



L.L.M. II

April, 17th., 1953

" AVIATION LAW IN CANADA "

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A thesis submitted to the  
Faculty of Graduate Studies,  
McGill University, in partial  
fulfillment of the requirements  
for a Master of Laws Degree.

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## TABLE OF CONTENTS

### CHAPTER I

#### The Development of Aviation in Canada

1. Introduction
2. The Early History of Aviation in Canada
3. The Pioneering Era of Canadian Aviation
4. The Modern Era of Canadian Aviation

### CHAPTER II

#### Canada's Role in International Aviation

1. Introduction
2. The Development of Trans-Atlantic Air Service
3. Canadian Bi-lateral Air Agreements
4. Future Air Policy in International Aviation

### CHAPTER III

#### The Magna Carta of Aviation Law In Canada

1. Sovereignty of the State over the Air Space.
2. The Air Navigation Convention of 1919
3. Analysis of the Convention of 1919
4. Canada as a Signatory to the Convention

### CHAPTER IV

#### Canadian Legislation on Aviation

1. The Air Board Act of 1919
2. The Air Board
3. Air Regulations of 1920
4. The National Defence Act of 1922
5. The Aeronautics Act of 1927
6. The Department of Transport Act of 1936
7. The Transport Act of 1938
8. The Aeronautics Act of Canada

## CHAPTER V

### The Constitutional Conflict Over Aeronautics

70

1. Introduction
2. Dominion Control of Aeronautics
3. The Dominion-Provincial Conference of 1927
4. The Supreme Court Decision on Aeronautics
5. The Privy Council Decision on Aeronautics
6. The Johannesson Case on Aeronautics

## CHAPTER VI

### The Canadian Carriage By Air Act

1. The Warsaw Convention
2. The Scope and Application of the Convention
3. The Provisions of the Warsaw Convention
4. The Adoption of the Warsaw Convention by Canada
5. Inter-Commonwealth Air Transport under the Convention
6. The Constitutionality of the Carriage By Air Act

## CHAPTER VII

### The Air Transport Board

1. The Formation of the Board
2. Composition of the Board
3. The Functions of the Board
4. The Jurisdiction of the Board
5. Judicial Functions of the Board
6. Appeals From Board to Supreme Court
7. Appeals From the Board to the Minister
8. The Procedure Followed in Application for Licences
9. The Procedure Followed at Public Hearings
10. Approval of Minister to License Applications
11. The Life-Expectancy of the Board

## BIBLIOGRAPHY

## LIST OF CANADIAN AVIATION CASES





## PREFACE

The very general nature of the title reflects the still rudimentary impact of aviation on the legal systems of Canada. There is no vast reservoir of aerial law on which we can draw for guiding rules, precedents, and principles. One of the greatest difficulties to be met with by a student of this new field of law is that of discovering where to find the information he requires. What material there is on this subject is to be found scattered in a surprisingly and provokingly, haphazard manner throughout statute books, case law reports, legal texts, printed documents, pamphlets, periodicals and books of the time.

To this day, there has been no general treatise of any considerable worth on the historical and statutory phases of aviation law in Canada, which deals effectively with the scope, application and trend of Parliamentary statutes and the ordinances issued thereunder, particularly as they exist at the present time; and which records in detail the existing judicial decisions on aeronautics relating to constitutional and jurisdictional questions of law. Since there has been no worthwhile attempt to correlate these statutes, regulations, and judicial decisions, the result is that the law of aviation in Canada has remained in a state of confusion and uncertainty. This utter uncertainty of the law, under which our aircraft operate, makes the risk of air transportation incalculable and dissuades the investment of capital into this new field.

The present title, however, is not meant to be a representation that the contents of the thesis is a full compendium of knowledge of the legal and quasi-legal aspects of aerial navigation in Canada. While the contents does embody considerable original thought and organization, my reliance upon a number of previous writers is, nevertheless, considerable. There are a great deal of defects which is entirely my own, and I can only trust that in a longer work upon the same subject, which I am devising for publication purposes, I shall be able to greatly improve upon the present short thesis.

This dissertation represents an attempt to clarify the laws of aviation in Canada by providing both the lawyer and the layman with a concise statement of the law written in a clear and readable language. Technical and economic considerations are omitted; and it did not seem desirable to have typed out as appendices the mass of statutes, regulations and judicial decisions upon which the thesis is founded.

Those who require information or minute details, or desire for other reasons to consult the authorities, will find the necessary references in the footnotes.

The material is organized into seven chapters. An introductory chapter first sketches the beginnings of aviation in Canada, traces the historical development and growth of air transport, and then concludes by outlining the successive domestic Government Air Policies enunciated over the years up to the present-day Air Age.

The second chapter is concerned with the vigorous role Canada has played in an effort to gain a place in international air transportation consistent with her geographical position and meteoric progress in aviation. Canada's bi-lateral air agreements and the Government's international air policy of the last decade receive mention and a fleeting, passing glance.

An attempt is made in Chapter three to state the leading principles of international air law recognized or created by the Paris Air Navigation Convention of 1919 which is regarded as the Magna Carta of Aviation in this country. Amongst other things, a historical sketch as well as an explanatory analysis of the leading provisions of the Convention are given.

The next chapter deals with the historical growth of federal regulative bodies by a comprehensive yet compact survey of the diverse governmental spheres of action and regulation in the field of aeronautics. The subject of national aeronautical regulations are treated briefly both historically and analytically.

The interesting and fundamental conflict between the Dominion and the Provincial Governments as to the right to control and regulate aeronautics is, discussed in its entirety by thoroughly examining the leading judicial decisions on this controversial subject-matter in Chapter five.

Chapter six is concerned with an historical and detailed analysis of the leading provisions of the first schedule of the Carriage by Air Act which is the formal text of the Warsaw Convention. Whether the Warsaw rules are applicable to flights between members of the Commonwealth and whether the Dominion can enact ancillary legislation under the residuary clause are controversial questions which are resolved in this chapter.

In the last chapter of this thesis I have presented the organization, program of operations, objectives and the very admirable work of the Air Transport Board. The main body of the material is descriptive in nature. This chapter will be particularly helpful to those who wish to understand the administrative routine and problems which confront the members and staff of the Board.

It is hoped that this thesis will serve to acquaint the legal profession and those connected with civil aviation with the necessary aerial rules of law to meet and appreciate the problems of the transportation laws of tomorrow.



## CHAPTER 1

### THE DEVELOPMENT OF AVIATION IN CANADA <sup>1</sup>

1. Introduction: There can be little quarrel in Canada with the saying "the history of civilization is the history of transportation". Before the advent of the railway, settlement and civilization in the Dominion was confined to the sea coasts and to the banks of our great river systems. These "scattered and weak boundaries" of "a number of inconsiderable colonies", as one of the Fathers of Confederation with some rhetorical exaggeration phrased it, "isolated and feeble", were dispersed along a narrow belt of territory from the Atlantic to the Pacific.<sup>2</sup> Intercourse with the interior was hazardous and uncertain; the fur trade flourished but commerce, in the modern sense, was unknown.

The building of our trans-continental railways, linking the Atlantic and the Pacific Oceans, paved the way for Confederation, opened the prairie provinces to settlement, increased the area of accessible forest, made possible the development of our northern mining districts, and stimulated industry and commerce in every direction. The products of our farms, forest,

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\* 1. The best references on the history of air transport in Canada are to be found in the daily press, aviation magazines, and in the annual statistical reports of the Dominion Government, and, for the most part, I have drawn heavily from the Canada Year Books which are published annually by the Dominion Bureau of Statistics, Ott.

2. Eggleston - "The Road to Nationhood", 1946 - p.3

fisheries and mines moved freely to the world's markets over our railway and shipping systems. Then the automobile and good roads modified our social habits; but the influence of the newest form of transport medium, the aeroplane, opened an era of inconceivable benefits and opportunities for Man everywhere.

Aviation may be said to be the newest branch of transport and communications. It certainly has become, in its own field, of equal importance as the older means of transport; and it is quickly finding its proper place, as shipping, railways, roads, and waterways have found theirs. The importance and development of aviation in Canada is something much more and beyond revenues, statistics, and the charm of strangely assorted payloads. It makes new areas habitable for Man, lifts the standard of living from the Stone Age to Modern Civilization, opens up new markets for products of all sorts, and provides new methods of marketing production which can increase employment and lower the price of goods to our country's consumers.

2. The Early History of Aviation in Canada: In the history of air transport in Canada, there must be a beginning. So common a practice is it to begin with the mythological legend of Icarus, or with the famous Wright Brothers, that tradition almost demands a passing glance. 3 But I have

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3. Warner - "The Early History of Air Transportation" - p.1

chosen to make a beginning at the turn of the 19th century.

W.R. Turnbull, often called "The father of aeronautical research in Canada", experimented with aero-foils and propellers at Rothesay, New Brunswick, where, in 1902, he set up the first small wind tunnel in Canada. He discovered the laws of the centre of pressure movement on aerofoils, and made deductions from these laws which explained the longitudinal stability of aeroplanes. He also propounded the static laws of our propellers and in later years evolved and developed the controllable pitch propeller<sup>4</sup>.

At the time Turnbull was beginning his work, Dr. Graham Bell was experimenting with kites and air screws at Baddeck Bay, Cape Breton Island. The Parliamentarian representing that area in the House of Commons had the following to say about this famous Canadian scientist:-

"I suggest that we enlist the help of the father of aeronautics in this country, I refer to Dr. Bell, who has a home at Baddeck, Nova Scotia.....I had the pleasure in September, 1896 at being present in the machine shop experimenting office of Dr. Bell in the town of Baddeck, when it was considered a great achievement in aeronautics that he could cause a certain machine, that he had in his laboratory, to rise 3 or 4 inches from the ground.....The first airship that was ever built in Canada was constructed at his workshops at Baddeck. It was operated by a Baddeck boy, young McCurdy, who was famous afterward as a flier and was in charge of some of the works at Toronto or Camp Borden in the early stages of the war .....He was the young man who took charge of the first flying machine that was built in Canada, if not on the continent of America, under the direction of Dr. Bell. He was assisted by another young Canadian, also

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well known to fame - or at least his pregenitors were, young Baldwin, the grandson of the famous Canadian Statesman of the name. Mr. Baldwin was in charge of Dr. Bell's works at Baddeck, where not only flying machines, but machinery of the most advanced type in connection with transportation are turned out ". 5

The air-minded experimenters of the flying machine in Canada formed the "Aerial Experiment Association" in 1907. One of their members was the great Glenn Curtiss, a motor-cycle engine builder from New York State, the others being Dr. Alexander Graham Bell (then living in Baddeck), Lieut. Thomas E. Selfridge (on leave from the U.S. Army), and two young Canadian engineers - Jack A. D. McCurdy ( now the Hon. J. A. D. McCurdy, Lieut-<sup>6</sup> Governor of Nova Scotia) and the renowned F. W. "Casey" Baldwin. As a result of the work of these associates, the first flight was made at Baddeck on Dec. 7, 1907, in the 'Cygnet', a tetrahedral man-carrying kite which was towed by a steam tug. It was successfully demonstrated by Lieut. Selfridge who ascended to a height of 168 feet remaining in the air seven minutes.<sup>7</sup> As a point of interest, Orville Wright, with Lieut. Selfridge as co-pilot, crashed in making a turn on Sept. 17, 1908 at Fort Meyer, Virginia, killing Selfridge - the first fatality in a powered plane.<sup>8</sup>

One of the most important chapters of Canadian aviation history was written on Feb. 23, 1909 when young McCurdy took off from and landed on the frozen surface of one of the Bras d'Or Lakes at Baddeck in a funny-looking equipage called the

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<sup>5</sup> House of Commons Debates, 1919 Sess., Vol. 2 at p. 2059

<sup>6</sup> Canadian "Who's Who", 1949 Ed. at p. 678.

<sup>7</sup> "The Airman's Almanac", 1945 Ed. at p. 161.

