. In this they pointed out that broadcasting was an undertaking connecting the various Provinces but nevertheless no inter-provincial works were involved. In making this reference Lord Porter stated: "Undoubtedly the main contention in that case was that a convention had been entered into between Great Britain, Canada and other Dominions and Colonies on the one part and foreign countries on the other, and that accordingly under the general powers conferred upon it by s.91 of the British North America Act, 1867, to make laws for the peace, order and good government of Canada the Parliament of Canada had under the convention a power similar to that which it would have had under s.132, if the convention had been a treaty between the British Empire, as an entity, and foreign countries." (1) Unfortunately this can only be considered as obiter and there is some doubt as to whose contention Lord Porter professed to be paraphrasing.

The next argument, and with respect to this study the most interesting, was based on the contention that roads are local works and undertakings constructed and maintained by the Province and are the property of the Province and therefore fall within the provincial jurisdiction re Property and Civil Rights, and as such the Province has complete power and control over them and can exercise that power in any way that it sees fit, even going to the extent of prohibiting their use. This, their Lordships

(1) 1954 2 W.L.R. 418 at p.430

recognized but with reservations, they countered pointing out that roads form a connection with other Provinces and in this particular case with another country and that, therefore, as Section 90(10)(a) of the British North America Act specifically allotted jurisdiction relevant to works and undertakings connecting the Provinces with other Provinces to the Federal legislature, the general power of Parliament could not be impaired by the Province's specific right to control its own roads under Section 92. Lord Porter summed it up in the following words: "The Province has indeed authority over its own roads, but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking, not the roads, which comes within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion. ..... The question as their Lordships see it, and indeed as it was argued, raises the hackneyed consideration what is the pith and substance of the provision under consideration. Is it in substance traffic regulation or is it an interference with an undertaking connecting province and province? Their Lordships cannot doubt but that it was the latter."(1) At this point in the judgment it was determined that the limitation imposed in the license granted to the Respondent was ultra vires and of no effect.

(1) 1954 2 W.L.R. 418 at p.435

The next point considered was whether the Supreme Court had been correct in adjudging that Winner could be prohibited by the provincial authority from taking up and setting down purely provincial passengers, i.e. those whose journey both began and ended within the Province. In reaching the aforesaid decision the Supreme Court had distinguished between what was essential and what was an incidental portion of the inter-provincial enterprise and come to the conclusion that if a portion of the enterprise was to be wholly executed within the Province then the Province had the right to control that said portion as long as it did not interfere with the activity as a whole.(1) The Privy Council could not accept this method of considering the problem and came to the conclusion that the question was whether the undertaking was in fact one and indivisible. In this it decided that the mere fact that one aspect of the undertaking was perhaps wholly confined to the Province did not in any way detract from the fact that the undertaking itself was of an inter-connecting or inter-provincial nature. Consequently it was determined that the undertaking was in pith and substance one which fell within the jurisdiction of the Federal Parliament and that consequently any limitations that were attempted to be imposed upon it by the provincial authorities, and this would include any attempt to prohibit the Respondent from picking up passengers within the Province of New Brunswick destined for another point therein in the course of his inter-provincial or international

(1) 1951 S.C.R. 887 at p.910

operations, were ultra vires.[1]

SUMMARY.

The Deputy Attorney General of Canada has stated that the Winner Case is actually the last in which the Judicial Committee of the Privy Council will be called upon to render a decision on the legal interpretation of the British North America Act.[2] Whether or not this will be a good or bad thing for the people of Canada remains to be seen, however, the decision has been made and from now on the Supreme Court will be the final tribunal in such matters. Nevertheless, in trying to prognosticate the future determinations of that Court, it obviously is prudent to look to the decisions of the Judicial Committee as well as those of the Supreme Court for guidance. A lay observer would no doubt hold that there has been little consistency in the reasoning of either of those learned bodies in reaching their decisions and in spite of all the ingenious arguments advanced to the contrary the writer is prone to agree. The Canadian Court deliberated under the ever present shadow of Privy Council reversal which, at the best of times, would not be conducive to strong judgments but was made the more unsatisfactory by the vast variances in interpretation given over the years by the appeal body. Justification for the uncertainty that prevailed from Confedera-

(1) 1954 2 W.L.R. 418 at p.438

(2) The Distribution of Legislative Power in Canada - Frederick P. Varcoe, p.1

tion can be found in a review of the previously discussed cases.

The cerebration of the members of the Supreme Court in the Aeronautics Case[1] was so varied that it is felt that almost any one of the formulae developed for interpreting Sections 91, 92 and 132 of the British North America Act over the years could be found in their judgments as authority for the general decision that the legislation was ultra vires of the Federal Parliament. In any event the final decision indicated that the Court was of the opinion that in order to validate federal legislation more was required than that the general subject matter be similar to that which a treaty between the Empire and foreign countries pertained. Perhaps incensed by the apparent equivocation of the Supreme Court, the Judicial Committee took a very strong stand on the matter and held that Parliament had jurisdiction based not only pursuant to Section 132 of the British North America Act but also in that Aeronautics was a class of subject which had attained such dimensions as to affect the body politic of the Dominion,[2] and therefore within its power to make laws for the peace, order and good government of Canada; although the same body subsequently maintained that the latter contention was obiter dicta.[3] Although when deliberating the Radio Case the Supreme Court did not have the benefit of the Judicial Committee's decision in the Aeronautics Case,

(1) 1931 1 D.L.R. 13

(2) 1932 A.C. 54 at p.77

(3) See page 42

it, in effect, reversed itself and found that legislation re radio operations was intra vires of Parliament, even though it could not rely on the "Empire Treaty" argument in addition to that arising out of the dominion wide nature of the subject. The views of the Judicial Committee on hearing the appeal were expressed by Lord Duneden and fleetingly he indicated that the Board was prone to treat the British North America Act as a constitutional document rather than interpret it in the more rigid statutory manner. Reference is made of course to his statement that although the Convention under discussion was not an Empire Treaty, it amounted "to the same thing". This statement had been made pursuant to a refusal by the Board to consider the subject as one that should be dissected and allocated to the various pigeon holes of Section 91 and 92.(1) Regrettably, this new approach was not elaborated upon and five years later Lord Aitken stated dogmatically that the Radio Case decision was founded on the contention that broadcasting was expressly excluded from Section 92.(2) However, it is submitted that even if such a novel approach as suggested by Lord Duneden is too radical to be accepted (although it has since been advanced by Canada's Chief Justice(3)) he presented the foundation, perhaps inadvertently, for another solution to Canada's dilemma re treaties, that is that treaties per se be considered "Matters" coming within the class of subjects assigned exclusively to the

(1) 1932 A.C. 304 at p.312

(2) See page 42

(3) See page 55 footnote 1

Legislatures of the Provinces. The aforesaid is submitted for consideration rather than as the studied submission of the writer on the realization that its acceptance would be just as radical as would be the acceptance of Lord Duneden's idea.(1)

It has already been noted that the decision of the Privy Council in The Social Legislation References gave small comfort to those seeking a method by which Canada could be sure that obligations it accepted on entering into international agreements would be fulfilled. If that decision is to be followed there is little hope that Section 132 of the British North America Act will be of any further use to Canada in this respect, for the status of Canada in relation to the British Commonwealth and the Empire as a whole has so completely changed in recent years that there appears to be slight possibility that any treaties in future will be entered into by the Empire as a unit, whereas the decision flatly rejected any idea that Section 132 could be interpreted to include treaties entered into by Canada in its own right. It was with this in mind that the next case selected for consideration in this paper was the 1946 appeal re The Canada Temperance Act, for although this case had nothing to do with an international convention, the Privy Council decision indicated a new trend or the return to a previous one with respect to the interpretation of the British North America Act. It will be recalled

(1) See "Tests for Validity of Legislation Under the British North America Act" by D. W. Mundell, Vol. XXXII, Canadian Bar Review 813 for a semasiological examination of the British North America Act.

that in The Social Legislation References the Board found that the subject-matter was one which fell within the class of "Property and Civil Rights in the Province" and was not of such general importance as to justify over-riding the normal distribution of powers in Sections 91 and 92. However, in the Temperance Case the Board looked to the subject-matter of the legislation and then prescribed this test: "if it is such that it goes beyond local or provincial concern or interests 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 upon matters especially reserved to the Provincial Legislatures."(1) Therefore unless the Supreme Court is prepared to take such a radical step as to start interpreting the British North America Act as a constitutional document rather than apply the strict rules of interpretation given to a statute, it would appear that Parliament will have to look to Section 91 for authority to implement into Canadian law those obligations entered into on behalf of the Dominion in international agreements and if such is to be the case then perhaps the more liberal interpretation of Section 91 given by the Judicial Committee in the aforesaid Temperance Case may provide the solution.

(1) 1946 2 D.L.R. 1 at p.5

Perhaps we have already an indication of the line that will be followed by the Supreme Court in future in matters of this kind in the decision of that body in the Johannessen Case. In that case both the trial judge and the Manitoba Court of Appeal, with the exception of Mr. Justice Coyne, looked to The Social Legislation References decision for authority to hold that the contested legislation was intra vires of the Manitoba legislature on the grounds that the subject-matter of the legislation was in the class of property and civil rights and also of a local nature. However, the Supreme Court in the final analysis appears to have agreed with Mr. Justice Coyne in his dissenting judgment wherein he concluded that "Aeronautics is indivisible, like peace itself, and is unsuited to be parcelled out in Canada ....." (1) The said Court went on record as having noted that the Paris Convention had been superseded by the Chicago Convention of 1944 to which the Empire had not subscribed as a unit and accordingly held that the Dominion Parliament could not look to Section 132 of the British North America Act any longer to authorize Parliament's passing the Aeronautics Act. Consequently each Judge appears to have contended that aeronautics has now reached such proportions as to affect the body politic of Canada and that as such legislation with respect thereto by the Dominion is justified under the "Peace, Order and Good Government" part of Section 91. It is respectfully suggested, however, that their Lordships

(1) See page 53

could have still looked to Section 132 for Federal authority in view of the fact that the Aeronautics Act as it existed at the time of their decision was fundamentally the same Act that existed prior to the Chicago Convention and therefore that the Act had actually been passed to implement the obligations entered into by Canada under the Paris Convention, which, as aforesaid, was signed and ratified on behalf of the Empire.

As the Johannessen Case had been commenced prior to the 23rd of December 1949, the Supreme Court decision thereon could have been appealed to the Privy Council;(1) unfortunately this step was not taken. It may therefore be prudent to look to the Winner Case for an indication of the contemporary thinking of both the Supreme Court and the Privy Council on the interpretation of the British North America Act with respect to the distribution of legislative power.

Although the Winner Case dealt neither with aeronautics nor international conventions it was studied in some detail herein, not merely because it has turned out to be the last decision of the Judicial Committee of the Privy Council pertaining to the interpretation of the British North America Act, but because in addition to that it deals with a mode of transportation which in this particular case could be considered to be intraprovincial, interprovincial and international. In this itself it is comparable to that aspect of aviation in which we are interested and consequently it should not be

(1) See 13 Geo. VI c.37

considered rash to look to the decision for some indication of the kind of reasoning that may be expected to govern future decisions on legislative competence to deal with matters pertaining to aeronautics. It had been argued that roads fell within the class Property and Civil Rights and as such were subject to the sole control of the Provincial legislatures, this the Privy Council did not deny but held that when a general power of the Federal Parliament was impaired by the exercise of a specific right of a province the latter was ultra vires in that it interfered with the prerogative of the Dominion.(1) This reasoning was similar to much of that contained in the obiter dicta of the Supreme Court judges when they decided the case; however in the following aspect the Board went much further than the Supreme Court. That Court had maintained that the New Brunswick authorities acting under powers granted by the Provincial Legislature had the power to regulate the purely intra-provincial portion of Winner's operations. With this the Judicial Committee did not agree and held that even if one aspect of the overall undertaking was wholly confined to a province if the undertaking itself was of an inter-connecting nature the undertaking was in pith and substance one which fell within the federal field and therefore the province could not even claim control over the provincial aspect.(2)

(1) See page 63

(2) See page 64

PROGNOSTICATIONS.

Acknowledging the probable accusation of temerity, an attempt will nevertheless be made to summarize the decisions considered herein and from them prophesy the probable stand that the Supreme Court will take with respect to legislation pertaining to aeronautics. The decision of the Privy Council in holding that the Aeronautics Act 3 R.S. Can. 1927 was validly enacted established two things, one that aerial navigation was a class of subject which had attained such dimensions as to affect the body politic of the Dominion, the other that the international convention the Canadian act implemented was of the type described in Section 132 of the British North America Act. In view of the latter point doubts still existed after the decision as to the authority of Parliament to enact legislation with respect to aeronautics per se.

In the Radio Case it was held that the convention the Canadian act implemented was not of the type described under Section 132 but as the subject-matter was specifically excluded from Section 92, being an undertaking connecting provinces, it was therefore subject to legislative control by Parliament under the authority given it under Section 91. However the most interesting aspect of the decision was the submission that the convention, although not of the Section 132 type, amounted "to the same thing".

The Social Legislation References were considered because those decisions rejected two of the theories advanced in the Aeronautics Case and the Radio Case, namely that the

former decision established that aerial navigation was of such proportions as to affect the body politic of the Dominion and therefore was subject to federal legislation and that the latter decision gave approval to federal legislation solely on the grounds that it was required to impliment treaties to which Canada was a party in its own right.

The next three decisions studied established three fundamental points relative to this study. In the Johannessen Case the Supreme Court held that aeronautics had in fact reached such proportions as to affect the body politic of Canada. The Privy Council ruled in the Temperance Case that if the subject is from its inherent nature the concern of the Dominion as a whole then legislation with respect thereto falls within the competence of Parliament though it may touch on matters especially reserved to the provinces. The Winner Case established that if the undertaking subject to the legislation was in pith and substance one which fell within Parliament's authority the provinces could not legislate even with respect to the provincial aspects thereof.

It is suggested that if the Supreme Court, as the court of last resort in matters Canadian, follows the pattern laid down in the last three named cases, and there appears to be every indication that it will, the position of Canada with respect to adherence to, and implementation of international aviation agreements will be clarified. If such is the case then it will not be necessary to look to the suggestion of Lord

Duneden in the Radio Case as to the mode of interpretation to be applied to the British North America Act or to even more novel solutions such as one advanced in this paper[1] in order to substantiate the authority of Parliament to enact legislation pertaining to aeronautical matters. In any event the possibility of the success of such a radical departure from precedent would be slight in view of the general tendancy to apply the doctrine of stare decisis and the spirit that prompted Section 7(3) to be incorporated into The Statute of Westminster, 1931.[2]

(1) See page 67

(2) 22 George V Chapter 4:

> "7.(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

PART III

THE AGREEMENTS

GENERAL

Since 1919 when Sir Albert Edward Kemp signed the Treaty of Versailles on behalf of Canada, this country has been a party to international agreements relating to aviation. These have varied in content from those which have endeavoured to curtail double taxation being imposed on aerial operations,(1) to the Final Act of the International Civil Aviation Conference held at Chicago from November 1 to December 7, 1944 signed by fifty-four countries.(2) Today Canada is a party to eight multi-lateral agreements and over thirty bi-lateral agreements which control her air commerce with seventeen countries stretching from Australia to Sweden. In addition to these she has at one time or another been party to over a score of other agreements, as amended or extended from time to time, with one or more countries. At the time of writing Parliament is considering a Bill which, if passed, will enable her to ratify the Rome Convention 1952, while at the same time

(1) Exchange of Notes between Canada and the Argentine constituting an Agreement for the Avoidance of Double Taxation on Profits Derived from Sea and Air Transportation, signed at Buenos Aires, August 6, 1949. ICAO Reg. No. 794.

Canada Treaty Series Reference: 1949/5.

(2) See page 114

our authorities are negotiating another agreement that if consummated will carry the Canadian flag into the Mediterranean area.

It is of course impossible to examine each of these past and present agreements individually and therefore, in this Part, consideration will be limited to four of the multi-lateral conventions and a typical bi-lateral. Of the four, one is no longer in force and another has not yet been ratified by the required number of countries to bring it into effect, however it is felt that these agreements, together with the other three, contain most of the elements that make the participation by Canada in negotiations of this nature controversial. It is therefore hoped that the detailed consideration given to them in the light of the two previous Parts of this paper together with the conclusions reached will be of assistance in determining the position regarding international aviation commitments that Canada was entitled to take in the past and will be justified in taking in the future.

PARIS CONVENTION 1919

INTRODUCTION

It will be recalled that in Part I a reference was made to the Canadian delegation that attended the Paris Peace Conference in 1919, and the contribution it made to the development of treaty procedures within the Empire. Consideration will now be given to the aeronautical aspects of that meeting. While on their way to Paris the Canadian delegates had an opportunity in London to consider a draft aviation treaty that the British proposed to advance at the Conference. This draft was based on experience gained at the aviation Conference held in Paris in 1910, and on British experience gained in formulating domestic flying policies. The result was a mature and studied document. The Canadians however, possibly considering the remoteness of Europe with respect to Canadian aviation, displayed misgivings in the form proposed and the Honourable C. J. Doherty maintained that, in view of the anticipated constitutional changes in the relationship between the United Kingdom and the Dominions, the adherence by Canada to any proposed convention should be dependent on independent ratification. Further he raised doubts as to the wisdom of conforming to a convention which would make Canada and its internal law subject to an international authority.(1)

(1) Canada at the Paris Peace Conference, G.P. de T. Glazebrook, Oxford University Press, 1942, p.101

It was in this frame of mind that the Canadian delegation proceeded to Paris.

Shortly after the Peace Conference convened The Aeronautical Commission of the Peace Conference was established pursuant to a resolution introduced by A. J. Belfour of Great Britain. It was invited to consider:

(a) Aerial matters arising out of the work of the Preliminary Peace Conference or referred by the Commissions set up by the Conference.

(b) A Convention in regard to International Aerial Navigation in time of peace.

In addition to this the Supreme Council agreed that the question of the commercial aviation to be allowed to Germany would be referred to the Commission.(1) Unfortunately, a Canadian was not included amongst the British Empire representatives on the Commission, and this no doubt increased the suspicion with which the Canadian delegation viewed the proceedings.

In view of the part that Canada was to play some twenty-five years later at Chicago the comment of one of the Canadian Plenipotentiaries is especially interesting. Referring to one of the drafts advanced to the Commission the Honourable A. L. Sifton stated: "The suggested con-

(1) United States Participation in Drafting Paris Convention 1919, John C. Cooper, Journal of Air Law and Commerce, Vol. 18, No. 3 p.266 at p.267

vention is probably the worst example we have yet seen of the principle of internationalism gone wild. ..... It is absolutely unnecessary so far as peace is concerned. There is no reason why we should accept it unless of some use to our own people, and being in connection with a matter of which no person in the world has yet had practical experience, it requires exceeding care." He then pointed out the unique situation existing between Canada and the United States, both politically and geographically, and advocated that the Convention should be restricted to the regulation of flying "leaving international landings for agreement between the countries interested."[1] [2]

(1) Canada at the Paris Peace Conference, G.P. de T. Glazebrook, Oxford University Press, 1942, p.102

(2) Before proceeding further it should be pointed out that although it has frequently been stated that the Paris Convention was the first international treaty on aeronautics to which Canada was a party, such is not the case, for an examination of the Treaty of Versailles[a] reveals that it contained very definite terms with respect to aviation. Part XI, headed "Aerial Navigation" includes Articles 313 to 320, which generally define the rights of aircraft belonging to the Allied and Associated powers, while operating into and over Germany, giving to them the same privileges as German aircraft were to enjoy. They also anticipated the participation of Germany in the aviation convention that was at that time being drafted.[b]

(a) The Treaty of Peace Between the Allied and Associated Powers and Germany, signed at Versailles, June 28, 1919.

(b) The Treaty of Versailles and After, Annotations of the Text of the Treaty, United States Government Printing Office, 1947.

FORM AND EXECUTION

Various drafts in addition to the one objected to so vehemently by Sifton were submitted to the Commission, and after a great deal of negotiation the Convention took the following form.

"Convention for the Regulation of Aerial Navigation.

Done at Paris, October 13, 1919.

The United States of America, ... the British Empire, ... and Uruguay,

Recognizing et cetera

Appreciating et cetera

Desiring et cetera

Have determined for these purposes to conclude a Convention, and have appointed their Plenipotentiaries the following, reserving the right of substituting others to sign the same Convention:-

.....

.....

His Majesty, the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India.
The Right Honourable David Lloyd George, M.P.
First Lord of the Treasury and Prime Minister; and
For the Dominion of Canada, by
The Honourable Sir Albert Edward Kemp, K.C.M.G.,
Minister of the Overseas Forces.

.....

.....

who have agreed as follows:-

Chapter 1.

General Principles.

Article 1.

/Text of the Convention/

"Done at Paris, the thirteenth day of October, nineteen hundred and nineteen in a single copy which shall remain deposited in the archives of the French Government, and of which duly authorized copies shall be sent to the contracting States.

The said copy, dated as above, may be signed until the twelfth day of April, nineteen hundred and twenty inclusively.

In faith whereof the hereinafter named Plenipotentiaries whose powers have been found in good and due form have signed the present Convention in the French, English, and Italian languages which are equally authentic."

Here follows a list of signatures including that of George H. Perley (1) with no indication of the countries on behalf of which they were affixed. (2) However, it has been established that Sir George did not sign on October 13, 1919, as did Eyre A. Crowe who signed on behalf of the British Empire and one authority (3) has indicated that at that time a reservation was entered by the British Empire on the part of Canada to the effect that the Dominion did not even consider itself obliged to submit the Convention to Parliament for its consideration. As according to the terms of the Convention it had to be ratified, this reservation by Canada can only be accounted for by the apprehension of her delegates that Canada might find herself bound on the deposit of an instrument of ratification for the whole Empire, to which she had not agreed.

(1) Sir George Perley, Canadian High Commissioner in London

(2) American Journal of International Law, Vol. 17, 1923, Supplement, p.195

(3) Canada at the Paris Peace Conference, G.P. de T. Glazebrook, Oxford University Press, 1942, p.103

According to the terms of the Convention itself it was to remain open for signature only until April 12th, 1920, but for some reason Perley did not affix his signature until April 15th, 1920, three days after the deadline. Again it can only be presumed that as the document had already been signed on behalf of the Empire, the default was overlooked. However, an Additional Protocol to the Convention was opened for signature on May 1st, 1920, and on that day Sir George signed on behalf of Canada together with the other representatives. On March 4th, 1921, the Governor-in-Council issued an Order whereby the Government of Canada signified its approval of the Convention and Additional Protocol, with reservations.(1)

RATIFICATION

The Minutes of the Deposit of Ratification of the Convention and Additional Protocol(2) referred to the Convention and the instrument of ratification as having been signed by the British Empire. No mention is made of Canada. It also refers to the signatory for the British Empire making a declaration with respect to his "Government". This would indicate an Empire Government, which of course did not exist,

(1) P.C. 1921/613. Unfortunately a search of libraries in Montreal and inquiries in Ottawa have failed to produce this Order in Council or other relevant documents that would throw more light on the matter. It is presumed that the reservation referred to Canada - U.S.A. flights in view of the proceedings described in the next paragraphs.

(2) I.C.A.N. Official Bulletin No. 1, p.3

and it can only be deduced that Hardinge of Penhurst signed on behalf of the whole Empire. This contention is supported by the fact that Canada, together with the other Dominions, is in various references listed as having ratified on June 1, 1922, and Robert B. Stewart refers to "a single instrument of ratification for the whole Empire".(1)

The aforesaid opinion is substantiated by the form that various subsequent documents took. For example, on December 4th, 1922, the British Foreign Office sent the Secretary-General of I.C.A.N. notice that the Canadian Government intended "under the terms of the procès verbal of the deposit of ratifications of June 1 last, to postpone the application of the provisions of Article 5 of the International Convention for Aerial Navigation" in respect to certain countries.(2) Another Note dated December 18th, 1922, from the British Embassy to the Secretary-General stated "the British Embassy has the honour on instructions from His Majesty's Government to communicate herewith an application by the Canadian Government for a derogation to Article 5". This was with respect to U.S. flights to Canada, and attached to the Note there was a memorandum explaining the conditions that made such a request necessary.(3)

(1) See page 87

(2) I.C.A.N. Official Bulletin No. 2, p.4

(3) I.C.A.N. Official Bulletin No. 3, p.6

RESULTING UNCERTAINTY

A consideration of forms and procedures followed in bringing the Convention into force, reveals a series of inconsistencies. It will be recalled that the Empire delegates had agreed that various Conventions drafted at the Peace Conference should take the Heads of States form, as the Dominions were adequately included in the formal description of the King, then the various Plenipotentiaries were to be identified with his own country, including that of the United Kingdom, under the general heading of the British Empire. Instead of this, the Convention initially takes a between-countries form by referring in the Preamble to the desires of the United States of America, the British Empire (although not a single country) et cetera but this is followed by a list of the Heads of State and the text of the Convention includes both the terms "High Contracting Parties" and "Contracting States". Then contrary to the agreed plan, Lloyd George is listed, not as the Plenipotentiary of the United Kingdom, but of the King under his descriptive title, followed by the Plenipotentiaries for the Dominions. Further, on execution Eyre A. Crowe's signature was not restricted to apply only to the United Kingdom and the instrument of ratification refers to the British Empire generally and no mention is made of any separate unit thereof. What then was the result of this procedure?