<sup>8</sup> Ibid at. p. 162.



"Silver Dart". This craft was an advance on any other aeroplane previously flown, notable features being a three-wheel under carriage, tapered wings, and the use of aileron controls.<sup>9</sup> With its designer as pilot and under its own power it flew over the lake for half a mile, rising thirty feet above the ice. While all the backers of the enterprise stood closely huddled together on the ice, the pilot went into a turn and began to fly in the other direction, flew gently and slowly along, continued to frustrate the fundamentalists by not falling to pieces in the air, turned again, glided gently downward toward the lake, and landed safely on its surface.<sup>10</sup> This was the first aeroplane flight by a British subject in the British Empire. Several other flights were later made by the same young man in March, 1912 in Bell's tetrahedral plane, called the Cygnet III which was powered by a 70 h.p. Gnome engine at a speed of 43 m.p.h..<sup>10'</sup>

Like the Wright brothers, the gentlemen whose money, plans, and determination made the flights possible for the 'Cygnet I'; the 'Silver Dart', and the 'Cygnet III' had their troubles. As far as the residents of the immediate vicinity were concerned, the innovators were all lunatics who would undoubtedly break their necks and richly deserved to do so for daring to attempt to over-ride the purposes of the Almighty. As was true of aerial experimenters everywhere in the world, they could not have taken a single dollar away from any so-called responsible citizen to further their strange and God-defying purpose. But, like true pioneers everywhere who are filled of the spirit of 'never-say-die', they went ahead anyway.

Such were the beginnings of aviation in Canada.

<sup>9</sup> Supra note 4 at p.711 ; <sup>10</sup> Bishop- "Winged Peace" at 29  
<sup>10'</sup> Supra note 7 at p.163.

3. The Pioneering Era Of Canadian Aviation: Progress was rapid throughout the civilized world in the development and design of heavier-than-air flying craft from 1908 to the outbreak of World War I, and this progress was accelerated still further during the war by the intensity of competition for superiority in the air, and by the wide field of experiment which the war activities provided.

Officially, Canada took little part in these developments. Many young Canadians, however, entered the flying services of the United Kingdom and, to facilitate their recruitment and preparation, training units were established in Canada. To provide the aircraft for training purposes, Canadian aeroplanes Limited, was organized by the Imperial Munitions Board to produce aircraft in Canada. <sup>II</sup>

This concentration on military flying during the war prevented all development on the civil side. Private and commercial aeronautics were prohibited altogether. At the time of the Armistice most Canadians had never seen an aeroplane, much less flown one, and the older generations looked on aircraft simply as novel instruments of destruction and of no value in the everyday life of the peaceful citizen.

Although civil aviation had its beginnings prior to World War I, the first major period of development began in 1919 when thousands of young men, with training and experience in the flying services of the United Kingdom returned to Canada. Full of foresight and enthusiasm for aviation, and

seeking an opportunity to apply their new knowledge to peace-time activities, these air force veterans started small flying enterprises in an attempt to establish themselves in civil life. At the same time, governments were disposing of their surplus stocks of planes at bargain prices. Their operations were largely confined to short sight-seeing passenger flights, to exhibitions and advertising. For the most part, the people of Canada regarded the aeroplane as a toy, a very dangerous sport carried on by the more adventurous, barnstormers of the day, to be seen in their daring feats at the annual county fairs or other places of public exhibition. Patronage of these activities soon waned as the novelty of flying wore off among the general public. <sup>12</sup> Post-war recession in the early 1920's forced most of these small organizations out of business.

The foundations for real progress, however, were laid by a few far-sighted, small operators who somehow managed to survive the recession by concentrating the facilities of aircraft to real practical purposes in forest reconnaissance and sketching, fire protection, game patrols, aerial photography, surveying and the transportation of special types of freight to inaccessible or remote areas of Canada. Apart from the good salesmanship of these

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\* 12. Speech by Mr. Mackenzie in House of Commons, 1919 session Vol II p. 2059 wherein he said: - "We got so used to flying machines last summer in North Sydney that it was no more a novelty to see an aeroplane in the air than an automobile on the street".

pioneers who amply demonstrated that they had a good product, the conditions in Canada were extremely favourable for the economic development of 'bush-piloting' on a moderate scale. The vastness of our north country was an obstacle to rapid progress. Until the advent of the aeroplane, the old historic means of travel - the canoe in summer and the dog-team in winter - were the sole means of communication for many years in two-thirds of the area of the Dominion. During the war, foresters, geologists and surveyors had watched with growing interest the increase in capacity and reliability of aircraft. As a point of interest, the federal Department of Mines made enquiries as early as 1915 regarding the possibility of using flying boats to increase the mobility of its scientific staff engaged in exploration. <sup>13</sup> And so when the Armistice released pilots and aircraft, there was a widespread effort to use them for civil work, for transport and for observation in these areas of economic importance.

In the early summer of 1919, successful flights were made for forest protection and survey work at Lac a la Tortue and Grand' Mere, Quebec. It is significant that these first flights were made possible through the co-operation of the Dominion Government, the forest service of the Province of Quebec, and the Laurentide Company. The Department

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\* 13. Wilson - "Civil Aviation in Canada", 1929 Vol. 36, "Queen's Quarterly". at p. 295.

of Naval Service lent two H.S. - 2.L. flying boats and the Province made a grant towards the expense of the operation, which was organized under the direction of the chief forester of the Laurentide Company. <sup>14</sup> The trials showed clearly the possibilities of the use of flying boats in the north country for fire protection, for the preparation of forest inventories and for transportation. As a consequence to this successful venture, some large corporations, such as Price Brothers and Laurentide Company, established their own air services.

The discovery of crude oil at Fort Norman on the MacKenzie River in the fall of 1921 led to the first large scale attempt to establish air transportation in the far north by Imperial Oil Company. This boom in prospecting and mining in the north proved to be the salvation of commercial flying. In 1924, the Laurentide Air Service established the first regular air mail, passenger and express service from Haileybury to the newly discovered Rouyn gold fields in northwestern Quebec; and during that year carried over 1000 passengers, 78,000 lbs. of freight and over 15,000 letters and telegrams. <sup>15</sup> But with the construction of railways to Rouyn, this service disappeared.

Public interest in aviation as a practical method of travel and transport was fast awakening. By the end of

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\* 14. Ibid at p. 296

15. Canada Year Book, 1924.

1927, those who had persisted amidst the discouragements and difficulties of the pioneering phase could at least see success beginning to dawn on their efforts. Canadian transport routes grew from a route mileage of 372 at the end of 1927 to 6,210 two years later. Some of the mileage connected the major cities of the east; but more of it went to open up mining territory and to maintain communications to remote posts that had been almost entirely cut off from the news of the world theretofore. Supplementing the regular routes, there was an enormous amount of contract operations with freight into the mining districts, many of which received practically all their machinery and supplies that way. Among the scheduled services, the most remarkable for the time covered the full length of the MacKenzie River down to Aklavik. That was an accomplished fact by 1929.<sup>16</sup>

From a government standpoint, 1927 was an important year in air transport history in that it saw the adoption of three policies which have proved of long term significance. These were:-

- a) inauguration of regular air mail services.
- b) encouragement of flying club formation, and
- c) indication of plans which envisioned a future trans-Canada air route.<sup>17</sup>

As to the first policy mentioned above, the Post Office Department, who had been watching with growing interest, the success of air mails in United States and elsewhere,

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\* 16. Supra note 3 at p. 72

17. Canada Year Book, 1927

decided in the fall of 1927 that the time was ripe to encourage similar services in Canada. In conjunction with the Department of National Defence an active programme of airway development was initiated. 18

A flying-club movement was sponsored by the Canadian Government with the view of maintaining public interest in flying, building up a reserve of pilots and mechanics against a possible emergency, and as a step in establishing a chain of airports across the Dominion. Flying schools were organized for the training of pilots and financial support was given to them by the government. Each club, by agreement, was required to maintain an airport of a given standard; and these airports provided nuclei around which aviation activities centered.

Co-incident with the encouragement of flying clubs, those responsible for formulating this civil aviation policy had the foresight to encourage and assist the building, by government subsidy, of civil airports adjacent to urban municipalities in all parts of the country. Many of these civic airports were used by the flying clubs; and later, they formed key points in the Trans-Canada Airway system. The establishment of this air policy laid down an excellent ground-work for aviation in time of peace so that the transition to a war-footing correspondingly came easy. It must be remembered that civil air transport fleets, civil aircraft industries and commercial air-fields represent a

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\* 18. Supra note 13 at p. 298.

war potential, a reserve both of personnel and of industrial capacity which is all-important in time of war.

During the depression years of the early 30's air transport, particularly in the north, practically ceased as many of the companies went into bankruptcy. In 1930, a change of government occurred and the attitude of the government toward civil aviation was altered due to the prevailing conditions of that time. Many of the air-mail contracts, from which the aviation companies derived a substantial part of their revenue, were cancelled. Appropriations for government assistance to civil flying were cut, and civil aviation received a severe set-back. However, in 1933, for the purpose of relieving an acute unemployment situation, the government commenced a project of building a series of airfields across Canada, by day labour, to form a trans-continental route for military planes and to continue the air policy of the Department of National Defence's Civil Aviation Division started in 1928. 19.

Subsequent to 1932 there was a revival in the air transport field. An effort was made to improve the position of the 'bush lines' which had been left in a greatly weakened position by government action in the early 30's. Many new companies were formed and old ones revived. While these lines were supported by renewed postal subsidies, they operated under conditions of unrestricted competition, with the

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\* 19. MacDonald - "The Work of the Air Transport Board"  
at p. 5 - found in A.T.B. Library, Ottawa.



the result that, as soon as an operation was profitable, a second, and perhaps a third operation would be undertaken by other owners over the same route. Unfortunately, many operators were forced out of business a shortwhile thereafter due to "cut-throat" competition.

In 1935, a new government came into office and was confronted with a situation that demanded a clear definition of policy toward civil aviation. Work was in progress on the government chain of airports. Municipal airfields, that had been built in the late twenties, were not being used. Aerodromes, for some unexplainable reason, were located at thirty mile intervals. The Trans-Canada Airway, designed on a basis for a comparatively slow, single-motor plane of relatively short-range and flying on a visual-contact or light-beacon basis, was considered obsolete for fast twin-engine, long-range aircraft; and radio-beacons rendered most of the previous investment in lighting and in landing fields out-dated.<sup>20</sup>

Two alternatives were open; the government could undertake a programme for developing a comprehensive system of transport by air, to serve all parts of Canada, or it could confine government activities in this field to regulation, and let private enterprise plan its own expansion. The former alternative was chosen.

The Trans-Canada Air Lines Act was presented to

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20. Currie- "Some Economic Aspects of Air Transport" - Canadian Journal of Economics and Political Science, Vol. 7, 1941 at p. 17 & 18.

the Dominion Parliament in the session of 1937. <sup>21</sup> The intention of the Government had been to unite the strongest transportation interests in Canada to undertake this new venture in transportation; and with that in view, the Minister of Transport approached the Canadian National Railway Co., the Canadian Pacific Railway Co. and Canadian Airways Ltd., the latter being by far the strongest of the air transport companies then operating. These companies were invited to provide the needed capital for, and assume the ownership of, the airline company - the government to assume responsibility for building adequate airports and the necessary communication system. Each of the three component companies were to share equally in the ownership of the airline, and each was to have two directors on a board of nine, the government to appoint three directors on account of its investment in airports and communications. The financial provisions were the same as those finally adopted and now in force, which made the company a non-profit organization that was also protected against loss of its capital. The C.P.R. and Canadian Airways objected to having three government directors on the board, and at the last moment these two companies withdrew their support. <sup>22</sup> The T.C.A. Act was enacted and set up a quasi-private corporation, four of the directors of which were to be appointed by the shareholders and three by the Government.