There is little doubt that at that time, in the eyes of the world, the Dominions were part of the British Empire,

and in fact the same opinion still generally remained true in the Dominions themselves. Therefore when the British Empire was referred to as a High Contracting Party to the Convention and the Convention was subsequently signed and ratified by the Empire, the Dominion of Canada as a part thereof would be presumed to be bound by its terms. If this was so, the separate signature of Canada and the belated approval of the Convention by her, was of no effective legal significance internationally and could only be considered significant with respect to intra-imperial relations. The authority, Robert B. Stewart, when writing on the subject some twenty years later had the following to say: "It remains true, nevertheless, that 'The British Empire' - despite the separate signature on behalf of the Dominions and India and despite the classification of the Dominions and India as separate states - was the High Contracting Party for the whole Empire. For the purpose of negotiating and concluding the Convention for the Regulation of Aerial Navigation in 1919 His Majesty appointed as his Plenipotentiary Mr. Lloyd George and entrusted him with general full powers. In addition, His Majesty appointed separate plenipotentiaries for the Dominion of Canada, for the Commonwealth of Australia ..... The convention was thus signed for the British Empire generally by the plenipotentiary chosen by the United Kingdom and was signed separately for each of the Dominions and India. The Dominions were thus accorded the doubtful advantage of a double signature. <u>The Convention was ratified by a single</u>

instrument of ratification for the whole Empire."[1] [emphasis supplied] In this case, it is hard to disagree with Mr. Stewart's statement and his contention appears to have had the support of the Supreme Court of Canada and the Judicial Committee of the Privy Council when they considered the Aeronautics Case.[2]

The Reports of the Aeronautics Case reveal no apparent doubt as to the Paris Convention being a Treaty to which the Empire was a party, in fact this was the prime factor for authorizing Federal Legislation. Nevertheless it is submitted that if Canada had deposited a separate instrument of ratification, which apparently it did not, then the situation would have altered materially. Admittedly the Preamble refers to the British Empire and the King's title embraces the Dominions, but when Eyre A. Crowe signed there apparently was a reservation made which indicated that Canada did not consider his signature to include her, and Canada subsequently had her own Plenipotentiary sign the Convention. If she had then retified independently could the contested Aeronautics Act have been considered to have implemented an Empire Treaty in the sense intended by Section 132 of the

(1) Treaty Relations of the British Commonwealth of Nations, Robert B. Stewart, The MacMillan Company, 1939, p.311

(2) See Part II

British North America Act? An interesting if only ar[illegible] academic question.[1]

CONTENTS

The Convention itself was made up of nine chapters containing forty-three articles, and a list of the titles of the chapters is indicative of the general contents of the Convention. They were as follows: General Principles, Nationality of Aircraft, Certificates of Airworthiness and Competency, Admission to Air Navigation above Foreign Territory, Rules to be observed on Departure when Under-way and on Landing, Prohibited Transport, State Aircraft, International Commission for Air Navigation, Final Provisions.

The most significant principle established was set out in Article 1, which read in part:

> "The High contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory."

Further the Contracting States undertook in time of peace to accord freedom of innocent passage to aircraft of other

(1) The intra-imperial relationship was not clarified by the form used for a subsequent Protocol to the Convention, signed at Paris on June 15, 1929, which after setting out the intended changes concluded:

> "The undersigned, duly authorized declare that they accept, in the name of the States they represent, the aforesaid modifications, which are proposed for final acceptance by the Contracting States."

Then follows the signature of Sefton Brancker "for Great Britain and Northern Ireland", and of the same gentleman "for Canada".(a) Presumably this change of form was brought about by the agreements reached at the Imperial Conferences of 1923 and 1926.

(a) American Journal of International Law, Vol. 23 Supplement, p.125

Contracting States,[1] and what appears to be a somewhat repetitious statement was set out in another article namely that "Every aircraft of a contracting State has the right to cross the air space of another State without landing."[2] Another leading principle that was established was that aircraft possess the nationality of the State on the register of which they were entered.[3]

Perhaps the most far-reaching aspect of the Convention was its establishment of an International Commission for Air Navigation to be placed under the direction of the League of Nations. This organization became known as I.C.A.N. and was the type of body that Sifton had in mind when he made his scathing remarks. However, when the power of the Commission was eventually established it became apparent that that gentleman's misgivings had perhaps been somewhat exaggerated.[4] Actually, the only real power of the Commission was restricted to the alteration of the technical annexes to the Convention, of which there were eight, and the settling of disagreements relating thereto. With respect to voting it was set out in a Protocol dated in London, June 30th, 1923, that "each State represented on the Commission (Great Britain and the British Dominions and India counting for this purpose as one State) shall have one vote." However this was again altered by a

(1) Article 2
(2) Article 15
(3) Article 6
(4) Article 34

Protocol dated in Paris, December 11th, 1929, under which each of the Dominions and India acquired equal voting rights with other States.(1)

IMPLEMENTATION

Although the Convention was not signed on behalf of the British Empire until October 13, 1919, and by Canada until April 15, 1920, the Parliament of Canada passed certain legislation in respect thereto at the Session which was prorogued on July 7, 1919. This legislation, known as The Air Board Act(2) was given Royal assent on June 6, 1919, and although it made no reference to either the Paris Convention or the I.C.A.N. it was fundamentally the same legislation which was later challenged in the Aeronautics Case when it was incorporated in the succeeding Aeronautics Act.(3) It will be recalled that in that case amongst the arguments advanced by the opponents of the said legislation, was the contention that the original legislation which allegedly was encroaching on the Provincial legislative field had, in fact, been passed before the Paris Convention came into being and that therefore it was impossible to look to Section 132 of the British North America Act for justification of the validity of the legislation. This argument was not accepted and it was pointed out in one of

(1) The Law of Civil Aviation, W.H.Moller, Sweet & Maxwell Limited, 1936, p.10

(2) 1919 9-10 Geo. V, c.11

(3) 1927 R.S.C., c.3

the judgments that in any event the legislation had been re-enacted after the Convention actually had come into force.

CONCLUSIONS

The Convention for the Regulation of Aerial Navigation, although only a minor item on the agenda of the Paris Peace Conference, may some day be recognized as one of the brighter issues of that meeting. Admittedly it has already been superseded, but its successor was drafted by men who had benefited greatly from the experience gained through its application and many of the fundamental principles and objects formulated in 1919 are now contained in the "Chicago Convention."

From the Canadian point of view the Convention is of great significance in that it is one of the first examples of independent action, or at least an attempt thereat, by a Canadian plenipotentiary in the complicated mechanics of intra-imperial and international contractural negotiations. There is no doubt that the approach was crude, and that it ultimately resulted in confusing the situation, nevertheless, it was another step in the direction of legal sovereignty.

The Convention was also the subject of controversy in Canada's perennial internal issue, for the legislation intended to implement the obligations incurred by the State under it was challenged by the Provinces. Again the result was far-reaching, for the Privy Council declared, inter alia, that aeronautics was a matter affecting the body politic of the nation, and in

doing so indirectly advanced the power of the central authority. As to the individual terms of the Convention, it is not intended to consider them further in the light of Sections 91 and 92 of the British North America Act, as they are no longer in effect. It is felt, however, that when the Conventions relating to private international air law have been examined, it will be agreed that according to recent judicial decisions the laws challenged in the Aeronautics Case would be held to be valid today even without the authority of an Empire Treaty.

WARSAW CONVENTION

INTRODUCTION

On May 2nd, 1939, Royal assent was given in Canada to the Carriage By Air Act, 1939,[1] the Preamble whereof reads in part:-

> "WHEREAS a Convention for the unification of certain rules relating to International Carriage by Air was signed at Warsaw on the twelfth day of October, one thousand nine hundred and twenty-nine, and it is expedient that legislative provision be made for giving effect thereto and for performing the obligations of Canada in respect thereof, in the event that Canada accedes to the said Convention or the Additional Protocol; and
>
> 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:"

The Convention itself is set out as a schedule pursuant to Section 2(1) of the Act and the provisions thereof "so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons ..... have the force of law in Canada in relation to any carriage by air to which the Convention applies ....."[2]

With respect to this study, the Convention raises two interesting points, these being the procedure by which Canada adhered to it and the resultant ramifications, and of course the question of whether the Federal Parliament has the power under the British North America Act, 1867, to pass legislation to implement it. First, it is intended to give

(1) 1939 3 Geo. VI, c.12

(2) Ibid Sec. 2(1)

a brief consideration to the latter aspect, but a more general study of the constitutional problem has been made elsewhere in this thesis;[1] to reconsider many of the points would be of little value.

THE CONVENTION

The Convention follows the usual form, having a preamble, five operative chapters, and an attestation clause, further at the time of signing an additional Protocol was attached. The first chapter sets out the scope of the Convention, describing that it "applies to all international carriage of persons, luggage or goods performed by aircraft for reward"[2] and then defining international carriage in such a way to make it dependent on the terms of "the contract /from the geographic aspect/ made by the parties".[3] Attention is called to Article 2(1) which resulted in the addition of the aforesaid Protocol, of which more will be said later, reading:-

> "This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1."

Chapter II contains fourteen articles, numbers 3 to 11 of which list the documents of carriage, prescribing the required contents thereof and stipulating that the limitations of liability provided for elsewhere in the Convention are not available to the carrier if the documents do not meet the said requirements. Articles 12 to 16 set out the rights and

(1) See page 130 et seq
(2) Article 1(1)
(3) Article 1(2)

duties of the consignors and consignees.

From the financial point of view, Chapter III is the most important, for it defines, and at the same time limits, the liability of the carriers. It also deals with the procedural[1] aspects, including jurisdiction and time limitations and restricts actions for damages to the conditions and limits set out in the Convention.[2] Articles 17 and 18 are in many ways contrary to the common law, imposing an almost[3] absolute liability on the carrier for the death of, or injury to, passengers and damage or destruction of goods if the accident or occurrence which caused the damage so sustained took place on board the aircraft in the case of passengers, or during the carriage by air in the case of goods.[4] To counterbalance this onerous duty the Convention sets out the monetary limitations of liability in Article 22, but in the next article any attempt by the carrier to limit its liability below those set out, is deemed to be null and void.

(1) This might be questioned by the drafters of the Convention for after setting out prescriptions, etc. they included Article 28(2) - "Questions of procedure shall be governed by the law of the Court seized of the case."

(2) Article 24.

(3) Article 20 releases the carrier from liability if it can establish certain facts, but the onus is great.

(4) In both cases the carrier's duty is extended to include periods beyond the actual flight.

It is not understood why Article 31 was designated as a separate chapter, for it merely defines the scope of the Convention with respect to combined carriage and this would appear to have been suitable for inclusion in the first chapter. Similarly Article 32, dealing with a contract purporting to infringe on the rules of the Convention, could have been combined with Article 23 to advantage. The remainder of Chapter V is primarily concerned with the execution of, and adherence to, the Convention and will be considered in more detail later.

FEDERAL OR PROVINCIAL JURISDICTION

Even from this brief outline of the Convention it immediately becomes apparent that its nucleus is the contract between the passenger or shipper and the carrier, for in the first place the carriage must be by air, and secondly the geo-political extent of the carriage contracted for determines whether the Convention is to apply. It is therefore generally apparent that a federal act incorporating the Convention as a schedule thereto will be subject to close scrutiny in the light of the British North America Act, 1867. Canada became a party to the Convention in a manner (1) that definately curtailed the possibility of applying Section 132 as the authority for Federal legislation and therefore Sections 91 and 92 must be looked to. In this respect it is submitted that the detailed appraisal

(1) See "Application of the Inter Se Doctrine"

made in this study of the Canadian Constitutional aspects of the Rome Convention, 1952 is not required, for unlike in it both parties affected by the Warsaw Convention have, by their voluntary actions, established a relationship pertaining to aeronautics, and therefore if it is accepted that aeronautics is deemed to be a subject falling within the jurisdiction of Parliament[1] it is equally true that the Convention falls within its jurisdiction, being in pith and substance aeronautics.[2] In accepting this, of course, it must also be recognized that legislation implementing such a Convention is bound to wander[3] into the provincial field, as for example in Article 21 where the lex fori is looked to in the event of contributory negligence.

(1) See Part II.

(2) It is significant that little, if any, question was raised as to the authority of Parliament to empower the Board of Transport Commissioners for Canada under the Transport Act, 1938, 2 George VI c.53 to make regulations governing the contractual relationship between air carrier and passenger in the celebrated case of Ludditt et al. v. Ginger Coote Airways, Ltd. 1942 4 D.L.R. 353 and 1947 2 D.L.R. 241. Indeed the Supreme Court judgments appeared to take it for granted that Parliament was so empowered and the Privy Council did not question that the Board had "for one of its purposes the control of contracts of this type", (i.e. contracts of carriage) p.242. It is noted that this case was decided before the Johannessen Case.

(3) The Distribution of Legislative Power in Canada -- Frederick P. Varcoe -- The Carswell Company Limited p.54 -- where he submits that this i.e. "wandering" should be distinguished from "trenching", which term is only apt if the federal legislation is ultra vires, for if it is not, there is no "trenching".

As the Convention, when incorporated into the law of Canada as a Schedule to the Carriage by Air Act, 1939, contained provisions that were contrary to existing statutory law of the provinces, it was apparently deemed advisable to assert as positively as possible that the federal legislation was paramount. Consequently Section 2(4) was inserted into the Act reading:-

> "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.",

Schedule II designating the possible beneficiaries of a passenger who died under circumstances that made the terms of the Convention applicable. This, of course, amounts to the prohibition of the application of Lord Campbell's Act, as variously enacted in the common law provinces, and Section 1056 of the Civil Code of Quebec. However, an even more contentious point is raised by Section 4 of the Act, which authorizes the Governor in Council to apply the provisions of the First Schedule and any provisions of Section 2 (1) to carriage by air not being international carriage by air according to the Convention. Although it is understood that there is

(1) Obviously the only relevant provision of Section 2 would be subsection 4 quoted above and consequently this coy piece of draftsmanship is inexplicable.

little likelihood of this being done with respect to domestic flights, in view of the low limits of liability of the Convention, if it were utilized Parliament could only base its authority on the Peace Order and Good Government doctrine, i.e. the national scope of aeronautics, for the "international treaty" veil would be unavailable as justification for parliamentary jurisdiction.