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\* 21 Statutes of Canada, 1 Geo. VI (1937) C. 43; amendments 1938, 1940.

22 House of Commons Debates, Hansard, March 17, 1944 at p. 1572.

The authorized capital was five million dollars and the intention was to sell stock to existing airline firms such as Wings Limited, Canadian Airways, and so on. The maximum profit, however, was limited to five per cent, operating control was vested permanently in the Government and payment for stock was required in cash. Since there were no buyers, the Canadian National Railways was forced to take on the full ownership of Trans-Canada Airlines. <sup>23</sup>

Speaking in the House of Commons in the debate on the T.C.A. bill <sup>24</sup>, the Minister of Transport gave the following reasons for making T.C.A. a subsidiary of C.N.R.

"After the consideration of these matters, the government has decided that its agency for transportation, the Canadian National Railways, should be the means of organizing this company, just as it was used as the means for operating such shipping as the government owned and the means of operating other government transportation facilities .....I think we are getting the best features of government ownership without the obligation of direct government operation which in the past has been troublesome".

This newly formed airline lost no time in organizing for operation. The President of the C.N.R. was made President of the company; three other directors of the railway were appointed directors of the new company; and three directors were appointed from the government service - two from the Department of Transport and one from the Post Office Department. The directors chose a general manager in the person of Philip G. Johnson, formerly President of Boeing Aircraft Co., and one of the leading business men in the

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\* 23. Supra note 20 at p. 18 & 19.

24. House of Commons Debates, Hansard, 1937 at pps. 2216 and 2217.

the U.S.A. Mr. Johnson had been a pioneer in transport by air in the U.S.A. and was perhaps the man best qualified by ability and experience to plan the new system. He came to Canada, at what was for him a nominal salary, and spent two years here as operating vice-president. His ambition was to make T.C.A. the finest air transportation system in North America, and although he returned to the U.S.A. in 1940, his influence on the management is still very noticeable.

The work of building a chain of modern airports, the gathering and training of operating personnel was pressed forward vigorously, with the result that T.C.A. was placed in operation early in 1938. It had been contemplated that T.C.A. would be non-competitive, non-profit system of transportation by air, planned to avoid the duplication of services that were the outgrowth of competitive building for profit in the field of surface transportation. The T.C.A. Act contemplated that T.C.A. would operate all principal routes parallel to the international boundary, as well as Canada's interest in all international routes, on a non-competitive basis. The field of routes into Canada's northland, as well as the field of air service in the settled areas complementary to the Trans-Canada operation, was left to private enterprise. The reason for this is not hard to explain. T.C.A. was to be a high-standard and costly operation, competing with paralleling trans-continental air transport services in the United States. Canada, having one-twelfth the population of its neighbour

to the south, could afford to support one service of this type as against three similar parallel services in the U.S.; and, obviously, to allow a second coast-to-coast service in Canada would have been wasteful and unjustifiable.

Since service to the public is the paramount consideration in air transport, it seemed obvious in 1937 that the cost of a non-competitive, non-profit service was the lowest that could be offered the Canadian public.

Traffic built up very rapidly in Canada, and T.C.A. grew until at the outbreak of the Second World War, its services extended eastward from Vancouver to Moncton, southward from Toronto to New York City and from Vancouver to Seattle, and northward from Lethbridge to Edmonton. In the early war years, military requirements made it necessary to extend the service eastward to Halifax, and from Moncton to Sydney and onto Newfoundland, and westward to Victoria. All in all, it might be said that increasing traffic has made the line an outstanding financial success; and has a safety record which can be compared with the best of any airlines operating in the world.

While the development of Trans Canada Airlines was in progress, an effort was made to improve the position of the 'bush lines' which had been left in a greatly weakened position by government action in the period from 1930 to 1935. In an effort to protect the lines against cut-throat competition, an amendment to the Railway Act was introduced in the Senate in 1937, where it failed to pass, and in the House of Commons in 1938, when it duly became law when the

Transport Act <sup>25</sup> was passed. The effect of this legislation was to allocate routes to companies then in the field, and to prevent competition on these routes from newly-formed companies. At that time, sixteen separate transportation companies were licensed for commercial operations in Canada, using two hundred and forty-four commercial aircraft, of which a large number were flown and operated by their owners. <sup>26</sup>

4. The Modern Era of Canadian Aviation: The second World War brought commercial aviation in Canada practically to a standstill, apart from the operations of the major transport companies, because of the exclusive manufacture of military aircraft, the great demand for experienced personnel in military aviation, and in the interest of national defence. Most of the companies engaged themselves to carry out war contracts, some in the delivery of men and material urgently needed in the development of projects that could not be served by road or rail, some in the training of air crews and mechanics, and some in the overhaul, repair and maintenance of aircraft in connection with the British Commonwealth Air Training Plan.

The first year of the war saw a sharp curtailment in gold mining operations, particularly those in the remote areas, with the result that traffic for the small independent airlines was sharply curtailed. The net result being that

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\* 25. 1938 Canada Statutes Ch. 53

26. Canada Year Book 1938

these small operators were faced with the necessity of either finding a buyer or of closing down. At this stage, the Canadian Pacific Railway Company entered the field of transportation by air, and bought the stock of all the independent operators at a fair price, thus obtaining by the end of 1941 a monopoly in the field of transportation by air, except for T.C.A. The ten small commercial air lines, whose operations were absorbed by Canadian Pacific Air Lines were Canadian Airways Ltd., Arrow Airways Ltd., Ginger Coote Airways, Prairie Airways, MacKenzie Air Service, Yukon Southern Air Transport Ltd., Dominion Skyways Ltd., Quebec Airways, Wings Ltd., and Staratt Airways and Transportation Co. <sup>27</sup> Although these represented the principal 'bush line' operating companies, there still remain independent organizations in the Canadian aviation field.

The building of the Alaska highway was the cause of great activity in air transport in a territory that was being served by C.P.A., and that company was assisted by the U.S. Army in obtaining new and modern airplanes, from U.S. sources, with the result that the equipment of the company was augmented considerably at a time when all other air lines on the continent found it impossible to buy new equipment. C.P.A. has continued to give service to the points served by its component companies.

The newly formed Canadian Pacific Air Lines lost no time in challenging the non-competitive position of the T.C.A. and in reaching out for new franchises; this at a time when C.P.A. seemed to be able to buy new and modern

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\* 27. Canada Year Book, 1943-44 at p. 629.

equipment. Another factor which created public concern was the realization that the shortest route to Europe and Asia is over the roof of the world; and C.P.A.'s feeder lines were strongly entrenched in the northern route franchises.

Recognizing the tremendous strides made during the war years in aviation by the technological improvements, by the vast increase in the number of personnel, by the strong organizations built up during the War and by the greatly increased experience in operations, the Canadian Government was determined that the people of Canada should benefit from them to the fullest extent. To clarify the situation, the Prime Minister made a statement, in the House of Commons 28 on April 2, 1943, formulating a crystallized Canadian air policy favouring a single "chosen instrument" both in the national and international fields of air transport. The following is the statement made by the late Rt. Hon. W.L. MacKenzie King with respect to domestic civil aviation:

1. "During the War, a remarkable expansion of Canadian aviation has taken place - in the training of air and ground personnel, in the construction of airports and air navigation facilities, in the manufacture of aircraft, and in the extension of air transport services. Details of this expansion in aviation cannot be revealed at present, and therefore its magnitude is not generally appreciated. The Canadian Government is aware of the importance of the developments in aviation now in progress and intends that the people of Canada shall

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28. House of Commons Debates, Hansard, 1943; Canada Yr. Book 1943-44 at pps. 572



benefit from them to the fullest possible extent.

2. The expansion of air transport services during the period of the War has been confined to war requirements. Canada has concentrated on the development of the British Commonwealth Air Training Plan and on combat flying, as a result, by agreement with our Allies, military air transport in the northwest has largely been undertaken by the United States army and on the northeast ferry routes by the ferry commands. When war necessities permit and suitable equipment can be obtained, the Government will encourage the further development within Canada of air transport services, to supplement and form part of an up-to-date transportation system for Canada by land, water and air. Transport by air requires close supervision on the part of the Government. The Board of Transport Commissioners will be responsible for regulating traffic matters and for allocating new routes apart from the lines brought under the Trans-Canada Air Lines Act. The Civil Aviation Branch of the Department of Transport will be responsible for the administration of traffic and safety regulations and for the physical development of airways. The Government intends to plan a number of routes suitable for post-war air services and offering traffic possibilities that will warrant a service. The Government will also continue to develop airports and other facilities for weather reporting and communications, which will contribute to the expansion of Canadian air transport.
3. While the employment in a peace-time air transport service of all the air and ground personnel of the R.C.A.F. and all the men and women now employed in the aircraft industry in Canada will be impossible, a considerable number will be absorbed into the peace-time aviation industry. To this end, the Government has undertaken the design of distinctive Canadian types of transport aircraft suitable for post-war industry, in the hope that, when the war ends, a part at least, of the equipment for Canadian air transport will be furnished by Canadian factories.
4. Trans-Canada Air Lines will continue to be the instrument of the Government in maintaining all trans-continental air transport services and in operating services across international boundary lines and outside Canada. The Government will encourage the company to obtain modern aircraft which will keep present services up to modern standards and will expand these services

to the fullest extent that post-war conditions permit. The development of supplementary routes will continue to be left to private enterprise, unless considerations of public interest indicate that certain of these routes should be designated by the Government as routes to be operated by T.C.A. The operations of T.C.A. will continue to be limited to important services of a main-line character, where the volume of passenger and mail traffic would justify it." .....

### Summary

" 10. The policy of the Canadian Government on air transport may be summed up as follows:-

a) .....

b) Within Canada, Trans-Canada Air Lines will continue to operate all trans-continental systems, and such other services of a mainline category as may from time to time, be designated by the government. Competition between air services over the same route will not be permitted, whether between a publicly owned service and a privately owned service or between two privately owned services. There will remain a large field for the development of air transport in which private Canadian companies may participate, and while preventing duplication of services, the Government will continue to encourage private companies to develop services as traffic possibilities may indicate".

This statement of policy enunciated by the Prime Minister failed to bring about confirmation to government policy in the development of privately owned air services within Canada, nor did it end intervention of private interests in the international field. Hon. (later the Rt. Hon.) C.D. Howe (then Minister of Munitions and Supply), speaking in the House of Commons <sup>29</sup> on March 17th, 1944, made the following policy statement on domestic civil aviation: -

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\* 29. House of Commons Debates, Hansard, March 17/44 p. 1573.

"It is becoming obvious that ownership of airways by our two competing railway systems implies extension of railway competition into transport by air, regardless of the government's desire to avoid competition between air services. In the old days, competitive railway building developed pressure methods for obtaining new franchises. Such methods must not have a place in the development of our airways.....

"The government desires the rapid development of air transport services in order, among other reasons, to offer post-war employment to R.C.A.F. personnel. Canada's northland was pioneered by small operators who were content to enlarge their operations as warranted by the development of the area they served. The government believes that feeder line operations, and pioneer lines into our northland, can best be developed as small operations. Our returning airmen will not be satisfied, in entering this new field of employment, to serve only as salaried employees. In this new medium of transportation, there must be a place reserved for small business enterprises.

".....It is believed that air transport should develop free from railroad tradition, shipping tradition or the traditions of any other form of surface transportation. It is a different type of transportation, it requires a different type of salesmanship, a different method of operation, and we believe it is good business at this time to make it an independent form of transportation. 30

"..... Accordingly, after full consideration, the government has decided that the railways shall not exercise any monopoly of air services. Steps will be taken to require our railways to divest themselves of ownership of air lines, to the end of the European war, transport by air will be entirely separate from surface transportation. In the meantime, no new air routes other than government operated routes will be allocated to airlines owned by any railway or other operator of surface transportation. The term "surface transportation" includes railways, shipping companies and highway transport companies. The U.S. Civil Aeronautics Act of 1938 provides that no common carrier (that is surface carrier) shall own, manage or operate any air carrier, unless specific provision has been given by the Civil Aeronautics Board. Apparently, the principle is well established in the U.S. that surface

carriers are not permitted to engage in air transport business. This serves to indicate that this problem, which has arisen in Canada is not new on this continent". <sup>31</sup>

"While I have had no cause to regret the step taken at that time (referring to 1937 when management of T.C.A. was given over to the C.N.R.), the entry of a privately owned railway into the field of air transport (referring to the C.P.R.) has made it apparent that the advantage of government ownership without the obligation of direct government operation <sup>32</sup> does not compensate the disadvantage of introducing into air transport the competitive methods of railways. Therefore, it will be necessary to divorce Trans-Canada Air Lines from the Canadian National Railway Co. and operate the former as a government company". <sup>33</sup>

Canada's new domestic air policy was therefore enunciated by the Minister's policy statement of March 1944 and implemented later on. The Canadian government, not without many dissident voices in Parliament, declared that within one year after the ending of the war, railroads would have to divest themselves of all air transportation interests. This was a particularly revolutionary step for the Dominion, since the country's principal domestic transcontinental air service had been operated as a completely nationalized undertaking by her nationally-owned Canadian National Railways. The second largest airline operator in Canada was the Canadian Pacific Railway, at which the Government's order was understood to be specifically directed. This divestment policy for railroads affected Canadian National Railways only to the extent of requiring a separate management group for Trans Canada Airlines, ownership being vested not in the railroad but in the government. The directors of C.N.R. and T.C.A. are no

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\* 31. Ibid at p. 1574

32. Supra note 24.

33. Supra note 29 at p. 1574

longer operated by the same Board of Directors; and the directors of T.C.A. cannot be a director of C.N.R.

Canada's new 1944 air policy also covered the question of aviation subsidies, and stated that in the future such subsidies would not be paid through the Post Office Dept., but that postal rates would be fixed at a reasonable figure from the postal point of view, and if additional subsidy were required the funds would be voted by Parliament. <sup>34</sup>

On August 10, 1944, the Canadian Parliament passed an amendment to the Canadian Aeronautics Act <sup>35</sup> creating an Air Transport Board to direct the general development of the Dominion's aviation interest. Few pieces of legislation in the last 15 years caused such discussion as did this amendment, to which it was generally felt Canada's future in the air was directly tied. The Air Transport Board is employed to examine needs for new commercial services and to make recommendations for their expansion in domestic and international fields; receive applications and issue commercial licenses; establish tariffs and regulate rates; examine ownership, the financial structure and operations of air carriers, recommend financial assistance where needed; and advise on operations of existing airlines and the need for new airports. <sup>36</sup>

The cessation of hostilities in Europe in May, 1945, and the somewhat unexpected collapse of Japan in August brought an avalanche of problems in civil aviation. Immediate steps were taken to dismantle whole sections of the vast

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<sup>34</sup>. Supra note 29 at p. 3974.

<sup>35</sup>. Statutes of Canada 1944 - 45 ch. 28 amendment to 1927 R.S.C. ch. 3.

<sup>36</sup>. Ibid Part II sec. 4

military structure erected for war purposes and at the same time restrictions, which had necessarily been imposed on civil aviation, were removed. Airports, airways, communication systems, aids to air navigation together with thier operations, control and maintenance were turned over to civil administration as fast as circumstances would permit. <sup>37</sup>

In the immediate post-war period, competition in the aircraft industry was virtually eliminated to allow the various operators a reasonable chance to build up businesses without direct financial assistance from the government. Therefore, the government laid down a policy which was designed to allow each operator to establish himself unhampered by the chaotic competitive arrangements which had flourished during the thirties. <sup>38</sup>

On November 10th, 1952, the Minister of Transport, the Hon. Lionel Chevrier, at the annual meeting of the Air Industries and Transport Assoication of Canada <sup>39</sup> outlined the new government air policy which has been laid down for the Air Transport Board to follow. The statement dealing with domestic civil aviation was as follows: -

"In the domestic field, trans-continental air services of the type presently provided by T.C.A. will continue to be reserved for T.C.A. Canada does not enjoy the extremely high volume of trans-continental traffic that exists in the United States and the government's policy is soundly based on present economic considerations."

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37. Canada year Book, 1948 - 49 at p. 748.

38. Supra note 19 at p. 42

39. Ibid at p. 43.

However, with the substantial growth of traffic within Canada it is no longer necessary to insist on monopoly conditions with regard to regional scheduled services and government policy will not forbid the gradual development on a regional basis of a reasonable amount of competition between scheduled air services. Any such development must be based upon findings of public convenience and necessity as required by the Aeronautics Act and any changes made by the Air Transport Board in this direction will be very gradual and related to maintenance of conditions which will establish a sound economic position for the operators, while ensuring the services that the public require.

In addition, government policy will continue to support the development of non-scheduled services particularly in the development of the north although non-scheduled services will not be permitted to develop in a manner which would endanger the economic well-being of scheduled services. The Air Transport Board has already laid down a policy which has controlled this situation in a satisfactory fashion and while no immediate changes are contemplated, it may be modified from time to time if circumstances require.

In carrying out the foregoing policy the Air Transport Board will continue to deal with matters of licensing and economic regulations for all carriers and will apply a basis of common procedures and policies for all".

In conclusion, it can be said that Canada has long been an extremely air-minded country, with a first-class transcontinental air service, with thousands of its youth trained in aeronautics as part of its defence program, and recognized as the world's largest user of the aeroplane in the transportation of freight. Politically, Canada has been affected by the new thinking of aerography and realizes full well her new position as the front yard upon the world. There are now seven <sup>40</sup> other domestic air lines licensed to operate scheduled services in addition to T.C.A. and C.P.A.

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\* 40. Canada Year Book 1948 - 49 at p. 479.

These are:-

- 1) Maritime Central Airways, Charlottetown, P.E. I.
- 2) Northern Airways Ltd., Carcross, Yukon.
- 3) Leavens Bros. Air Services Ltd., Toronto, Ont.
- 4) M. and C. Aviation Co. Ltd., Prince Albert, Sask.
- 5) Central Northern Airways Ltd., Winnipeg, Man.
- 6) Queen Charlotte Airlines Ltd., Vancouver, B.C.
- 7) Quebec Airways Ltd., Quebec.

There are many other independent air lines but these are operating non-schedules services which, with few exceptions, are charter services from designated bases. It is in this field that the greatest development has taken place in recent years. These non-scheduled air services not only provide effective means of access to sections of Canada that are inaccessible by other means of transportation, but also add as feeders to the schedules air lines. In view of the recent government steps to assist commercial aviation by the elimination of tariffs on aircraft imports of a type and size not made in Canada, by the amendment of the Industrial Development Bank Act to make it possible for that agency to make direct loans to the operators of commercial air services, by the changing of the allowable scale of aircraft depreciation, and by the new policy of allowing a reasonable amount of competition between air services, many ex-service men have shown new interest in the future development of Canadian Aviation by joining the ranks of the air transport industry as independent operators.





## CHAPTER II

### CANADA'S ROLE IN INTERNATIONAL AVIATION

1. Introduction: The Paris Peace Conference in 1919 may be taken as the beginning of Canada's role in the international field of aviation. For at that conference the Dominion was represented at its own insistence, not only as part of the British Empire delegation, but also on equal status with the smaller independent allied nations. The Canadian delegates at Paris thus occupied the anomalous position of being representatives, sometimes of the British Empire as a whole, and sometimes of the Dominion of Canada alone. In form at least, the Canadian representation at that Peace Conference was symbolic of the new emerging status of the Dominion as an independent nation, although this was somewhat dimmed in lustre by the curious anomalies of the representation.<sup>1</sup> The Aeronautical Commission, constituted at this Conference, drafted an international convention governing aerial regulation in time of peace to form part of the Treaty of Versailles. In 1919,<sup>2</sup> Canada was a signatory to this multilateral convention on civil aeronautics which became the 'Magna Carta' of aviation in this country. Canada became bound by a double signature on the treaty, first, the signature of the representatives of the United Kingdom and the Dominion, and second, that of Canada's plenipotentiaries.

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- \* 1. Glazebrooke - "Canada at the Peace Conference of Paris", 1942 at p. 35-56. This 1919 convention was amended by protocols from time to time, the last amendment becoming effective September 19, 1930.
2. Paris Convention signed Oct. 13, 1919 and ratified by His Majesty on behalf of the British Empire on June 1st, 1922.

2. The Development of Trans-Atlantic Air Services: The first major agreement regarding the actual operation of international air services in which Canada participated was the agreement between the United Kingdom, Canada, Ireland and Newfoundland, in 1935 and 1936, <sup>3</sup> providing for the initiation of trans-Atlantic air services. Under this arrangement, the United Kingdom proceeded with what at that time appeared to be a vigorous policy of flying-boat construction to link Europe and America by air. Imperial Airways, now known as British Overseas Air Corporation, was to carry out experimental flights on the north Atlantic route, to Canada by way of Ireland and Newfoundland. Subsequently a joint-operating company, owned by the United Kingdom, Canada and Ireland, was to be established to carry on a regular air service. Imperial Airways was to be the majority shareholder in the joint company, and was to control commercial, technical and operating matters. Canada, under the agreement, was to assume responsibility for meteorological services in Newfoundland and was to lend assistance by way of money contributions.

While the United States was not a party to the arrangement, the four governments concerned agreed that in return for landing and transit rights in the United States for Imperial Airways, or for the joint company, each government would grant transit and landing rights to Pan American Airways for a north Atlantic service. Each government also agreed that it would not, without the consent of the others, grant similar rights on this route to any other companies over a period of fifteen years.

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\* 3. Canada Year Book, 1948 - 49 at p. 748.

The facilities required under this agreement which included airports, radio and meteorological services, and other aids to navigation, were provided by the countries concerned. The service envisaged by Pan American Airways at that time went into operation in 1939 after permits had been granted to Pan American Airways by the governments concerned.

On the other hand, while certain experimental flights were undertaken, after some delay by Imperial Airways, no regular British services were established in the North Atlantic prior to the outbreak of the second World War and the joint operating company was never set up. It was said that this plan did not succeed because weather reports were scanty and inadequate for present day needs; aids for air navigation were almost non-existent; communication facilities were sketchy in the extreme north; and added to all this, the flying boats, could, so far as the northern routes were concerned, operate only during the summer months. <sup>4</sup>

The wartime necessity, however, for the speedy delivery of aircraft in Europe introduced in the matter of a few months, changes which in the normal course of events would probably have taken years. A large airport was constructed at Goose Bay, Labrador. The Gander Airport in Newfoundland was greatly improved. Long-distance aids to navigation were installed wherever possible and were inter-linked by radio communication facilities with each other and with centers on the mainland on both sides of the Atlantic.

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\* 4. Ibid at p. 749.

Weather stations were established not only at Continental points but in Iceland and Greenland; and a fleet of weather ships cruised continuously on more or less fixed areas in the Atlantic to give accurate weather data at frequent intervals.

While these services were still in process of development, it became apparent that the maintenance of morale of the Canadian troops in Britain would be greatly improved if a rapid and reliable system of mail deliveries could be established. The British Government placed a converted Lancaster bomber at the disposal of the Canadian Department of Transport, which in turn, turned it over to Trans Canada Air Lines for the operation of the Canadian Government Trans-Atlantic Air Service. More aircraft were added to this Service as soon as they became available from the Assembly line at Malton, Ontario. A regular non-commercial service across the north Atlantic was instituted on July 22, 1943 in accordance with notes exchanged between the Canadians and British Governments on July 15 and 16, <sup>5</sup> 1943, and the Canadian and Newfoundland governments on July 19 and 30, <sup>6</sup> 1943. This service was established solely for war purposes and the arrangements were to apply only for the duration of the war and six months thereafter. It carried only official passengers and freight-particularly mail for the troops - and was, of course, providing valuable experience for Canada in the operation of trans-ocean air services. The R.C.A.F. also established

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5. Canada Treaty Series, 1943 No. 8

6. Canada Treaty Series, 1943 No. 9

a direct mail service from Canada to the U.K. and to the Mediterranean theatre of operation.