APPLICATION OF THE INTER SE DOCTRINE

It has been noted that Royal Assent was given to the Carriage by Air Act, 1939, on May 2, 1939, but due to seemingly more pressing matters, the Canadian authorities took no further official action with respect thereto until 1947, when on June 6th with the approval of His Excellency the Governor-General, the Committee of the Privy Council (Canadian) authorized The Secretary of State for External Affairs to accede to the Warsaw Convention on behalf of the Government of Canada with the reservation that the first paragraph of Article 2 of the Convention should not apply to international carriage by air performed directly by Canada.(1) Accordingly by a Note dated June 10, 1947, the Charge d'Affaires at the Canadian Legation at Warsaw advised the Polish Minister of Foreign Affairs that Canada had decided to accede to the Convention "in accordance with the provisions of Article 38 of that Convention". Subsequently the Polish Minister on October 5th notified the

(1) P.C. 1947/2293. This reservation was authorized by the Additional Protocol.

Canadian Legation that registration of Canada's accession had been made on June 10th, and at the same time answered a Canadian request for a complete list of "High Contracting Parties to this Convention" by stating, inter alia, that "The following countries ..... Great Britain and Northern Ireland ..... Australia ..... have ratified without reserve the Convention with the Additional Protocol".

At the same time, pursuant to Section 6 of the Act, an Order in Council (1) was made advising that a Proclamation be issued providing that the Act should come into force and have effect upon, from and after the 1st day of July, 1947; this Proclamation was issued on the 13th of June. (2) The next relevant Order in Council (3) was made on January 30, 1948, wherein, after stating that according to Article 38(3) of the Convention the accession of Canada took effect on September 8, 1947, it was advised that a Proclamation be issued pursuant to Section 2(1) of the Act. The said Proclamation (4) certified that September 8, 1947 was the day on which the Convention came into force as regards Canada and that the provisions thereof had the force of law in Canada. (5)

The adherence to the Convention by Canada in the

(1) P.C. 1947/2343.

(2) The Canada Gazette No. 28, Vol. LXXXI, p.2152

(3) P.C. 1948/384

(4) The Canada Gazette No. 9 Vol. LXXXII, p.968

(5) Thus making the Act over four months retroactive.

aforesaid manner was immediately subject to criticism, it being alleged that rather than acceding to the Convention according to Article 38 thereof, Canada should have become subject to its terms under the procedure set out in Article 40(2).[1] Such a controversy could only have arisen with respect to a country subject to the peculiarities of the constitution of the British Commonwealth. The criticism was based on the old theory that the British Crown is indivisible and that therefore the Convention would not be effective between members of the Commonwealth; that is, that the inter se doctrine[2] would apply in view of the fact that the between Heads of States form had been used.[3] However, the advocates of the manner of adherence used by Canada questioned

(1) Article 40(1) "Any High Contracting Party may, at the time of signature or of deposit of ratification or of accession declare that the acceptance which he gives to this Convention does not apply to all or any of his colonies, protectorates, territories under mandate, or any other territories subject to his sovereignty or his authority, or any territory under his suzerainty."

(2) "Accordingly any High Contracting Party may subsequently accede separately in the name of all or any of his colonies, protectorates, territories under mandate or any other territory subject to his sovereignty or to his authority or any territory under his suzerainty which has been thus excluded by his original declaration."

(2) See page 22

(3) See page 13

whether that form had in fact been used and in any event whether that in itself was by any means conclusive. Admittedly at first glance it would appear from the Preamble to the Convention that the Heads of States form had been used but, without attempting to examine the status of other sovereigns listed, as for example His Majesty the King of Denmark and Iceland, the position with respect to the Commonwealth, as is frequently the case, must be given special consideration.

In the preamble the King is described as "His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India", then it goes on that he, inter alia, has nominated his respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the Convention. This, together with the use of the term High Contracting Party in the Convention, if read by themselves, might indicate that George V as the Head of State had bound all his territories as a single High Contracting Party. However, an examination of the form of execution of the Convention reveals a flaw in this theory. The last sentence of the Convention reads[1] "This Convention done at Warsaw on the 12th of October, 1929, shall remain open for signature until the 31st January, 1930" - and amongst other signatories there follows

"Pour la Grande-Bretagne et l'Irlande du Nord -

A.H. Dennis
Orme Clarke
R.L. Megarry"

(1) Official translation from the French.

and the same three signatures are inscribed beneath.

"Pour le Commonwealth d'Australie"

and

"Pour l'Union Sud-Africaine".

It is thus seen that although the three Plenipotentiaries were the same individuals, they appear to have acted in separate capacities, for they did not sign on behalf of "His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India", but rather as the duly authorized representatives of the King as the constitutional head of three political entities, namely Great Britain and Northern Ireland, the Union of South Africa, and the Commonwealth of Australia. If such was not intended then His Majesty's Plenipotentiaires should merely have attached their signatures once, and thus bound all of his territories as a single unit, declaring at the same time any exceptions as provided for in Article 40(1) of the Convention. In support of this it is to be noted that the Convention was also ratified separately and at different times,(1) which would be neither proper nor necessary if the King acted in the capacity of a single High Contracting Party for the Commonwealth and Empire as a whole.(2)

(1) In accordance with Article 37 the Convention came into force with respect to The United Kingdom of Great Britain and Northern Ireland on May 15, 1933, and The Commonwealth of Australia on October 30, 1935. The Union of South Africa has not yet ratified.

(2) Incidentally if such had been the case the Convention would have presented no internal constitutional problem in Canada in view of Section 132 of the British North America Act, 1867.

It is regretted that it has not been possible to examine the Full Powers issued to the Plenipotentiaries to the Convention or the instruments of ratification of the United Kingdom and Australia; however, it is felt that they would not support the contention that Canada should have adhered to the Convention pursuant to Article 40(2) which would be incongruous with the fact that the exclusion of Canada provided for in Article 40(1) was not made either at the time of signature or on the deposit of ratification.

Although the Statute of Westminster, 1931, was not enacted at the time the Convention was drawn up, there was nevertheless a form of Royal Style and Titles for His Majesty, which was recognized throughout the Empire (1) and it is submitted here that the title incorporated in the Preamble to the Convention was descriptive only and was not intended to designate the capacity in which he authorized the negotiation of it. (2) In fairness, however, it should be noted that the aforesaid contention is at complete variance with that of one of the foremost authorities on intra Commonwealth relations, who, in 1938, wrote the following with respect to the Warsaw Convention and its birth:

"The convention is between heads of states. An earlier draft, being between states, defined international transport

(1) The King's Title, Norman A.M. MacKenzie 1924 Canadian Bar Review 549, and see also 1947 II Geo. VI, c.72 in which the form was revised.

(2) It is doubtful whether a similar controversy could again arise, for at a meeting in London in December, 1952, it was decided that each country of the Commonwealth "should use for its own purposes a form (Royal Style and Titles) suitable for its own circumstances, but retaining a substantial element common to all:"(a)
(a) Statutes of Canada 1952-53 1-2 Elizabeth II c.9

as carriage between two 'contracting states'. The British delegation proposed by way of amendment that the Convention be drawn up between heads of states and that 'international carriage' be defined as carriage 'between the territories of two High Contracting Parties'. This proposition was declared to be motivated by the special constitutional relations of the members of the British Empire as described by the Imperial Conference of 1926. His Majesty being the sole high contracting party for the United Kingdom, Australia, and South Africa, the convention would not apply to their relations inter se. The British amendments were accepted and embodied in the preamble listing the contracting parties and in the portion of Article 1 quoted above. From the point of view of the convention, then, transport between members of the British Commonwealth is not international transport." (1) [emphasis supplied]

SOLUTION

In any event it soon became obvious that the air carriers operating between Commonwealth countries were confronted with a difficult situation while the question remained unsettled,

(1) Treaty Relations of the British Commonwealth of Nations, Robert B. Stewart, The MacMillan Company, 1939, p.348. It is regretted that Mr. Stewart has not revealed who so declared the motivation for the change and the writer has not been able to find out. It should be noted, however, that Mr. Stewart wrote many years before Canada acceded to the Convention, and had he had the opportunity to consider the procedure then followed he might not have continued to hold the same view.

for they were unable to estimate their potential liability and consequently determine what amount of insurance should be carried. Fortunately in this case machinery existed that could be used to settle the question for all practical purposes without waiting for a judicial decision arising out of litigation. The Carriage by Air Act, 1932,(1) which incorporated the Convention into the national law of the United Kingdom contains a section which authorizes His Majesty by Order in Council to certify who are the High Contracting Parties to the Convention and in respect of what territories they are respectively parties, and under it such an Order is deemed to be conclusive evidence of the matters so certified.(2) Accordingly The Carriage by Air (Parties to Convention) Order, 1939,(3) was made, and Part 1 of the schedule thereto was divided into three columns headed: "High Contracting Parties to the Convention", "Territories in respect of which they are respective parties", and "Dates on which the Convention came or will come into force". Under the first heading the following was

(1) United Kingdom Statutes, 1932, 22 & 23, Geo. V. c.36

(2) Section 1(2) "His Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the Convention, in respect of what territories they are respectively parties and to what extent they have availed themselves of the provisions of the Additional Protocol to the Convention, and any such Order shall, except insofar as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified."

(3) S.R. & O. 1939 No. 733

inserted: "His Majesty, the King of Great Britain, Ireland, and The British Dominions beyond the Seas, Emperor of India", then in the second column the name "The United Kingdom of Great Britain and Northern Ireland" appears, and thereafter throughout the schedule His Majesty is referred to as the High Contracting Party to the Convention.(1) In 1948 another Order was made(2) in order to add Canada to the certified list. Clause 2 of this Order read: "It is hereby further certified that His Majesty in right of Canada is a High Contracting Party to the said Convention". It is not known whether any consideration was given to the use of the term "His Majesty in right of Canada", however, it should be noted that in all of the Canadian documents pertaining to the accession to the Convention reference is made only to Canada and not to His Majesty. In any event the Order was issued(3) wherein, without any word of explanation, "The United Kingdom of Great Britain and Northern Ireland" was listed

(1) This Order superseded earlier Orders made under the same section of the Act and it is interesting to note that this particular one was issued to cover the accession to the Convention by His Majesty in respect to Newfoundland. This of course was before Newfoundland became a Province of Canada and it is not intended to give any consideration herein to the status of Newfoundland with respect to Commonwealth participation in the Warsaw Convention.

(2) S.I. 1948 - No. 1336.

(3) S.I. 1951 - No. 1386.

in the schedule as a High Contracting Party as was Canada and each on behalf of its own territory which was described as the United Kingdom and Canada respectively. Thus, in listing Canada and the United Kingdom as High Contracting Parties and as the Act provided that such listing should be considered to be "conclusive evidence of the matters so certified", the question of flights between Canada and the United Kingdom was apparently settled with respect to the law of the latter. As the Canadian Carriage by Air Act, 1939, had a similar provision for certification of the High Contracting Parties to the Convention, which said certification was deemed to be conclusive evidence thereof, it only remained for the Governor-in-Council to issue such an Order to clarify the law in Canada. This Order, published by way of Proclamation on the 13th of November, 1952,(1) listed Canada, the United Kingdom, and the various other Dominions as separate High Contracting Parties to the Convention. Thus, by the issuance of these two Orders, it would appear that any question that existed as to the nature of flights between Commonwealth countries which may have existed were settled for all practical purposes, for pursuant to the law of both Canada and the United Kingdom the said countries were then recognized as separate High Contracting

(1) The Canada Gazette, No. 18 Vol. LXXXVI

Parties.[1] There is, of course, always the possibility that an action with respect to carriage between Canada and the United Kingdom might be heard in a third jurisdiction, which would not be bound by the aforesaid Orders in Council. However it would appear to be extremely unlikely that the court involved would take it upon itself to question the constitutionality of the United Kingdom or Canadian legislation, the Orders in Council, or the manner of adherence to the Convention followed by those two countries.[2]

(1) For a more detailed discussion of the position of Australia and other Commonwealth countries see "Canada and the Warsaw Convention" - an address delivered by John Cobb Cooper, A.B., LL.M. Director, Institute of International Air Law, McGill University, to the Junior Bar Association of Quebec, January 24th, 1953. This address also contained an extremely interesting reference to an exchange of notes between the British and American Governments dealing with the interpretation given to the term "High Contracting Parties" as used in the Warsaw Convention.

(2) From the time of its inception the Warsaw Convention has been subject to a great deal of criticism and repeated efforts have been made from time to time to amend it. The latest of these takes the form of a Protocol to the Convention, which was drafted at the 9th Session of the Legal Committee of ICAO sitting at Rio de Janeiro in August and September 1953. This Protocol is to be the matter for consideration at a diplomatic conference being held at the Hague in September of this year, and Article 17 thereof is of interest in light of this study. It reads:

"The following new article shall be added to the Convention:-

42(1): In Article 37(2) and Article 40(1), the expression 'High Contracting Party' shall mean 'State'. In all other cases the expression 'High Contracting Party' shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

(2): For the purpose of the Convention the word 'territory' means not only the metropolitan territory of a State but also all other territory for the foreign relations of which that State is responsible."

The inclusion of this new Article would appear to be a belated attempt to clarify and prevent a repetition of the situation that has just been discussed.

CONCLUSIONS

To summarize it is submitted that although initially there may have been some justification for doubt as to the applicability of the Warsaw Convention to flights between Commonwealth countries generally, and Canada and the United Kingdom specifically, the same does not, for all practical purposes, hold true today. The conclusive action in this respect was the re-wording in 1951 of the previous United Kingdom Parties to the Convention Order and the Proclamation of Canada issued in 1952. As to the internal constitutional aspect it is contended that the legislation implementing the Convention is primarily concerned with the control of contracts of carriage by air and consequently, according to arguments advanced earlier, is intra vires of Parliament.

CHICAGO CONFERENCE

INTRODUCTION

When on September 11th, 1944 the United States of America issued an invitation to the members of the United Nations and the nations associated with them in the war, together with the European and Asiatic neutral nations, to attend a meeting in Chicago to discuss post-war civil aviation, Canada was unlike 1919 not only well prepared but had in fact seconded the request of the United Kingdom to the United States to call a Conference.

The opening plenary session of the Conference was convened on November 1st, the Canadian delegation consisting of the Right Honourable C. D. Howe, then Minister of Reconstruction, as Chairman, H. J. Symington, President of Trans-Canada Air Lines, and J. A. Wilson, Director of Air Services, Department of Transport, who were accompanied by an impressive retinue of advisers and technicians. However, in view of the magnitude of the project that was to be undertaken and the fact that there were not less than fifty other nations represented, the strength of the group would not appear to have been out of proportion. It was revealed at the Conference that various countries, notably the United States, the United Kingdom, Canada, New Zealand and Australia had been exchanging views on post-war civil aviation and in fact the Right Honourable C. D. Howe had on March 17th, 1944, tabled in the Commons a draft international air

transport convention, which was widely discussed in Parliament and in the press.(1) This was referred to by Mr. Howe in his opening address which commenced as follows: "Mr. Chairman and Gentlemen, an international air authority, established along the lines of the Civil Aeronautics Board of the United States, is the principal proposal which Canada places before this Conference. We are firm believers in healthy competition. We are convinced that it will develop most fruitfully under an international authority. We want to see free choice for the traveller between competing air lines; competition in service, but not in subsidies: /emphasis supplied/ a guaranteed minimum of routes and frequencies to the airline companies of all nations, large or small; the most frequencies, where need exists, whether a nation is large or small; the substitution of international regulation for national restrictions; and the complete absence of discriminations, preferences, exclusive rights, and arbitrary landing fees and charges."(2) What a contrast this was to the sentiments expressed by Canadian delegate A. L. Sifton twenty-five years before!

(1) Debates of the House of Commons, Session 1944, Vol. II p.1580

(2) Proceedings of the International Civil Aviation Conference, United States Government Printing Office, Washington, 1948, Vol. 1, p.67(a)

(a) Note: These records will hereafter be referred to merely as "Proceedings"

CANADIAN DRAFT

Of the four drafts submitted to the Conference[1] the Canadian draft was used as the primary basis for the discussions in Subcommittees 1 and 3 of Committee 1 of the Conference, being those on International Organization and Air Transportation Principles respectively.[2] This draft international air transport convention envisaged an international air authority, giving it a constitution and certain powers, its object being -

> "(a) to make the most effective contribution to the establishment and maintenance of a permanent system of general security;
>
> (b) to meet the needs of the peoples of the world for efficient and economical air transport; and
>
> (c) to ensure that, so far as possible, international air routes and services are divided fairly and equitably between the various member states."[3]

Other main principles of the draft were that the domestic air policy of a country would be left entirely up to that country to determine, that certain regional councils of the international authority would allocate air routes to air lines (which would be recommended by their countries) based on certain economic factors, the general recognition of the

(1) United States, United Kingdom, Canada and Australia with New Zealand

(2) Proceedings Vol. 1, p.647 Minutes of Meeting of Sub-Committee 1 of Committee 1, November 7, Document No. 102

(3) Proceedings Vol. 1, p.570

so-called Four Freedoms, and the establishment of general regulations and technical procedures. It is not intended to discuss in any further detail the Canadian draft here. Suffice it to say that it played a major part in the development of the final Convention and when that Convention is considered some of the sections thereof that were developed from the Canadian draft will be noted.(1)

FINAL ACT

The Conference sat for over a month during which it frequently appeared doomed to failure. On at least one occasion the plea of Mr. Symington had a considerable influence in the decision to make further attempts at conciliation.(2) Finally, however, general agreement was reached and on December 7th, 1944, the various documents that had been negotiated were opened for signature. These consisted of The Final Act of the International Civil Aviation Conference(3) together with its five appendices -

I. Interim Agreement on International Aviation
II. Convention on International Civil Aviation
III. International Air Services Agreement
IV. International Air Transport Agreement
V. Drafts of Technical Annexes

(1) It should, however, be noted at this time that the draft was set up as an inter-government agreement and the preamble commenced "The Government signatories hereto agree ....."

(2) Proceedings Vol. 1, p.453 - Symington's statement November 22, 1944

(3) Canada - Treaty Series, 1944 No. 36

The Final Act took the form of an agreement between governments and, after having recited the proceedings that took place at the Conference, stated that the aforesaid appendices had been formulated and that certain resolutions and recommendations were adopted. The Final Act in English was then signed by the delegates with the stipulation that another text would be drawn up in English, French and Spanish each of which would be of equal authenticity and that text would then be open for signature at Washington, D.C.

INTERIM AGREEMENT

The Interim Agreement on International Civil Aviation being Appendix I of The Final Act contained the following paragraph:

> "The undersigned delegates to the International Civil Aviation Conference, convened in Chicago on November 1, 1944, have affixed their signatures to the present Interim Agreement with the understanding that the Government of the United States of America shall be informed at the earliest possible date by each of the Governments on whose behalf the Agreement has been signed whether the signature on its behalf shall constitute an acceptance of the Agreement by that Government and an obligation binding upon it." (1)

This is known in international law as signing "ad referendum" and is used when the delegate regards the matter contained in the document to be beyond his authorized powers and consequently signs subject to approval by his home government.

(1) Article XVII

Actually such a procedure was unnecessary as far as Canada was concerned, for on December 1st, 1944, the Governor-in-Council issued an Order,(1) which authorized the issuance of Full Powers to H. J. Symington, enabling him to sign not only the Convention, but also the Interim Agreement and the Two Freedoms Agreement. Subsequently, on January 18, 1945, the Canadian Government announced its decision to accept the Interim Agreement. This was a foregone conclusion as the Interim Agreement provided that the Organization set up under it should have its seat in Canada.(2)

As is indicated by its title, the Interim Agreement was only intended to be a temporary measure and the Organization a provisional one. In fact the agreement itself provided that the period of its existence should not exceed three years and that its records and property be transferred to the International Civil Aviation Organization established under the Convention on International Civil Aviation when the latter Convention came into force.(3) In view of this and the fact that most of the terms of the provisional agreement were embodied in the permanent Convention, the Interim Agreement and the Provisional International Civil Aviation Organization will not be considered further.

(1) P.C. 1944/9084

(2) Article 1, Section 2

(3) Article 1, Section 3 and Article VII

CONVENTION ON INTERNATIONAL CIVIL AVIATION

This Convention, set out in Appendix II to The Final Act, like the other agreements negotiated at Chicago took the between-Governments form. It was at the suggestion of the United Kingdom and Canada that the term "Contracting State" was substituted for the term "High Contracting Party", (1) which is understandable in view of the doubts that arose from the use of the latter term in earlier Conventions. It should be kept in mind that this Convention was drafted at a time when the most terrible conflict in human history appeared to be approaching an end, and the eternal optimism of man is evidenced in the Preamble. Being only too aware of the awesome impact that aviation had had on the world the delegates expressed the following sentiment: "Whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security;". A cursory examination of the Convention reveals that the fundamental principles of Paris were not greatly changed, and the minutes of the proceedings at Chicago show that the various delegates recognized the great contribution that the earlier Convention had made to civil aviation.

The Convention itself is made up of four parts, divided into twenty-two chapters and ninety-six articles. In the same words as the Paris Convention it recognizes that

(1) Proceedings, Vol. II, p.1380

every State "has complete and exclusive sovereignty over the air space above its territory."[1] and similarly that "Aircraft have the nationality of the State in which they are registered",[2] but like the earlier Convention it excludes from its scope State aircraft.[3] Where the Paris Convention accorded freedom of innocent passage, this Convention only recognizes the right of transit or stops for non-traffic purposes on non-scheduled operations.[4] Article 12, which will be considered in more detail as relating to Canada, provides that the Contracting States will undertake to keep their own regulations in line with those established under the Convention. In this the delegates did not go as far as their predecessors, for under Article 39 of the Paris Convention it was agreed that the annexes which contained such regulations should have the same effect as the Convention itself. Chapter V, Conditions to be Fulfilled with Respect to Aircraft, encompasses Chapters III and IV of Paris and was inserted at the request of Sir Frederick Timms of the Indian delegation, who was later to become the United Kingdom representative on the Council. The Chapter on International Standards and Recommended Practices[5]

(1) Article 1

(2) Article 17

(3) Article 3

(4) Article 5

(5) Chapter VI

elaborates on the principles set out in Article 12.

Although Canada cannot take sole credit for developing the idea of an international body to regulate aviation there is no doubt that Part II of the Convention, setting up the International Civil Aviation Organization, owes a great deal to Articles I, III, IV, and IX of the Canadian draft.(1) Space does not permit a detailed study of the Organization but it should be noted that in view of the form the Convention took there is no question that Canada has one vote as do all the other contracting States in the Assembly, and another important difference from the earlier organization is that the body had certain powers of sanction.(2)

In spite of the high principles set out in the Preamble it is significant that the Convention includes an article that releases the Contracting States from the provisions of the Convention in the event of war but at the same time authorizes the Organization to enter into agreements with other world bodies with respect to the preserving of the peace.(3) Further, provisions are made for submission of disputes to the Permanent Court of International Justice.(4)

(1) Proceedings, Vol. II, p.1386

(2) Article 87 - Council Control over Airlines
Article 88 - Assembly Control of Voting Power of Contracting States

(3) Articles 89 and 64 respectively

(4) The International Court of Justice is now substituted for P.C.I.J.

As the Convention provided for ratification[1] it was signed by the Canadian Plenipotentiary on December 7, 1944, at the conclusion of the Conference.[2] The words of Adolph A. Berle, Jr., permanent President of the Conference, on that occasion should be of great satisfaction to Canadians. He said: "Let me also pay tribute with particular affection to the Delegation of Canada, which tirelessly worked to reconcile the different points of view. Indeed, to the Canadian thought and the Canadian draft we owe the language we are using, even to the phrase 'the freedoms of the air'."[3]

IMPLEMENTATION

It will be recalled that legislation to implement the terms of the Paris Convention was passed in Canada before the Convention had actually been ratified or even signed by it. However, similar steps were not taken with respect to the Chicago Convention. On September 7th, 1945 Mr. Howe moved in the Commons "That it is expedient that the houses of parliament do approve the interim agreement on international civil aviation signed by Canada on December 7, 1944, tabled on September 7, 1945, the convention on international civil aviation signed by Canada on December 7, 1944, tabled on September 7, 1945, and the international air service transit agreement signed by Canada on February 10, 1945, tabled on September 7, 1945, and that this

(1) Article 91
(2) Authority P.C. 1944/9084
(3) Proceedings Vol. I, p.111

house do approve the same." and on November 26, 1945 the Commons[1] and on December 5, 1945 the Senate agreed to the motion.[2] An Order in Council was issued authorizing the Secretary of State for External Affairs to ratify the Convention and subsequently the instrument of ratification in the name of the Government of Canada was executed on February 1st, 1946 by the Right Honourable William Lyon Mackenzie King. The Convention came into force pursuant to Article 91 on April 4, 1947.

The resolutions of the two Houses are of no significance other than to indicate that those august bodies gave their approval to Canada becoming a party to the Convention and cannot be considered to be the sanction of Parliament envisaged by Mr. Justice Lamont when in referring to an earlier treaty he stated: "The treaty itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the

(1) Debates of House of Commons Vol. LXXXIV No. 53, p.2528

(2) P.C. 1946/214 of January 22, 1946

subject. [emphasis supplied] Upon this point I agree with the view expressed by both Courts below, 'that in British countries treaties to which Great Britain is a party are not as such binding upon the individual subject but are only contracts binding in honour upon the contracting states.'"(1) It therefore remains to be determined whether at the time of ratification legislation existed that would empower the Federal Executive to fulfil the commitments entered into under the Convention or if there has been subsequent enabling legislation.