The tremendous strides made in the war, with respect to international aviation, prompted Prime Minister Mackenzie King to make the following statement on air policy in 1943. <sup>7</sup>

"Canada has a geographical position that will enable it to play an important part in the development of international air transport routes. During the War, the development of international civil air routes must be deferred in favour of military aviation, Canada, to-day, is the fourth greatest military air power among the United Nations, and in the post-war period, Canada can make an equally great contribution to civilian air transport.

The future of international air transport will be determined in large measure by negotiations between the governments of the United Nations. The policy of the government, at the moment, in dealing with all questions which affect international air transport, is to make temporary arrangements, leaving the issues open so that Canada may be able to support in international negotiations, when they take place, whatever policy appears best at that time. The Government, however, intends to press vigorously for a place in international air transportation consistent with Canada's geographical position and progress in aviation. All concessions and privileges that have been granted by Canada to other countries as part of the war effort will terminate at the end of the war or almost immediately thereafter.

T.C.A. has by its charter the right to operate international air transport services and has already been designated as the instrument of the Canadian Government in air transport services across the North Atlantic, and in Canadian services to the United States. The fact that international negotiations of great importance must shortly take place confirms the wisdom of Government policy under which its freedom of action in international negotiations is not limited by the existence of private interests in international air transport services.

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\*  
7. House of Commons Debates, Hansard. April 2, 1943  
at p. 1776.

The Government has established an inter-departmental committee on international civil aviation to advise it on all matters of international air transport which affect Canada, and particularly on the attitude which Canada should adopt towards post-war developments. This committee has already been at work for a considerable time.

The problems of international air transport are, of course, immense and cannot be solved by one country. The Government is determined, however, that its influence on the course of events will be in the direction of international co-operation and collaboration. The Canadian Government is in complete agreement with the United Kingdom Government that "some form of international collaboration will be essential if the air is to be developed in the interests of mankind as a whole, trade served, international understanding fostered and international security gained".

#### Summary

The policy of the Canadian Government on air transport may be summed up as follows:-

a) The Government sees no good reason for changing its policy that Trans-Canada Air Lines is the sole Canadian agency which may operate international air services.....

c) In order to prepare for forth-coming international negotiations on air transport, the Government is studying carefully the problems which will have to be dealt with in the negotiations.

d) The Canadian Government strongly favours a policy of international collaboration and co-operation in air transport and is prepared to support in international negotiations whatever international air transport policy can be demonstrated as being best calculated to serve not only the immediate national interests of Canada but also our over-riding interest in the establishment of an international order which will prevent the outbreak of another world war."

Honourable C.D. Howe, who was Minister in Charge of Air Services, Department of Transport, addressing the House of Commons on March 17, 1944 reported on a preliminary exchange of views among members of the Commonwealth in London in October, 1943, with respect to inter-

national discussions on air-transport policy. Mr. Howe  
 was Chairman of the Canadian Delegation.<sup>8</sup>

"A complete airing of ideas and opinions, with regard to international air transport after the war, took place and provided a useful introduction to the broader discussions which will take place in due course. Canada of course, expects to participate in these further discussions also and is at the moment taking part in discussions with the United Kingdom and the United States regarding the holding of exploratory conversation.

"No final decisions were taken in London, but I may say that it was evident from the outset that all participants had the same general objectives in view and that there was a broad basis of general agreement as to the way these objectives might best be obtained. All the participants were desirous of improving the air services between their territories, and agreed that such development must take place within an international framework, and that closed discriminatory systems could only promote disharmony and endanger the chances of reaching that broad agreement which is necessary".

Outlining the Canadian Government's policy on international air transport, Hon. Mr. Howe pointed out that Canada occupied a strategic position athwart most of the air routes linking North America with Europe and Asia. He stressed that this position carried with it great responsibilities and opportunities.

"For many months the problem of international air transport has been the subject of exhaustive study by Canadian officials and of active consideration by the Government; and a policy designed to meet these ends had to be worked out. Canadian representatives in future international discussions on air transport will enter these discussions on air transport well prepared and with a clear view of the type of arrangement best designed to meet the needs of Canada for the development of international air services and provide for a fair share of international air transport, and at the same time establish an atmosphere of working co-operation among all other interested nations.

"I think we should be prepared to subscribe to the granting of general freedom of transit for international air services on a universal basis, so that national air

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\*  
 8. House of Commons Debates, Hansard, March 17, 1944, p. 1570  
 Canada Year Book, 1943-44 p. 574.



services will automatically possess the right to cross the territory of other nations en route to their destinations, and to land in other countries for refueling and reservicing without having to request the specific permission of each government concerned. However, in order to prevent misuse of this freedom, it would appear necessary to grant some international authority the power to supervise the manner in which it is carried out".

The Minister thought that such an international air transport authority should also have power to regulate international air services in order to prevent dangers of unnecessary and uneconomic duplication, prepare uniform traffic rules, safety and navigational aids. Powers of regulation would be obtained through control of rates and schedules and licensing. Cross border services, such as those between Canada and the United States, would be considered in a special category and dealt with specially by <sup>the</sup> two countries concerned.

"The Canadian Government is of the opinion that some form of organization along the lines suggested would go far toward meeting the needs of the world for the establishment of effective international co-operation, in the provision of efficient and economical air services, and at the same time provide for the fair and equitable participation of Canada in these air services".

Summarizing the Canadian Government policy, Hon. Mr. Howe said the Government was determined that Canada, "by its participation in the framing of the general settlement of air transport will make as great a contribution as possible to the successful solution of this problem. Our representatives in the international discussions, therefore, will be authorized to support or initiate such proposals as, in the Government's opinion, will be likely to result in the establishment of an international air transport authority, with effective powers, supported by all governments concerned, which will further international co-

operation and good-will, ensure that international air routes and services are divided fairly and equitably among all member nations, meet the needs of the peoples of the world for efficient and economical air transport, and contribute to the establishment and maintenance of a permanent system of general security".

The above policy was the broad outline of Canada's views on international aviation. It was published on March 17, 1944, in the form of a tentative and preliminary draft of an international air convention and was the subject of public discussion and debate, both in the Canadian Parliament and in the press of Canada and other countries. This draft convention received thorough consideration in the House of Commons, and the principles of the convention commanded the almost unanimous support of members of all political parties in the Parliament of Canada. 9

During the early months of 1944, the United States Government conducted exploratory discussions with other allied nations with respect to international civil aviation problems. On the basis of the talks, invitations were sent to fifty-five allied and neutral states to meet in Chicago in November 1944. Of these fifty-five states, fifty-two attended. The Chicago Convention of 1944 produced the following results:-

1. A new International Air Navigation Convention, providing for up-to-date safety and technical regulations in international air operations, and for the establishment of an International Civil Aviation Organization ( I.C.A.O. ), with technical and advisory powers in the fields of international

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\* 9. "Proceedings of the International Civil Aviation Conference U.S. Dept. of State Vol. 1 at p. 67

air navigation and air transport.

2. The Interim Agreement creating a provisional organization (P.I.C.A.O.) that would function until the International Convention was ratified. (The 26th ratification, which made up the amount of ratifications necessary to bring it into force, was received by the U.S. State Department on March 5, 1947. According to the term of the Convention, the I.C.A.O., therefore, came into being officially on April 4, 1947, thirty days later).

3. The "Two Freedoms Document". (the International Air Services Transit Agreement) affords aircraft of all signatory powers (a) the privilege of flying across the territory of any other signatory power without landing; (b) and the privilege of landing for non-traffic purposes. (As of May 1st, 1951, 41 nations have adhered to the Transit Agreement).

4. The "Five Freedoms Document" (the International Air Transport Agreement) includes the "Two Freedoms" of the Transit Agreement and adds the following:-

- a) Third Freedom: the privilege of putting down anywhere in the world passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses.
- b) Fourth Freedom: the privilege of taking on passengers, mail and cargo anywhere in the world destined for the territory of the state whose nationality the aircraft possesses.
- c) Fifth Freedom: the privilege of taking on passengers, mail and cargo destined for the territory of any other contracting state and the privilege of putting down passengers, mail and cargo coming from any such territory.

(As of May 1st 1951, twelve nations adhere to the Transport Agreement).

5. The Conference also adopted a resolution recommending a Standard Form of Bilateral Air Transport Agreement. 10

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On August 1, 1944, the United States Department of State disclosed that Canada had agreed to pay the United States \$76,700,000 for the construction work performed by the U.S. Army in building two main aerial arteries in the northwest of Canada, one leading northeast toward Europe, the other northwest toward the Orient. The announcement of the sale revealed for the first time the exact route of the northwest polar airway. This created a great deal of speculation in Canada on the future development of aviation in this country. In making the purchase, Canada was referred to as making "a down payment on her air future". This purchase which gave her title to nine bases on the northwest airway, helped in a measure to heal an old wound in Canada's pride in air development, namely that it had never been able, through negotiations, to win operating rights in the Pacific as a means of reaching the Orient and other world markets by air. Not only were such efforts always blocked by the United States, but the same efforts received little encouragement in England.

The year 1945 brought the Second World War to an end. Changed conditions in aerography and her airpower made it necessary for Canada to drop the 1935 Air Agreement as it no longer accurately reflected the new position of Canada as an operation of world air routes. The other parties to the agreement were duly notified of Canada's views.

The collapse of the vast technical system set up to meet war requirements was avoided by the quick action of the Provisional International Civil Aviation Organization (P.I.C.A.O.) in calling a meeting of the interested countries

at Dublin, Ireland, in March 1946, at which time provision was made for the retention of all the services essential to successful operation. These services are provided by the nations concerned on an agreed and equitable basis, Canada bearing her share of the cost. In this connection, search and rescue facilities are provided by the R.C.A.F. to assist aircraft in trouble at the Canadian end of the route. The Search and Rescue Organization includes not only aircraft to search for lost aeroplanes, but the integration of control and communications systems to enable ships on the Atlantic to render assistance. It keeps all concerned fully informed almost constantly, of the position and general well being of every aircraft in the area. <sup>11</sup>

After the air agreement with the United Kingdom on Dec. 21, 1945, <sup>12</sup> Trans Canada Air Lines Ltd. assumed responsibility for the operation previously provided by the Canadian Trans-Atlantic Service and officially commenced operations on May 1st, 1947. Since that time, this service has attained full commercial status and has become an outstanding financial success.

3. Canadian Bi-lateral Air Agreements: Although representatives of the United States participated in the drafting of the Paris Aerial Navigation Convention of 1919 which they signed on behalf of their country, it was never ratified by the U.S. Senate. As a substitute for becoming a party to the Convention, the U.S. Government later entered into a series of bilateral

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\* 11. International Agreement on North Atlantic Ocean Weather Stations - Canada Treaty Series. 1946 #45.

12. Canada Treaty Series 1945, #17. (United Kingdom)  
Ibid 1947, #19 (Ireland)

agreements with Canada on air services between the two countries which embodied certain basic principles of the Convention.

On August 29th and Oct. 22nd, 1929 a general air-navigatinn agreement was concluded between the United States and Canada. <sup>13</sup> The agreement provided that "subject to the conditions and limitations hereinafter contained and set forth, Canadian civil aircraft shall be permitted to operate in the United States and, in like manner, civil aircraft of the United States shall be permitted to operate in the Dominion of Canada." <sup>14</sup> This 1929 agreement was later superseded by another air-navigation agreement concluded between the two countries on July 28, 1938 which grants to the civil aircraft of each country "liberty of passage" above the territory of the other country. Immediately following this specific grant, the agreement further provides that "establishment and operations by an enterprise of one of the parties of a regular air route or service to, over or away from the territory of the other party, with or without a stop shall be subject to the consent of such other party." <sup>15</sup> Certain technical agreements were also concluded in 1938 and 1939 between these two countries dealing with air navigation, certificates of competency, certificates of air-worthiness and the use of radio. <sup>16</sup> These agreements established certain

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\* 13. Canada Treaty Series, 1929, #13.

14. Ibid sec. 2 at p. 3

15. Canada Treaty Series, 1938 #8

16. Canada Treaty Series, 1938 Nos. 9 and 10, 1939 Series #5.

established certain standardized practices to facilitate the movement of cross-border air traffic. Most important, however, was the agreement between Canada and the U.S. on air transport services effected by exchange of notes on August 18, 1939. <sup>17</sup> Under this agreement, each party agreed that air carriers of the other would be permitted to operate non-stop over the territory of the other between two domestic points. (Non-stop services between the United States and Alaska was dealt with by another understanding). It is under this clause, for example, that Canada possesses rights to fly from Quebec to New Brunswick over the territory of Maine, and that U.S. airlines fly from Buffalo to Detroit over Canadian territory. In addition, each party agreed to grant operating rights to the air carrier enterprises of the other for services between the two countries as decided between the aeronautical authorities of the two respective nations, the purpose being to maintain a fair balance between operations of each country. Transportation of mail was to be subject to direct agreement between the Postal Officials of both countries. This exchange of notes was to remain in force for two years and thereafter until terminated on six months' notice given by either government. The implementation of arrangements provided for in the exchange of notes, just mentioned, was covered by a further exchange of notes on November 29th and December 2nd, 1940, between the two countries. <sup>18</sup> Under this second exchange,

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17. Canada Treaty Series 1939 No. 10.

18. Canada Treaty Series 1940 No. 13.

cross-border routes between Canada and the U.S. were divided between the two countries. This agreement, which did not cover services between Canada and Alaska, was to remain in effect until Dec. 31st, 1942. Subsequently, since neither government felt, that war time was the proper time for reconsideration or alteration of the agreement, it was again renewed by an exchange of notes on March 4th, 1943, for the duration of the war subject to cancellation by either party on six months' notice after a period of sixty days consultation. <sup>19</sup>

On June 4th, 1949, a formal air agreement on air transport was signed by the U. S. and Canada which extended and established new operating rights to the air carriers of each country, creating for the first time, a fair balance between operations in each country. By this agreement, Trans-Canada Airlines was allowed to establish air services to the following points in U. S. territory, namely:- Fairbanks, Detroit, Cleveland, Boston, Chicago, New York City, Tampa, St. Petersburg and Honolulu. <sup>20</sup>

Since 1947, bilateral agreements have also been signed between Canada and the following countries for air services, namely:- Belgium, <sup>21</sup>Netherlands, <sup>22</sup>Denmark, <sup>23</sup>Sweden, <sup>24</sup>Norway, <sup>25</sup>

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- \* 19. Canada Treaty Series, 1943 No. 4
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|-----|--------|---|---|-----------------------------|
| 20. | Canada | " | " | 1949 No. 14                 |
| 21. | "      | " | " | 1949 No. 22                 |
| 22. | "      | " | " | 1948 No. 14                 |
| 23. | "      | " | " | 1949 No. 24                 |
| 24. | "      | " | " | 1949 No. 20 and 1947 No. 16 |
| 25. | "      | " | " | 1950 No. 1                  |



France, 26 the United Kingdom, 27 Ireland, 28 Portugal, 29 and Germany, 30 Inter-continental scheduled services in the Atlantic generally are provided by Trans-Canada Airlines and within the Pacific area generally they are provided by Canadian Pacific Air Lines. As soon as bilateral agreements were concluded with Australia, 31 New Zealand, 32 Japan, the United Kingdom 33 for Hong Kong, Canton Island and Fiji Islands, and the United States 34 for Hawaii, C.P.A. began scheduled operations from Vancouver to Australia and New Zealand in July 1949; and to Japan and Hong Kong in September of that year.

4. Future Air Policy in International Aviation: The position of Canada in the field of aviation, as well as its geographical location, makes cooperation with other nations of the world, engaged in international civil aviation, imperative. Canada has taken a liberal course of cooperation with other nations in all its negotiations. This outlook has been adopted in view of the great importance of air transport in the future. Air transport is more than just the latest and fastest method of transporting passengers and cargo. It is a revolutionary development which has profoundly affected the civilization of the world. No one can predict with any degree of certainty or

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\*26, Canada Treaty Series, 1950 No. 13  
 27. " " " 1949 No. 21; also 1948 No. 18  
 28. " " " 1947 No. 19  
 29. " " " 1947 No. 12  
 30. " " " 1952  
 31. " " " 1946 No. 22  
 32. " " " 1950 No. 14  
 33. " " " 1947 No. 37  
 34. Supra Note 20.

precision the nature and extent of the contributions which it may make to the future security and prosperity of the peoples of the world.

Canada, as a result, has made every effort at the International Civil Aviation Organization to promote international cooperation and not to foster international bitterness. Our country played a major part in the original discussions that led to the establishment of the International Civil Aviation Organization, generally known as I.C.A.O., which has its headquarters here in Montreal. Canada has participated actively in the deliberations of I.C.A.O. and its many committees, and, as a result, has secured the benefit of the joint knowledge and experience of all member States to the technical and economic aspects of all phases of civil aviation.

In closing, reference should be made to the Minister of Transport's recent speech, which he gave at the Annual meeting of the Air Industries and Transport Association of Canada on November 10th, 1952, <sup>35</sup> at which time he stated the government's air policy with respect to international routes. I quote:-

"In the international field, particularly as regards inter-continental routes, we are concentrating on the firm establishment of good Canadian scheduled services. In the Atlantic area generally these will be provided by Trans Canada Air Lines and within the Pacific area generally they will be provided by Canadian Pacific Air Lines. T.C.A. has just extended its Atlantic operations to serve Germany in addition to France and the United Kingdom. This by no means represents the end of T.C.A. expansion abroad although, further growth will continue to be gradual and based on sound economic considerations. In the Pacific area, C.P.A. already serving Hawaii, New Zealand, Australia, Japan and Hong Kong, is

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35. MacDonald - "The Work of the Air Transport Board" at p. 43  
A.T.B. Library, Ottawa.

considering expansion to serve a service between Western Canada and South America.

In the establishment of new international routes, progress must of necessity be slow because of the difficulties involved in making satisfactory bilateral air agreements with other countries. In some cases our plans for extension of Canadian routes may well be seriously delayed if not actually prevented by inability to make reasonable arrangements with other governments.

As regards trans - border service to the United States, the major scheduled services will continue to be provided by T.C.A. generally although we would be glad to see more Canadian operations of a secondary type, particularly in the non-scheduled field, and even semi-regular operations which are not of a mainline character, developed by other Canadian operators".



## Chapter 111

THE MAGNA CARTA OF AVIATION LAW IN CANADA

1. Sovereignty of the State over the Air Space: The literature on this topic is so rich that to examine it all would be a serious task indeed for my purposes. So many leading jurists have attacked this subject from its various points of view that nothing short of genius could accomplish originality in discussing it. It suffices to say that sovereignty of states over the airspace has been much discussed by jurists over the years under various theories which fell into the following groups. In the first place, there was the older view, based upon a pre-airship tradition, of the complete freedom of the air space without restriction, analogous to the freedom of the high seas. (Wheaton, Bluntschli, Pradier-Fodere, Stephan, Nys, etc). This theory is justified by the very nature of the air, an element common to all and one which cannot be confined within the frontiers of a state. Secondly, there was the theory of the freedom of the air but taking into consideration the right of preservation of States. This theory supported by Meili, in 1908, had some small number of adherents (Stranz). Thirdly, the view of the freedom of the air with the exception of the airspace which was necessary for the defense of states. (Despagnet, Fauchille, Rolland, Bonnefoy, Oppenheim, Merignac, Ferber, Meyer, van Fels etc). Under this theory the influence of the analogy to territorial waters is somewhat evident. A number of the authors took as a criterion, for the extent of territorial airspace, the range of guns or the maximum height to which aircraft can fly. Fourthly, there

was the practical view that while a state might claim territorial rights in a lower zone air of air some thousand feet above the ground, considering that airspace in that zone as belonging to the land, it could not claim sovereignty in the higher air spaces which, like the high seas beyond the marginal sea, remained open to free navigation. (Von Holtendorff, Rivier, Pietri, Hilty, Von Barr, von Listz etc). Under this doctrine the height varies to an undetermined altitude defined, as in the third theory above, by the range actually reached by guns or by air navigation. Fifthly, certain jurists argued that the entire air space above the territory of a state should be regarded as under its territorial jurisdiction, excepting the innocent passage of aircraft, certain ones considering this passage as a servitude. (Westlake, Corsi, Grünwald, Meurer, A. Meyer, Catellani, etc). Lastly and the sixth of the theories, it was asserted by a group of jurists that States had complete sovereignty over the airspace above their territory without any restrictions following the principle of the common law, "Cujus est solum ejus est usque ad coelum" <sup>1</sup> (von Ullmann, Gollard, Gemma, Baldwin, Dr. Lycklama a Nijholt, Scialoja, joined by von Listz and Gruenvald who reconsidered their previous opinions, etc).<sup>2</sup>

Before the War of 1914-18, this fundamental question of national jurisdiction over the airspace was the subject of

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1. Blackstone Commentaries, Book 2 p. 18

2. Lycklama - "Air Sovereignty" at pps. 9 to 20  
Journal of Air Law Vol. 2 1931 at p. 610 - "Droit Aerien - Grannini."

debate by diplomatic and international juridical bodies. Certain of the above theories received endorsements by the Institute of International Law, the Diplomatic Conference of 1910 in Paris, the Congress of Verona, the International Juridical Committee for Air Navigation and the International Law Association, which varied from freedom of the air to sovereignty.

The question of sovereignty over the air arose immediately with the declaration of war in 1914. Germany cited as a 'casus belli' that French aviators had violated the neutrality of Belgium and had been guilty of a wrongful act in flying over her own domain<sup>3</sup>. The war resulted in nations accepting immediately the theory of the nation's "free and exclusive sovereignty over the air space above its territory", a principle which was carried over after the Armistice and written into the Convention of Paris for the Regulation of Air Navigation as Article I. This principle, which was based upon restraint rather than development of air navigation, was the only one which was adopted without discussion and this, by itself, was a definite advance in the establishment of a basis of international public air law, which was not to be confined to Europe but from the outset was to reach out to other continents, with universality as its ultimate goal.

2. The Air Navigation Convention of 1919: After the cessation of hostilities of the first Great War, there gathered in Paris one of the largest groups of diplomats ever to assemble for an International Conference. Emerging from the holocaust, the plenipotentiaries of thirty-two victorious Allied and Associate Powers met in 1919 to draw up the Treaty of Versailles. The object of which

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\* 3. Davis - "Aeronautical Law, 1930" at p. 6., which in turn refers to the "French Yellow Book".

being not only to end wars for all time to come but also to establish a new world-wide organization, known as the League of Nations, an International Court, an International Labour Organization; and to devise a complex system of Conventions on various subjects which merited international attention and consideration.

One of the effects of the war on Canada was to make her more ready to take a direct place in the world of States. Her military and economic effort in the war had given her confidence, a sense of accomplishment, and added impetus to a slowly-rising spirit of nationalism. Conscience of the large contribution it had made to victory and anxious to exert a commensurate influence on the Peace settlement, the Dominion of Canada was represented at the Peace Conference not only as part of the British Empire Delegation but also in its own right as an independant country on equal status with the smaller Allied nations.