An examination of the Convention with a view to considering its contents with respect to Canadian constitutional law reveals that it relates to subjects some of which, such as patents,(2) obviously fall within the scope of the Federal Parliament, and others for which Parliamentary jurisdiction is less obvious. An example of the latter is the undertaking that airports which are open to public use by national aircraft shall be open also to aircraft of the other Contracting States,(3) for in Canada many airports are not federally owned, but are owned by municipalities, and such an undertaking by the state would definitely affect property and civil rights. However, there appears to be little

(1) Re Arrow River and Tributaries Slide and Boom Co. Ltd. 1932 2 D.L.R. 250 at p.260. This was an appeal heard by the Supreme Court of Canada with respect to the Ashburton Treaty

(2) Convention, Article 27 and Sub-heading 22 of Section 91 of the British North America Act

(3) Convention, Article 15

point in going through the Convention article by article, separating the subject matters thereof into the two categories, for it is contended that it is conclusively shown elsewhere in this paper that if Parliament has not enacted legislation to implement the Convention, it definitely has the power so to do. It will be recalled that in the Aeronautics Case the Supreme Court held that although Parliament had power under Section 132 of the British North America Act to pass legislation to enable Canada to fulfil its commitments made under the Paris Convention that that body had actually gone further than its authority in enacting Section 4 of the Aeronautics Act,(1) but that the Privy Council on hearing the appeal determined that such was not the case and that the powers granted to the Minister under Section 4 of the said Aeronautics Act were in line with the powers required by the Minister to implement the Convention. Further, the Judicial Committee hinted that even if Section 132 was not applicable, Parliament would have had power as the subject matter was one of national interest and importance.(2)

From the time of the aforesaid decision until the ratification of the Chicago Convention by Canada, the Aeronautics Act was only amended twice, and in both cases pertaining to the formation and duties of the Air Transport Board and not in a manner that would alter the position of Canada with respect

(1) See page 32

(2) See page 37

to international aviation agreements.[1] However, on June 30, 1950, some three years after the Convention on International Civil Aviation had come into force, Royal assent was given to legislation[2] which bestowed greater powers upon the Minister of Transport than those granted by the earlier Aeronautics Act.

Under this legislation the Aeronautics Act was amended in such a way that the duties of the Minister were broadened to authorize him "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;". It also authorized him to make regulations to control aircraft registered in Canada when they are operating over the high seas or in territory not within Canada; this would allow Canada to conform with the latter part of Article 12 of the Convention. Possibly the most important

(1) 1944-45, 8 Geo. VI, c.28, and 1945, 9-10 Geo. VI, c.9

A possible exception to the above statement might be taken with respect to the new Section 17 encompassed in the latter Act. This Section reads: "The powers conferred by this Part on the Board shall be exercised subject to any international agreement or convention relating to civil aviation to which Canada is a party."

(2) 1950, 14 Geo. VI, c.23

This legislation was passed some time before the publication of the Second Edition of Shawcross and Beaumont on Air Law, but nevertheless that publication omitted any reference to Canada with respect to legislation implementing the Convention. It is not known whether this was an oversight or whether the authors considered that the amendment to the Aeronautics Act referred to was not direct implementation of the Convention.(a)

(a) See Shawcross and Beaumont, Para. 113.

addition to the Minister's powers was contained in the new sub-section (i) of Section 4 of the Aeronautics Act, which empowered him to make regulations with respect to "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 such aircraft registered in Canada wherever such aircraft may be." This would permit adherence to the general principle set out in Article 12 of the Convention, which provides that each Contracting State will undertake to adopt measures to insure that aircraft flying within its territory and its own aircraft flying anywhere will comply with the local rules and regulations and further that it will keep its own regulations uniform in every possible extent with those established from time to time under the Convention. At the same time under Section 6 of the amendment the Air Transport Board was given power to control traffic and tariffs relating to any "international air service pursuant to any international agreement or convention relating to civil aviation to which Canada is a party".

CONCLUSIONS

It should be noted that the aforesaid legislation was passed before the Supreme Court handed down the judgment in the Johanneson Case; however, it is submitted that if there was any doubt as to the validity of the legislation before,

that there is no longer any room for it now that that case has been decided. It would appear that if at the time Canada ratified the Chicago Convention, or at the time the Convention came into force, the Federal Executive did not have the power to carry out the obligations entered into by Canada therein, that situation was remedied by the legislation of 1950. Further it is reiterated that the validity of the said legislation can no longer be questioned.(1)

INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT
AND INTERNATIONAL AIR TRANSPORT AGREEMENT

These two Agreements, set out as appendices to The Final Act, took the same form and both are dependent on the Convention on International Civil Aviation. Their Preambles prescribe: "The States which sign this ..... Agreement, being members of the International Civil Aviation Organization, declare as follows:" and in view of the fact that they were both opened for signature at Chicago on December 7, 1944, this would appear at first to be inconsistent, as at that time the said Organization did not exist. However, both Agreements contain clauses substituting P.I.C.A.O. for the permanent Organization until the Convention on International Civil Aviation comes into force.(2)

(1) See conclusions at end of Part II

(2) Article IV and Article VI respectively

The first Agreement provides:

> "Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air service:
>
> (1) The privilege to fly across its territory without landing;
>
> (2) The privilege to land for non-traffic purposes."

and the second these additional freedoms:

> "(3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
>
> (4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
>
> (5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State, and the privilege to put down passengers, mail and cargo coming from any such territory."

These so-called freedoms or privileges are now generally referred to according to the numbers which have been prefixed to them, e.g. the Fifth Freedom. Apart from the greater number of privileges granted in the second, the Agreements are otherwise fundamentally the same and the other terms merely provide for the application of the freedoms and machinery for settling disputes. The latter makes full use of the International Civil Aviation Organization which in turn is authorized under Article 66 of its Charter to consider submissions of this nature.

The privileges set out in the Agreements were granted by the contracting States and would appear to be of a nature

that any autonomous government could grant, certainly as far as Canada is concerned there is little doubt that the Federal Executive had the power to authorize the exchange and no constitutional problem appears to arise therefrom. Actually Canada has not yet agreed to be bound by the second plan and such an event seems unlikely as many of the States which became parties to it initially have since denounced it. However, on February 10, 1945, Canada signed and indicated its acceptance of the International Air Services Transit Agreement.(1) It should be pointed out that the First and Second Freedoms are generally incorporated in the various bi-lateral Agreements Canada has entered into with other States.

GENERAL CONCLUSIONS ON CHICAGO

The decision of the Government of Canada to participate wholeheartedly in the proceedings at Chicago in 1944 was undoubtedly a happy one; her delegates played a leading part in the drafting of the final Act, perhaps partially due to Canada's long history of internal conciliation which has developed an attitude of mind in her public servants that is not undesirable at international conferences. As has been noted Canada has become a party at various times to all the Agreements negotiated at Chicago with the exception of the International Air Transport Agreement. It is submitted that in following this course the Federal Executive

(1) It is not known why this Agreement was not signed for Canada on December 7, 1944 for it provided for "ad referendum" execution and in any event Mr. Symington had been authorized to sign by P.C. 1944/9084

was acting for the general good of the country and, further, in accordance with the constitutional powers of the Dominion.

ROME CONVENTION, 1952

INTRODUCTION

On January 7th, 1955 the Governor General of Canada opened the Second Session of the 22nd Parliament at Ottawa. In his speech from the throne, His Excellency said, inter alia, - "You will be asked to approve a convention signed by the members of the International Civil Aviation Organization which fixes the responsibility for damage caused to third parties by foreign aircraft."(1) Perhaps it is picayune to point out that this statement was somewhat misleading in view of the fact that at the time it was made many members of ICAO had not signed the Convention and that Parliament would be required to do much more than merely approve it. In any event on January 11th, Bill "F" intended to implement the Rome Convention, 1952 was given its first reading in the Senate. In it the proposed Act is cited as the "Foreign Aircraft Third Party Damage Act", Section 3 whereof provides that the Convention is approved and declared to have the force of law in Canada, but only as far as the type of damage contemplated by Article 1 of the Convention is caused in the territory of Canada by aircraft registered in another Contracting State. The Act also provides that it shall come into force on a day to be fixed by proclamation of the Governor-in-Council and authorizes him to make regulations for carrying out the purposes and provisions of the Act and the Convention, which is set out as a schedule. An examination of Hansard reveals that

(1) Hansard - Vol. 97 No. 1

Senator J.W. de B. Farris moved the second reading of the Bill and explained it to the Senate. It received little opposition, and questions were generally restricted to inquiring as to the scope of the Convention. Amongst these was one made by one of the female members of the Upper House who inquired whether the reference to "damage on the surface", referred to in Article 1, meant damage "to the 'surface' of the person only?"! The Bill did not go to committee, perhaps due to the high esteem in which the members held Senator Farris with regard to constitutional matters, and on March 15th, 1955, it was given its third reading, passed and the Clerk ordered to go down to the House of Commons and acquaint that House that the Senate had passed the Bill and desired their concurrence. Although the action of the Commons cannot be predetermined it is submitted that in any event an analysis of the Convention in the light of Canadian constitutional law will be of interest.

On October 7th, 1952, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was opened for signature at Rome. This Convention, popularly referred to as The Rome Convention of 1952, or the Second Rome Convention, was adopted by the first international conference on private air law convened under the auspices of the International Civil Aviation Organization after years of international negotiations. It had been preceded by an earlier Convention, intended to govern similar situations, which was also finalized at Rome, but in 1933. This latter Convention had been entitled An Inter-

national Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, to which a Protocol, relating to insurance requirements, had been signed in Brussels in 1938. Canada never became a party to this Convention and in fact by 1952, when the new Convention was opened for signature, it had only been ratified by the minimum number of states required to bring it into effect and as these were so widely separated and had at that time little international aviation[1] the general application of the Convention was negligible. However Canada had taken an active part in the development of the new Treaty and although its duly authorized plenipotentiary did not sign the Convention in Rome it was subsequently signed in accordance with its Article 31 by the Minister of Transport on behalf of Canada at the headquarters of the International Civil Aviation Organization at Montreal on May 26, 1954.[2]

Presumably as Canada has signed the Convention and the enabling legislation is at present being considered by Parliament it is intended that it will be ratified at some future date. In any event, its incorporation into the laws of Canada has already

(1) Belgium, Brazil, Guatemala, Roumania and Spain.

(2) As far as is ascertainable authority for this was contained in a Minute of the Cabinet dated February 18, 1954, this of course was not published. Apparently the prior approval of the House was not obtained.

been recommended by The Canadian Bar Association.[1] The records of that body do not reveal how much consideration was given to the constitutional aspects of such a proceeding; but it is presumed that the majority members felt that Parliament had the required power, for it is suggested that amongst Canadian lawyers it is generally recognized that the possibility of implementation of international treaties in Canada by means of uniform provincial legislation is most remote; Lord Atkin to the contrary.[2] It is therefore intended herein to examine the said Convention with the sole object of considering whether or not it falls sufficiently within the jurisdiction of Parliament to justify the Government committing Canada to the obligations of a Contracting State, as a consideration of the merits of the Convention itself could well be the subject of an independent

(1) At the thirty-sixth annual meeting of The Canadian Bar Association held at Winnipeg, Manitoba, August-September 1954 the following resolution was passed:

"Whereas Canada has signed or adhered to the International Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, known as The Rome Convention and signed at Rome 7 October, 1952

The Canadian Bar Association urges the early implementation of that Convention by Canada."(a)

Although that learned body apparently was not aware whether the Convention had been merely signed by Canada or actually adhered to, it is suggested, with all due respect, that it should have had knowledge of the fact that in the former event ratification was still required before Canada became a Contracting State and implementation feasible.(b)

(a) Proceedings of The Canadian Bar Association, Volume 36, 1954
(b) Article 30

(2) See page 43

study.[1]

THE CONVENTION

The Rome Convention of 1952 is made up of a preamble, six chapters, and an attestation clause; broadly the chapters cover the following aspects:-[2]

Chapter I - Principles of Liability.

Under this the absolute liability (with certain exceptions) of the operator (defined) is established; however in some circumstances there may be joint and several liability.

Chapter II - Extent of Liability.

This provides for a liability limited by the weight of the aircraft (with certain exceptions, e.g. damage caused with deliberate intent) and the formula for distribution amongst victims.

Chapter III- Security for Operator's Liability.

This describes the various acceptable forms of security the operators may provide. If the form takes that of insurance, a right of action and a priority for payment is established for the victims against the insurers and the latter's defences are defined.

(1) It is of interest to note that from a practical point Canadian air carriers are not directly concerned with the constitutionality of the legislation for it only applies to foreign carriers in Canada.

(2) Unfortunately space does not permit the inclusion of the whole text of the Convention and therefore only those parts that are essential to the study will be quoted.

Chapter IV - Rules of Procedure and Limitations of Actions.

As its title suggests, this Chapter provides for jurisdiction, prescriptions, execution, costs, interest et cetera.

Chapter V - Application of the Convention and General Provisions.

This defines the scope of the Convention and certain terms.(1)

Chapter VI - Final Provisions.

This provides for participation in the Convention and specifically prohibits participation with reservations.

From this summary it is quite apparent that the Convention touches on many matters coming within the classes of subjects enumerated in Section 92 of the British North America Act - 1867, and reserved thereunder to the provincial legislatures. Some of the more obviously contentious articles will be listed and considered specifically and then as a whole.

Article 1 reads in part:

> "Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention ....."

and Article 2(1) reads:

> "The liability for compensation contemplated by Article 1 of this Convention shall attach to the operator of the aircraft."

(1) Article 28 is of interest in that it requires that notification be given I.C.A.O. of the legislative measures taken if they were necessary to give effect to the Convention in any Contracting State.

Reading these two articles in conjunction it is hard to conceive of any more obvious example of a matter falling within the description Property and Civil Rights. Similarly Articles 6 and 9 in offering a form of defence in one case, and specifically absolving the operator from all liability in the other, deal with matters in the same field, the former referring to third party negligence, and the latter reading in part:

> "Neither the operator ..... nor their respective servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than expressly provided in this Convention ....."