The Canadian Plenipotentiaries occupied the anomalous position of being representatives, sometimes of the British Empire as a whole, and sometimes of the Dominion of Canada alone. The British Empire Delegation consisted of five delegates from the United Kingdom, seven delegates from the Dominions, and two from India, including the Native States. Throughout the Conference, this delegation met almost daily. It received regular reports of the proceedings and decisions of the Council of Four, the Council of Five, and various Commissions upon whose conclusions the terms of the Peace Treaty were eventually founded. In this way the Canadian delegates were regularly and intimately informed as to the progress of negotiations and the trend of events. Upon many of the numerous Commissions established by the Conference



to consider and report upon special aspects of the conditions of peace the Dominions were fully represented. Canadian plenipotentiaries and their advisers<sup>4</sup> filled some highly important positions on several committees and discharged responsible duties in connection with the British Empire Delegation.<sup>5</sup>

During the war, the aeroplane had been used as an instrument of warfare thus serving to focus the attention of the European powers upon it. The aeronautical experts of the various delegations at the Conference were quick to seize upon this new mode of transportation as a war weapon and as a means of fast transportation knowing no national boundaries. Enthusiastic about the future prospects of aviation and fully aware of its needs, they were convinced of the absolute necessity of an International Convention, for the regulation of aerial navigation.

On March 12, 1919, on the motion of A.J. Balfour, the conferences established the Aeronautical Commission of the Peace Conference, charged with the following duties:<sup>6</sup>

- (a) To study all aeronautical questions placed before it by the Supreme Council of the Peace Conference.
- (b) To study all aeronautical questions which they deemed should be placed before the Supreme Council of the Peace Conference for its due consideration.
- (c) To draft a Convention to govern international aviation in time of peace.

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4. Canadian Delegation:

- a) Sir Robert Borden, Prime Minister and Secretary of State for External Affairs.
  - b) Sir George Foster, Minister of Trade & Commerce.
  - c) Mr. A.L. Sifton, Minister of Customs.
  - d) Mr. C.J. Doherty, Minister of Justice.
- Advisers: - Lieut. Gen'l Sir Arthur Currier, Commander of the Canadian Army Corps, Lieut.-Col. O.M. Biggar, Judge-Advocate General, Mr. Loring C. Christie, Legal Adviser of Dept. of External Affairs.

5. Hansard Report, Special Session, Sept. 2, 1919, 2nd Sess. Vol. 1 p. 13

6. Roper - "La Convention Internationale du Oct. 13, 1919" at p. 30

The Aeronautical Commission consisted of two representatives from the five large States - British Empire, France, Italy, Japan and the United States - and one representative from seven "powers of limited interest" - Belgium, Brazil, Cuba, Greece, Portugal, Roumania and the United Kingdom of the Serbs, Croats and Slovenes. The drafting of the convention was almost entirely the work of the great States. Belgium alone was represented on the subcommissions, and then only on one of the three. The conference had the services of very able legal talent including ' Mssrs. d'Aubigny and de Lapradelle of France, Buzzati of Italy and White Smith of Great Britain who formed the Legal Subcommission.<sup>7</sup> Although Canada was not officially represented on the Aeronautical Commission or Sub-Commissions, Sir Robert Borden's chief adviser, Lt. Col. O.M. Biggar had the honour of taking part as one of the British representatives at a series of meetings.<sup>8</sup>

After many meetings, preliminary drafts of the Convention were presented on July 10th and September 27th, 1919, to the Supreme Council of the Peace Conference. The Canadian Plenipotentiaries immediately began to think of the effects of any international control of civil aviation on their long border with the United States. The drafts called forth a vigorous condemnation by A.L. Sifton, who described it in a letter to Sir Robert Borden as "the worst example we have yet seen of internationalism gone mad". Conversation with the U.S. delegate, Mr. Lansing, showed that the Americans too would think in terms of special arrangements for the common frontier, and a Canadian reservation

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\* 7. Tombs - "International Organization in European Air Transport" p. 42

8. Biggar - "The Law Relating to the Air", Proceedings of the Canadian Bar Ass'n, Vol. 6 1921 at p. 196

was entered, expressing some objections and leaving the final word to the Canadian Parliament.<sup>9</sup> Later the Convention was approved with the following reservation allowing for bilateral arrangements with the United States:-

"The Canadian representatives, after giving careful thought to the recent amendments made to the draft aerial Convention, are prepared to sign same with the following reservations:

1. This acceptance must not be considered as a renunciation of the objections put forward by the Canadian plenipotentiaries which have not been dealt with by the recent amendments. Consequently, the future outcome for these objections is absolutely reserved for examination by the Canadian Government and Parliament.

2. The signature to the Convention by the Canadian plenipotentiaries must be considered only as a provisional measure not binding on the Government of Canada, and does not impose on the Canadian Government the obligation of placing the Convention for ratification before the Canadian Parliament.  
(translation from French to English my own) 10

It is to be noted that the proposed aerial convention was to be separate from the treaty of peace. The experienced diplomat, Pichon, had pointed out, in the Supreme Council, that it was necessary to disjoin the air clauses pertaining to peace with Germany from the rules that properly belong to a general air convention. He had called attention to the difficulties that had beset the drafting of such a convention in the past, and indicated that the attempt to incorporate an aerial convention in the treaty of peace would indefinitely postpone the signing of the treaty.  
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These views prevailed:

3. Analysis of the Convention of 1919: The draft Convention set forth in concrete form the world attitude on the rights and liabilities of aircraft and those who own, control and operate such aircraft

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\* 9. Glazebrooke - "Canadian External Relations" - p. 313

10. Supra note 6 at p. 48

11. Miller, - "My Diary, with Documents" XV p. 346.

in international operations. Every clause bore the impress of the work of experts well versed in the mechanics of flying. The details were mainly concerned with practical problems of the operation of aircraft; while the legal rules were carefully formed. On the whole, the convention provided for a system of amendment that looked toward the future development of aviation.

As early as the first session on March 17th, 1919, the Aeronautical Commission decided to study questions of fundamental principles before regulating aerial navigation. There were several principles which governed the Convention.

1. Recognition of (1) the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft, and (2) the right of each State to impose its jurisdiction over the air above its territory and territorial waters.

On the proposal of the American delegation,<sup>12</sup> the Commission adopted the principle of national airspace sovereignty. This principle, which had become customary law during the war years, was the only one which had any chance of being adopted without discussion. In its very first clause, the Convention ended, for a time at least, the controversy over the freedom of the air. The Convention recognized the complete and exclusive sovereignty of every State over the airspace above its territory and its territorial waters. But each contracting State undertook in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States provided the conditions of the convention were observed.

2. Subject to the principle of sovereignty, recognition of the right of innocent passage in time of peace in so far as

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12. Cooper - "United States Participation in Drafting Paris Convention 1919", Journal of Air Law & Commerce, Vol. 18, 1951 at p. 268.

this freedom is consistent with the security of the State, with the enforcement of reasonable regulations relative to the admission of aircraft of the contracting States and with the domestic legislation of the State.

An important compromise was thus effected in Article 2; recognition of sovereignty, but, besides that, free air traffic in times of peace, within the limits of sovereignty. <sup>13</sup> This freedom was granted as a privilege instead of being conceded as a national right.

3. With regard to domestic regulations relative to the admission and treatment of the aircraft of the contracting States, recognition of the principle of equality of treatment without distinction to nationality.

The latter part of article 2 elucidates the principle of equality of treatment when it prohibits discrimination based upon nationality. Articles three and four relate to prohibited areas, which a State may proclaim on the grounds of military reasons or public safety; and from which it may exclude all aircraft provided that its own private aircraft are comprised in the prohibition. This provision was to balk any temptation to declare prohibited zones of undue size.

4. The recognition of the principle that every aircraft must possess the nationality of the contracting State only and that every aircraft must be entered upon the register of the contracting State, the nationality of which it possesses.

This principle that each aircraft must have nationality and be registered was incorporated in articles five and six. As a means of forcing as many States as possible among the Allied and Associated Powers to adhere to the convention, the fifth article prohibits a State, except by a special and temporary authorization to admit any aircraft possessing the nationality of any State which

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13. Slotemaker - "Freedom of Passage" at p. 16.

is not a contracting party; and further limits the right of any State to grant nationality to aircraft not belonging either to its nationals as individuals or to incorporated companies of which the President or Chairman and at least two-thirds of the directors are its nationals. An annex provided for the method in which registration was to be effected, and prescribes the registration marks to be adopted by each country.

5. The following provisions are recognized as desirable from an international point of view to insure the safe conduct of aerial navigation.
  - (a) Regulations for compulsory certificates of airworthiness and licenses for wireless equipment, at least for aircraft used for commercial purposes. Mutual recognition of these certificates and licenses by the contracting States.
  - (b) Regulations for compulsory licenses of pilots and other personnel in charge of aircraft. Mutual recognition of these licenses by the contracting States.
  - (c) International rules of the air, including international rules as to signals, lights, and for the prevention of collisions. Regulations for land and on the ground.

The Convention further provided that certificates of airworthiness and licenses of pilots were to be issued by the State whose nationality was claimed by the aircraft in accordance with the regulations stipulated in the annexes. The annexes also included requirements as to the papers and logbooks to be carried; rules of the road, including signals; regulations as to the laying out of aerodromes; as to the minimum qualifications for certificates to pilots and others, as to weather reports and other like matters, and also a prohibition of the carriage in international traffic of explosives or, except with special permission, of wireless apparatus.

6. Recognition of the right of transit without landing for international traffic between two points outside the territory of a contracting State, subject to the right of the State traversed to reserve to itself its own internal commercial aerial traffic and to compel landing of any aircraft flying over it by means of appropriate signals.

In regard to navigation above the territory of a State,

Article 15 provides that aircraft of a contracting State has the right to cross the air space of another State without landing. It is under obligation, however, to follow the route fixed by the subjacent State, and it must land if ordered to do so by the prescribed signals, or if there was a general requirement for aeroplanes crossing the border to land in a particular aerodrome for inspection.

The establishment of international airways is subject to the consent of the State or States flown over. Furthermore, article 16 enunciates the principle of cabotage by granting each contracting State the right to make restrictions in favour of its national aircraft in connection with commercial transportation wholly within its own territory. While this liberty of action might lead to abuse, a counter-balance is found in the provision that any contracting State may retaliate against another imposing reservations and restrictions.

7. Recognition of the principle of special treatment for military, naval and state aircraft when they are in government service.

A chapter of the Convention is devoted to state-owned aircraft, including military planes, applying principles quite analogous to the status of public ships in territorial waters.

Such, in brief, were the leading provisions of the Convention of 1919. Not only was the Convention one of the permanent contributions of the Peace Conference of Paris but also it is regarded as the Magna Carta of Aviation Law so far as the Dominion of Canada is concerned.

4. Canada as a Signatory to the Convention: At the time of Confederation in 1867, the United Kingdom made any treaty it saw fit which became binding upon all her colonies and Dominions throughout the

Empire. In 1878, Canada obtained a declaration from the British Government that, for the future, no commercial treaty would be made by which Canada should be bound, unless she herself assented to it. <sup>14</sup> Consequently, from that time on Canada became free from any future commercial treaty obligations other than those of her own making.

In 1879, Canada wanted to enter into some tariff arrangements with Spain; but having to act through the British Foreign Office, negotiations were difficult and Canada's Commissioner, Sir A.T. Galt said (as afterwards summarized by Sir Charles Tupper in the House of Commons). <sup>15</sup>

"that he found himself greatly hampered in discharging the duties imposed upon him by the Government of Canada, because he only stood in the position of Commercial Commissioner, and it was necessary that all his negotiations with the Government of Spain should be filtered through Her Majesty's Minister at the Court of Madrid".