Again Article 11 of Chapter II sets a maximum amount which, with certain exceptions, the liability for damages giving a right to compensation cannot exceed. The rest of the Chapter is concerned with the aforesaid exceptions and a formula for pro rata distribution in certain circumstances, a subject falling within the provincial sphere.

Although Chapter III deals with insurance and other forms of security required to establish the financial responsibility of operators of aircraft, Article 15 of that chapter governs the requirements of a Contracting State in that respect and therefore it is submitted that this could not be termed a matter coming under the heading Property and Civil Rights in the Province. However, the same cannot be said of Article 16 which establishes a relationship between the third party and the insurer completely foreign to the common law, or Article 18

which reads:

> "Any sums due to an operator from an insurer shall be exempt from seizure and execution by creditors of the operator until claims of third parties under this Convention have been satisfied."

On first consideration of the Rome Convention, it is felt that a Canadian lawyer would find Chapter IV thereof the most difficult to reconcile with federal legislation. Article 20(1) commences - "Actions under the provisions of this Convention may be brought only before the courts of the Contracting State where the damage occurred.", but paragraph (4) thereof provides for the recognition of the judgments of those courts in the other Contracting States and the enforcement thereof on compliance with the formalities described by the laws of those states.(1)

The chapter also sets out various time limitations; Article 21 provides that actions are subject to a limitation of two years from the date of the incident that caused the damage and paragraph (12) of Article 20 sets out five years after the judgment as the period within which an application for execution must be made. However, although the Convention

(1) Paragraph 7 of this Article 20 presents a problem. It reads - "The court to which application for execution is made may also refuse to issue execution if the judgment concerned is contrary to the public policy of the State in which execution is requested." Frequent judicial warnings have been given with respect to the caution with which the argument of "public policy" should be used as a basis for judgments, and it would seem to be even more apparent when the executive and legislative branches have both seen fit to enter into and implement the Convention.

sets out these prescriptions in certain cases, the law of the Court trying the action is to be used in calculating them.(1) The old common law maxim actio personalis moritur cum persona is also voided by Article 22, which allows an action to lie against those legally responsible for the obligations of a deceased person who was liable. It is difficult to determine what sections of the Chapter could be considered substantive and what part procedural law,(2) but in any event a great deal of it is intimately connected to the subjects enumerated in Section 92 of the British North America Act.

The next chapter defines the conditions under which the Convention applies. Under it the injured party can only look to the Convention for his remedy when the aircraft causing the damage is registered in the territory of another Contracting State,(3) but even then it is of no avail if the liability is subject to a contract between the two parties, or workmen's compensation.(4) This, indirectly, is also an encroachment on the civil rights of the individual, for although it gives him certain rights at the same time it denies him others which may be part of his legal heritage.

The final operative chapter is not of interest in the light in which the Convention is being examined.

(1) Article 22(2)

(2) See page 146

(3) Article 23

(4) Article 25

FEDERAL OR PROVINCIAL JURISDICTION

From the foregoing it becomes apparent that many, and certainly the majority, of the pertinent parts of the Convention, come within the classes of subjects enumerated in Section 92 of the British North America Act, generally under the heading of Property and Civil Rights in the Province. It is necessary, however, to look beyond this feature to determine whether the incorporation of the Convention, without reservations, into the federal law is ultra vires of Parliament, for we have already seen that the mere fact that, if enacted separately one or more of the parts of an act would not fall within the federal field, does not necessarily make the legislation as a whole invalid. In should be pointed out nevertheless that the Convention must be considered as a whole, for by its very terms it must be accepted without reservation (1) and therefore to conclude that Parliament can enact legislation with respect to some but not to all of the subject matter of the Convention would be of academic interest only.

Fundamentally, with what is the Convention concerned? It is suggested that its prime intent is to establish certain rights between two people, one of whom was damaged by an aircraft which the other operated. Obviously a law setting out those rights will be in relation to property and civil rights, at least at the place where the damage occurred. But one must also consider the way in which the damage must occur;

(1) Article 39

it must have been directly caused by the operation of an aircraft and nothing else. Can it then be said that the purpose of the Convention is to regulate liability arising out of the operation of aircraft? It is submitted that this is the case, for without aircraft the whole object of the Convention would vanish, its very reason for conception evaporate. If this is accepted, is it then true to say that in pith and substance the Convention deals with aeronautics? Again it is submitted that such is the case, for although undoubtedly property and civil rights are rudely affected, this in itself does not establish them, with respect to the distribution of legislative powers under the British North America Act, as the prime subject of the Convention, for there are many other objects enumerated in both Sections 91 and 92, which have been subject to legislation which affected those rights but was considered intra vires nevertheless.

If the Convention does not in pith and substance deal with aeronautics, is there any other way in which the Courts could assert that Parliament has jurisdiction to pass enabling legislation? Obviously Section 132 of the British North America Act cannot be looked to for authority as long as the last Privy Council observation on Canadian participation in international agreements is looked to for guidance, for therein it was contended that the said section would only apply when Canada was bound to a treaty as part of the British Empire.(1) If of

(1) 1937 A.C. 326 at p.349-50 and see Thesis page 42

course the alleged obiter dicta in the Radio Case decision[1] or the lead of the Chief Justice in the Johannessen Case[2] were followed the problem would present no further difficulties; however, such a possibility is remote. It has already been noted that the trend in the highest courts has been to hold that if the subject matter of the legislation is from its inherent nature the concern of the Dominion as a whole then it falls within the jurisdiction of Parliament.[3] Before considering this doctrine further a quotation from the last century is apt, for in 1896 Lord Watson gave the following caution - "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."[4]

Even if the emergency doctrine which Russell v. The Queen is frequently erroneously credited with establishing,

(1) See page 39

(2) See page 55

(3) See page 46 - Temperance Case

(4) A.G. Ont. v. A.G. Can., 1896 A.C. 348 at p.361

had not been recently refuted both in judgment[1] and text,[2] it could hardly be said that the number of foreign registered aircraft causing damage to third parties on the ground in Canada has reached such proportions as to constitute a national emergency. That argument in itself, however, does not close the door to establishing that Parliament has power to enact legislation with respect to the Rome Convention. If aeronautics is rejected as not being the pith and substance of the Convention, and subsequently authority for the legislation under the Peace, Order and Good Government aspect of Section 91 of the British North America Act is denied, perhaps the very adherence to the Convention by Canada should be considered. In Part I it has been established that Canada has the power to enter into international commitments binding on the country as a whole. It is submitted, therefore, when the executive branch of the federal government deems it advisable to enter into such an obligation its fulfilment immediately becomes a matter of national concern and therefore one rightly falling subject to the jurisdiction of Parliament under the said Peace, Order and Good Government phrase of Section 91. The spontaneous answer to this, of course, is that although the executive has the power to enter into international commitments, it has no legal right to enter into commitments where there is no reasonable guarantee that they can be implemented by a valid

(1) See page 46

(2) The Distribution of Legislative Power in Canada - Frederick P. Varcoe. The Carswell Company Limited, pp. 60 to 69.

parliamentary enactment. But if the executive errs it has, under the Canadian system of government, to answer to Parliament, which in turn answers to the people, and so Parliament has the power to determine whether a treaty should have been entered into. With respect to the Rome Convention, at the time of writing it has not yet been determined conclusively whether Parliament will give its approval; if it does not, then Canada will presumably refrain from ratifying the Convention, or if it has already done so by then it will be obliged to denounce it. On the assumption that it will be incorporated into the laws of Canada, which appears certain in view of the Governmental majority in both Houses, the final step in establishing the constitutionality of the act would be its consideration by the courts. It has been noted that this may be brought about indirectly through litigation or by a direct reference;(1) in any event, it is the duty of the court to consider the matter with a purely legalistic approach. Now it has been reasonably well established that if the matter subject to the controversial legislation is in its inherent nature one of national concern, then it is a fit subject for federal legislation, and it is herein submitted that the representatives of the people, in Parliament assembled, are the best qualified to determine if a subject meets those requirements. Thus by inference Parliament in enacting the legislation would be expressing the opinion

(1) See page 26

that the subject matter thereof was of national concern. This theory can be applied either with respect to the Convention per se, which is incorporated in toto in the Bill, or the contents thereof.(1)

THE FORUM

It has been said earlier(2) that on first consideration Chapter IV of the Convention would be the hardest to reconcile with federal legislation. Article 20(1) restricts actions under the Convention to "the courts of the Contracting States where the damage occurred." If this is to be interpreted literally, it might be suggested that as they are presently constituted no court in Canada could be considered to have jurisdiction to hear an action under the Convention except in appeal, for if Canada is the Contracting State in question, then the only courts with jurisdiction under Article 20(1) would be a Court of Canada, and the British North America Act has distinguished between Courts of Canada and Provincial Courts.(3) That is the provincial courts that would normally have jurisdiction might not be considered to be "courts of the Contracting State." Thus, the latter would not be empowered under the Convention and the former, being the Supreme Court and the Exchequer Court would not have jurisdiction under their present constitutions. However,

(1) The Distribution of Legislative Power in Canada - Frederick P. Varcoe, at p.164

(2) See page 138

(3) Section 92(14) and Section 133, the latter of which refers to the use of French and English in "any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec".

apart from the solution of establishing a federal Court or extending the authority of an existing one to hear all matters pertaining to aeronautics[1] or at least those pertaining to Dominion legislation with respect thereto, it is felt that the problem is not insurmountable even if such an extreme interpretation was given. In Atlas Lumber Co. v. A.G. Alta. and Winstanley, Rinfret J. said - "But it has long been decided that, with respect to matters coming within the enumerated heads of Section 91, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent."[2] and his reference to "enumerated heads" should not disallow the application of the same ruling to matters subject to federal legislation under the introductory paragraph of Section 91 of the Canadian Constitution. It is also suggested that with respect to federal legislation the provincial courts could be considered as ad hoc Dominion tribunals, and one anonymous authority stated - "there is the view that the Parliament of Canada, in imposing duties on provincial courts, constitutes them Dominion courts under s.101 qua those duties."[3]

(1) Under authority of Section 101 B.N.A. Act 1867 which reads "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the better Administration of the Laws of Canada".

(2) 1941 - SCR at p.100

(3) Constitutional Law - Provincial Courts Exercising "Dominion" Jurisdiction - Whether Dominion or Provincial "Procedure" Applicable. 1945 23 Can. B.R. 159 at p.160

Another aspect of Chapter 4 of the Convention that may cause concern is that relating to what might be considered to be procedure and thus being designated to the provincial legislative field.(1) The line dividing substantive law from that of procedure is generally difficult to define and the authority quoted in the last paragraph wrote - "Any attempt to separate the substantive from the procedural is at best artificial, and to adopt the pro-provincial view would mean that Dominion legislative authority under the enumerations of s.91 must be fitted into the moulds of provincial procedural regulations."(2) In any event we have the authority of Rinfret J. as last cited and one of the earliest Canadian appeals to the Privy Council(3) that Parliament can regulate the proceedings in the provincial courts with respect to federal legislation. Thus it can be seen that even if Chapter 4 of the Convention, together with other parts thereof, appears to affect matters falling within the enumerated heads of s.92 of the British North America Act this in itself does not make Parliamentary implementation of the Convention ultra vires, for legislation in respect to those parts is merely ancillary to the general purpose of the enactment, whilst at the same time being

(1) B.N.A. Act, s.92 (14)

(2) Constitutional Law - Provincial Courts Exercising "Dominion" Jurisdiction - Whether Dominion or Provincial "Procedure" Applicable. 1945 23 Can. B.R. 159 at p.161

(3) Cushing v. Dupuy 1879-80 A.C. 409

an essential part thereof for it is part and parcel of the Convention and consequently of the legislation.(1)

SUMMARY

To summarize it is contended that Parliament has power to pass legislation which will make the Rome Convention a part of the law of Canada. This power could be based on that part of Section 91 of the British North America Act that authorizes legislation for the Peace, Order and Good Government of Canada, which has been judicially interpreted to cover matters which from their inherent nature are of national concern or have reached such dimensions as to affect the body politic of Canada. It is submitted that the said Convention could meet these descriptions either as concerning a matter which is in pith and substance aeronautics, or as an international treaty that Canada has become a party to, or even as being a matter which Parliament in its wisdom has deemed to have those required characteristics.

(1) The Distribution of Legislative Power in Canada - Frederick P. Varcoe at p.54

BI-LATERAL AGREEMENTS

EXAMPLES

Having considered some of the multi-lateral agreements that Canada has become a party to, and the forms that they take, consideration will now be given to the more common type of aviation arrangement entered into by countries, namely the bi-laterals. With Canada, they have generally followed one of two forms, the between-Governments agreement or the more informal Exchange of Notes. Of the more recently negotiated bi-laterals, the agreement between Canada and Japan is a good example of the former, whereas the Canada-Mexico arrangement follows the latter form. Again, these forms may themselves be placed in one of the three categories developed in aviation circles, which have been given the descriptive titles of "Chicago type", "British type" and "Bermuda type". The first, of course, was prescribed in the Final Act signed at Chicago in 1944, the second follows the form of a United Kingdom-Union of South Africa Agreement in 1945, and the latter derives its name from the form developed at Bermuda by the United Kingdom and the United States of America in February, 1946.(1)

(1) For a more detailed description of the contents of these various types of agreements, see Shawcross and Beaumont on Air Law, 2nd Edition, Paragraph 301 et seq.

The contents of these agreements vary, of course, according to the form used and the desires of the parties, but the Canada-Mexico agreement entered into in Mexico City on July 27, 1953,(1) can be considered to follow the normal lines of an Exchange of Notes and contain the kind of terms generally agreed to. The initial Note was addressed by the Canadian Ambassador to the Mexican Minister of External Relations, in it a reference is made to the desire of both countries to enter into an agreement and to establish air services between their respective territories, and the prior discussions by their respective Government Officials. The agreement previously reached by the said officials is then quoted; it sets out a list of definitions, the rights exchanged, the recognition of the domestic law of each party, the desire for fair play and economic operation, tariff requirements, an arbitration procedure and provisions for amendment. Attached thereto is a schedule designating the routes to be followed. The Note concludes with the proposition that if the conditions are agreeable to the Mexican Government that the Note, together with the Minister's reply, will constitute an agreement between the Government of Canada and the Government of Mexico. The Mexican Minister's Note accepting the agreement was forwarded the same day. It is apparent that although the informal Exchange of Notes was utilized, in effect it is just as

(1) I.C.A.O. Reg. No. 1018

binding as a more formal commitment, for the Notes themselves express the agreement reached by the two Governments.

The Canadian agreement with Japan contains almost identical conditions as those in the Mexican bi-lateral; however, as stated aforesaid, it takes the form of an agreement between governments. The Preamble commences "The Government of Canada and the Government of Japan, ... have accordingly appointed their respective representatives, who have agreed as follows:" then follow the terms of the agreement, the last of which, being Article XVIII, reads: "The present Agreement shall be approved by each Contracting Party in accordance with its legal procedures, and the Agreement shall enter into force on the date of exchange of diplomatic notes indicating such approval." Then the duly appointed representatives have affixed their signatures. It will be seen that although the form of the agreement is different from that of the Mexican arrangement its purport is the same, and it in turn requires an Exchange of Notes to become operative.

Another bi-lateral agreement recently entered into by Canada was one with Peru.(1) It too took the between-Governments form, but varied to a degree from the Japanese agreement in that the Plenipotentiaries for the two Governments are set out in the Preamble and the last article of the terms requires that the "Agreement shall be ratified

(1) This agreement has not yet been registered with I.C.A.O.

in conformity with the constitutional requirements of each Contracting Party and shall come into force on the date following the exchange of instruments of ratifications, which shall take place in Lima as soon as possible."

CONCLUSIONS

From this very cursory examination of three bi-lateral agreements recently executed by Canada, one can see that at this date no single fixed form is prescribed, partly because the constitutions of the other countries may entail the employment of different styles. It is submitted, however, that this is of little purport as the treaty-making power is part of the Royal Prerogative, and the form used is up to the discretion of the Queen's Ministers. In any event when the terms have been agreed to by Canada, whether by ratification, execution, or exchange of notes, she is bound by them. Unlike the United States, where under its Constitution, certain international arrangements have to be submitted to the Senate for its approval before they are binding upon the country, Canada follows the British system, whereby the right to become a party to international commitments remains in the Crown. In the United Kingdom the only problem remaining for the executive after accepting such commitments is the obtaining of Parliamentary approval and implementation if a change of the municipal law is required. However, in Canada the problem of the executive

is enhanced in that it must be determined whether the obligations incurred fall within the Federal legislative field. This aspect has been considered in more detail elsewhere in this paper.

PART IV

CONCLUSIONS

"In a country with a federal constitution it is necessary at the outset to consider whether the sovereignty so established is exercisable by the federal or by the provincial or state authorities, and this question has been much debated in the United States. It presents, however, little difficulty in Canada. The necessity for governmental interference on any cognate subject did not exist in 1867, and in the absence of any subject of exclusively provincial legislation expressed in section 92, which would necessarily include the use of the airways, that subject would fall within the residuum of powers given to the Dominion. Even the residuary clause need not, however, be alone relied upon. The tenth of the classes of subjects allotted to the Dominion, namely, navigation and shipping, seems clearly to include it. The air is like the sea in pathlessness. In its relation to land surface, it perhaps approximates more closely to a navigable river, but control of the use of both has, so far as legislative jurisdiction in Canada is concerned, been confined to the Dominion. There appears to be no reason for refusing to extend the application of the words of the British North America Act to include everything comprehended within their common signification, and the common terms relating

to navigation have all been applied to the navigation of the air with the same meanings as they bear in relation to the navigation of the waters of the earth. Even if neither the residuary powers of the Dominion nor the words 'navigation and shipping' were sufficient to confer jurisdiction over the air on the Dominion, section 132 of the British North America Act, conferring upon the Dominion, all 'powers necessary or proper to performing the obligations ..... arising under treaties between the Empire and ..... foreign countries,' would, as will appear later, in view of the ratification of the Convention Relating to International Air Navigation, give wide powers to the Dominion."

These words were spoken by Colonel O. M. Biggar, who had been a member of the Canadian delegation at the Paris Peace Conference, when addressing the annual meeting of the Canadian Bar Association in 1921.(1) They were in a sense prophetic for although the "navigation" aspect has been temporarily rejected it remains to be advanced again if, for some reason, the other two grounds for Federal control are not available. However, it is felt that this is unlikely even though Section 132 is momentarily in eclipse and it is hoped that this paper has substantiated such a contention.

The first two Parts covered separate and yet completely complimentary aspects of the essential require-

(1) The Law Relating to the Air by Col. O. M.Biggar, K.C., Proceedings of Canadian Bar Association, Vol. 6, 1921, p.197.

ments for valid participation in international contracts, namely, the capacity to enter into a binding commitment and the power to fulfil it. Without both, a country, like an individual, is severaly handicapped. As to the first, there is obviously no doubt that Canada, since the Statute of Westminster, 1931, has had full capacity to enter into any kind of international agreement as a fully sovereign nation. However, although 1931 may have witnessed the final recognition of this independent status, which was achieved by a series of almost imperceptible changes that after being established were sometimes recorded, it is submitted that in fact Canada had the capacity at least as early as the Imperial Conference of 1923. From that time on the mere selection of the form to be used should have indicated whether the Dominions intended to act as independent political entities. Admittedly, however, we see in the Warsaw Convention one glaring example of inconsistency in this respect; that Convention, signed in 1929, appears generally to follow the Heads of States form, in spite of the fact that at the Imperial Conference of 1926 it was agreed that such a form was not to be used if it was intended that the agreement be binding on the British Commonwealth members inter se. Also there is evidence that the form was requested by the British delegation, although it was subsequently signed independently by the delegations from the three Commonwealth countries. Nevertheless this action can be considered, in view of subsequent developments, to have

been a single incident rather than establishing a precedent. In any event, if it is found necessary in the future to use the Heads of States form in order to meet the requirements of one of the non-Commonwealth countries, it is suggested that this should present no real difficulty, for even if the doctrine of the indivisibility of the Crown is upheld it should not nullify the specific intent of the parties especially if that intent is clearly set out in the agreement. In other words, a statement to the effect that the agreement is to be binding upon the Commonwealth inter se should make it so for all practical purposes.

Although the development of Canada's capacity to contract has been steady since Confederation, and is now complete, the situation with regard to the second requirement of contracting is not so definite. In Part II six cases were examined in detail, all of which pertained directly or indirectly to the ability of Parliament to fulfil by the required legislation the international aviation commitments entered into by Canada. It is submitted that if the precendents laid down in those judgments are followed in determining the validity of Federal legislation that Canada, to date, has not entered into any agreements she is incapable of adhering to, and that her actions should not be unduly restricted in the future. It has been shown that aeronautics are judicially recognized as having attained such dimensions as to affect the body politic and that subjects of this nature are fit matters for Federal

legislation. Such legislation is enacted under the authority of Section 91 of the British North America Act and is valid even if it results in "incidental interference with the free use of property". A very obvious although frequently overlooked fact should perhaps be pointed out here, namely, that aviation is impossible without the use of real property, and this situation will continue until man is able to conceive a space vehicle in space. Until then, aviation has three essential requirements, the land, the atmosphere, and the vehicle. If this is kept in mind, it will become fully apparent how nonsensical it is to divorce aeronautics from the use of property, and further, how Provincial control of property and civil rights that restrict aerial operations is ultra vires.

In spite of the aforesaid, it is admitted that there are doubts as to the extent Parliament can legislate with respect to matters which, were they not connected in some way with aeronautics, would be reserved to the Provinces. The emancipation of Parliament within Canada has not kept pace with the rise of Canada within the Empire or internationally. Ever since the Senate of the United States failed to approve that country becoming a member of the League of Nations the other countries of the World have been painfully aware of the uncertainty which casts its shadow over the United States international negotiations. However the Senate at least has the power to approve the acceptance of international commitments,

and in so doing insure their performance within the United States, but such is not the case in Canada at the moment. This perhaps is not generally recognized abroad, possibly due to the caution which the Federal executive has exercised before commiting itself; nevertheless, if as a result of one or two unfortunate judgments, Canada found that she was unable to act as was agreed, the result might be disastrous, for her position in the world is not such that the other nations would find themselves obliged to deal with her whether or not performance was guaranteed. In view of this, it is submitted that it is essential that the right of Parliament to pass enabling legislation with respect to treaty commitments be recognized. If this requires an amendment to the British North America Act, then an effort to do so should be made, but again it is submitted that such action is not necessary, and that the Act, if given a practical interpretation, contains all that is required. It has already been shown that the judicial committee of the Privy Council and a former Chief Justice of Canada have concluded that international agreements to which Canada became a party individually and treaties adhered to by the British Empire amount "to the same thing". If such is the case then Parliament has under Section 132 of the Act the authority to implement international agreements. However, if the courts of Canada are reluctant to give this sensible interpretation to the Act because of the decision delivered by Lord Atkin in The Social Legislation References, then it is submitted that they

should consider international agreements to be a particular class of matter which, as it is not exclusively reserved for the legislatures of the Provinces, is automatically a fit subject for Parliamentary control.

In Part III an examination of the four most important multi-lateral aviation agreements was made and even in the comparatively short period of time they embrace, a definite change in the status of Canada is evident. In 1919, at Paris, she played a very minor and somewhat reticent role probably only becoming a party to the Convention because she was a part of the British Empire. Ten years later when the negotiations were carried on at Warsaw she refrained from taking part, which in itself was a sign of growing independence. At Chicago in 1944 Canada not only acted as a completely separate political unit, as did the other Dominions, but in fact played one of the leading parts in formulating the new charter for world aviation.

Of the major agreements examined two pertain to what might be defined as public international law and the others to private international law. It could be argued that of these, adhesion by Canada to the former was perhaps more justified in that they were primarily concerned with the relationship between countries although inadvertently affecting property and civil rights, whereas the latter were designed fundamentally to control the relationship between individuals. Nevertheless, it is

contended that it has been shown that even the Rome Convention of 1952 can be validly implemented by Parliamentary legislation, although undoubtedly it contains provisions that by themselves embrace matters reserved to the Provinces under the Canadian Constitution.

Before concluding one point that is frequently overlooked should be made and that is that for almost forty percent of Canada no problem exists respecting the right to control aviation for under Section 4 of the British North America Act, 1871,[1] the Yukon and Northwest Territories fall fully within the jurisdiction of Parliament. However, it is equally certain that in the Provinces the question of jurisdiction will be raised from time to time and seldom has this difficult constitutional problem been so delightfully understated than as by Norman MacKenzie, President of the University of British Columbia when as a student in 1925 he said: "Another point that occurred to me was the difficulty that is continually cropping up, even in the field of aviation, of undertaking international commitments that may affect the interests guaranteed to the Provinces by the B.N.A. Act. A Federation has advantages, but for effective action in external affairs it does create difficulties."[2]

(1) Imp. 34-35 Vict. c.28

(2) Congress of Laws of Aviation, N.A.M. MacKenzie, 1926 Canadian Bar Review p.29. A report on the seventh International Congress on the Laws of Aviation held at Lyons, France, in September 1925.

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* This does not include statutes, law reports, documents or records the citations of which are included in the footnotes.

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ADDENDUM

"P.C. 613

"Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 4th March 1921.

"The Committee of the Privy Council have had before them a Report, dated 17th February, 1921, from the Secretary of State for External Affairs, to whom was referred a telegraphic despatch from the Right Honourable the Secretary of State for the Colonies, dated the 26th January, 1921, relative to the ratification of the International Convention for Air Navigation.

"The Minister recommends with the concurrence of the Minister of Militia and Defence, that the Canadian Government accept the proposals set forth in Lord Milner's despatch as satisfactory, and consent to ratification subject to a reservation to the effect that Article 5 is not to be regarded as affecting any reciprocal arrangements which Canada may desire to make with the United States, and on the understanding that reservations proposed by the Canadian Government relating to technical annexes shall be discussed by the International Commission on Air Navigation to be convened after the ratification of the Convention.

"The Committee, on the recommendation of the Secretary of State for External Affairs, advise that Your Excellency may be pleased to forward a copy of this Minute, to the Right Honourable the Secretary of State for the Colonies, and also to His Majesty's Ambassador at Washington.

"all of which is respectfully submitted for approval.

(Sgd) K.B.Bryce

Clerk of the Privy Council."

The Order in Council set out on the foregoing page has been received since this paper was printed. A perusal of it confirms the presumption advanced in Footnote (1) of Page 83 and does not materially alter the validity of the statements set out in the subsequent pages.

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April 14th, 1955. Ian E. McPherson.