In 1893, Canada's Commissioner, Sir Charles Tupper, was associated with the British Ambassador at Paris in negotiating trade agreements between France and Canada, and Sir Charles did the work, In 1897 further arrangements were made with France, and on this occasion the part taken by the British authorities was purely formal. With reference to this situation, Sir Wilfred Laurier afterwards said:

"It has long been the desire, if I mistake not, of the Canadian people that we should be entrusted with the negotiation of our own treaties, especially in regard to commerce. Well, this looked-for reform has come to be a living reality. Without revolution, without any breaking of the old traditions, without any impairment of our allegiance, the time has come when Canadian interests are entrusted to Canadians, and just within the last week, a treaty has been concluded with France - a treaty which appeals to Canadians alone, and which has been negotiated by Canadians alone." <sup>16</sup>

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\*14. Am. J. of Int'l Law, Vol.7 (1913) p.275 which makes reference to the Br. Blue Book, Commercial, No.5, 1903; also Can. Sess. Papers  
 15. House of Commons Hansard reports, May 12, 1887 at (No. 24, p.7. p.369, also Can. Sess. Papers, 1894, No. 56A at p. 98.



In 1909, Canada created a Department of External Affairs by statute which expressly referred to negotiations with foreign countries:

"The Secretary of State.....shall have the conduct of all official communications between the Government of Canada, and the government of any other country in connection with the external affairs of Canada, and shall be charged with such other duties as may from time to time be assigned to the Department by order of the Governor-in-Council in relation to such external affairs, or to the conduct and management of international or inter-colonial negotiations, so far as they may appertain to the Government of Canada". 17

In 1910, a treaty was arranged between the United Kingdom and the United States providing for the general arbitration of differences between Canada and the United States by proceedings with which the British authorities have nothing to do, by direct communication between Canada and the United States. In this respect, the treaty was really equivalent to a transfer from the British Foreign Office to the Canadian Government of the conduct of external relations with the only foreign country with which Canada at that time had large and delicate relations. The importance of these arrangements was significant in view of the British Foreign Office's statement in 1892 which said:

"To give the colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate states, and would be equivalent to breaking up the Empire into a number of independent States". 18

Hitherto to 1919, it had been the practice to insert in political treaties an article or reservation which enabled the Dominion

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\* 16. House of Common's Hansard Reports 1907-08 at p. 1260

17. 8,9 Canada Statutes Edward VII ch. 13.

18. Supra note 14 at p. 277

to adhere after signature and ratification by the Government of the United Kingdom. Early in the first World War, it was announced in the various parts of the Empire that the Dominions would be fully consulted concerning the terms of peace in view of the important role they were playing in the war. The sessions of the Imperial War Cabinet held in the spring of 1917 and in the summer of 1918 afforded in a certain measure the means for the carrying out of this understanding. It was this body which passed Resolution No. IX which reads as follows:

"The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important a subject to be dealt with during the war, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.

They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous units of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several governments may determine". 19

On March 12, 1919, Sir Robert Borden called the Dominion Delegates into an informal conference and submitted to them the proposal that in each treaty the participation of the Dominions should be signified by the signature of Dominion plenipotentiaries, and that the preamble and other formal parts of the drafts should be drafted accordingly.

This proposal was unanimously adopted in the form of a memorandum which was circulated to the British Empire Delegation, and was accepted in principle both by the Delegation and the Conference.

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\* 19. Dawson - "The Development of Dominion Status", -p.175.

This memorandum read as follows:

1. "The Dominion Prime Ministers, after careful consideration, have reached the conclusion that all the treaties and conventions resulting from the Peace Conference should be so drafted as to enable the Dominions to become Parties and Signatories thereto. This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole and will at the same time record the status attained there by the Dominions.

2. The Procedure is in consonance with the principles of constitutional government that obtain throughout the Empire. The Crown is the supreme executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministries within different constitutional units; and under Resolution IX of the Imperial War Conference, 1917, the organization of the Empire is to be based upon equality of nationhood.

3. Having regard to the high objects of the Peace Conference, it is also desirable that the settlements reached should be presented at once to the world in the character of universally accepted agreements, so far as this is consistent with the constitution of each State represented. The object would not be achieved if the practice heretofore followed of merely inserting in the body of the Convention an express reservation providing for the adherence of the Dominions were adopted in these treaties; and the Dominions would not wish to give even the appearance of weakening this character of the peace.

4. On the constitutional point, it is assumed that each treaty or convention will include clauses providing for ratification similar to those in the Hague Convention of 1907. Such clauses will, under the procedure proposed, have the effect of reserving to the Dominion Governments and legislatures the same power of review as is provided in the case of other contracting parties.

5. 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 heading 'The British Empire', the sub-headings 'The United Kingdom', 'The Dominion of Canada', 'The Commonwealth of Australia',

'The Union of South Africa', 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.

6. The Dominion Prime Ministers consider therefore, that it should be made an instruction to the British member of the Drafting Commission of the Peace Conference that all treaties should be drawn according to the above proposal.

Hotel la Perouse, Paris, 12th March, 1919". 20

Upon the firm insistence of Sir Robert Borden, the Dominions received distinctive representation, not only as part of the British Empire Delegation, but also in their own right as independent countries on equal status with the smaller Allied nations gathered at the Peace Conference.<sup>21</sup> By this arrangement the Dominion representatives lost the right to vote other than as part of the British Empire Delegation, and won the doubtful advantage of a general and a special designation, as well as a double signature on the treaty—first, by the signature of the representatives of the United Kingdom and the Dominions, and secondly, by that of the Dominion's plenipotentiaries. The British Plenipotentiaries, therefore, affixed their signature on behalf of the entire Empire, including the Dominions; the Overseas Delegates signed for the same Dominions.

By the adoption of this method of signature, Canada appeared in the various Treaties as a Signatory; and its concurrence to these was thus given in the same manner as that of the other nations.

In form at least, the Canadian representatives at the Peace Conference was symbolic of the new emerging status of the Dominion as a free and independent nation.<sup>22</sup> This important constitutional development involved the issuance by the King, as the

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\* 20. Borden - "Canada and the Commonwealth" at p. 110

21. Glazebrooke - "Canada at the Peace Conference", 1942 at pps. 35-56

22. Tempereley - "A History of the Peace Conference", Vol. VI

High Contracting Party, of 'Full Powers' to the various Dominion Plenipotentiary Delegates. In order that such powers might be based upon formal action of the Canadian Government, an Order-in-Council was passed on April 10, 1919, granting the necessary authority. In consequence thereof, the Full Powers from the King, confirming diplomatic status, were issued by the Imperial Government. Sir Robert Borden addressed a communication to the Prime Minister of the United Kingdom requesting that necessary and appropriate steps should be taken to establish the connection between the Canadian Order-in-Council and the issuance of the Full Powers by His Majesty so that it might formally appear of record in the Archives of the Peace Conference. Such request was complied with and an official statement, as to the true intent and meaning of the provisions of the Treaty with respect to Canada's representation, was filed on record in the Archives of the Peace Conference at Paris. <sup>23</sup>

After this full acceptance of the new Dominion status, the logical step was that the ratification of the treaties should take place only after the Dominion Parliament, as well as the Imperial Parliament, had approved such action; and, on the insistent demand of Sir Robert Borden, this course was adopted in preference to the suggestion of the Imperial Government that express approval of the Dominion Legislature could be dispensed with. Consequently, at a Special Session of the House of Commons on Sept. 2nd, 1919, the following resolution was introduced in Parliament on behalf of the Government for general approval before advising ratification to His Majesty in respect of the Dominion of Canada:-

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\* 23. Hansard Reports, House of Commons Debates, supra note 5 at p. 14

"Resolved that it is expedient that Parliament ~~that~~ ~~Parliament~~ do approve of the Treaty of Peace between the Allied and Associated Powers and Germany (and the Protocol annexed thereto) which was signed at Versailles on the 28th of June, 1919, a copy of which was signed on behalf of His Majesty acting for Canada, by the plenipotentiaries therein named, and that this House do approve of the same."

And then the Prime Minister, Sir Robert Borden, went on to say the following:

"It is unquestionable that the Treaty should be submitted to Parliament for its consideration and approval before ratification on behalf of Canada takes place..... The formal ratification is, of course, in the name of the Sovereign, but in giving that ratification on behalf of Canada, His Majesty necessarily acts at the instance of his constitutional advisers in this country." 24

This precedent as to signature and ratification was the procedure followed from that time on. This in effect was a ready recognition of the fundamental change which had taken place in the constitutional structure of the Empire at the Peace Conference. Though, in point of fact, the declarations and resolutions, which had been concurred to by the United Kingdom and the self-governing Dominion of Canada, had not as yet been formally embodied in the Statute of Westminster<sup>25</sup> by the Imperial Legislature.

In concluding, it is important to note that the Treaty of Peace, which was signed on June 28, 1919, preceded the adoption of the Aerial Navigation Convention. However, this Convention, signed on Oct. 13th, of the same year, and containing 45 articles, forms Part XI of the Treaty of Versailles and cannot be disassociated from it. The same procedure as at the Treaty of Peace prevailed in that the Convention was signed on behalf of each Dominion under full powers issued by the Crown upon the advice of the respective Dominion Governments. Signing the Convention for Canada, under its

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\* 24. Ibid

25. Imperial Statutes George V ch. 44

particular territorial signification, was present the Hon. Sir  
Albert Edward Kemp, United Kingdom Minister for Overseas Forces.<sup>26</sup>  
This Convention was later formally ratified by His Majesty, on  
behalf of Canada, on June 1st, 1922, thereby binding Canada to  
perform her international duties and obligations under it.<sup>27</sup>

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\* 26. Supra note 6 at p. 298

27. Ibid at pps 73-75





## Chapter IV

CANADIAN LEGISLATION ON AVIATION:

1. The Air Board Act of 1919: Immediately after the first World War, it became apparent to our Legislators that the new air transport medium, the aeroplane, was destined to play an important part in Canadian development; and that it would, therefore, be necessary to introduce legislation both to encourage and control flying. <sup>1</sup> Contemporaneously with the first session of the Aeronautical Commission on the 17th of March, 1919 <sup>2</sup> at the Paris Peace Conference, a Bill to control aeronautics in Canada, under the jurisdiction of the Federal Government, was drafted and introduced for its first reading in the House of Commons on the 29th of April, 1919. Hon. A.K. Maclean introducing the bill said:

"It will be necessary owing to the development of aeronautics in Canada and in other countries that there be appointed a body to administer this service in this country. .... The purpose of the Bill as I have said is to control and regulate and to prescribe laws for the conduct of Aeronautics in Canada. It is deemed advisable to constitute a method of dealing with this new subject." <sup>3</sup>

At the second reading of the Bill on May 5th, 1919, Mr. A.K. Mackenzie went on further to say:

"Obviously, there must be some development in commercial aeronautics in the near future. During the war the development of aeronautics related almost entirely to military and naval affairs. Private and commercial aero-

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1. Canada Year Book 1943-44 at p. 571  
2. Supra note 10 at ch. III of this Thesis.  
3. House of Commons Debates, 1919 session, Vol. II at p. 1864.

nautics was prohibited altogether and consequently there was no development along these lines. It is necessary in view of the probable development of aeronautics that there should be some governmental control of such matters and it is proposed to establish a Board which shall have entire control of a government or commercial service..... It is necessary of course, to have representatives of the Naval and Military Departments upon the Board for the reason that heretofore they have been very much and practically interested in aeronautics. Consequently it is proposed that they shall have direct representation on the Board. .... The immediate purpose of this legislation is chiefly to control aeronautics in Canada, established by any Government department or by private corporation. For example it is not within the right of any individual to fly in the air with aeroplanes or hydroplanes. or any other machine of the kind, although there is no statutory law which directly prohibits it... It is unknown to both the common law and the statute law. Consequently, nobody can legally engage in flying today; and in none of the provinces, nor in Canada is there any statutory authority for anybody to grant licenses for the purpose. The Board must establish aerial routes, or to put it in another way: 'If a commercial company desires to carry on an aerial service between, say .. Montreal and Toronto, their routes should be first established and that would be one of the functions of the Board. The machines used should be licensed and inspected just as a steamer is. The pilots and the crews must also be licensed and that will be another function of the Board. Furthermore, regulations must be enacted, compelling flying machines to use telephonic or wireless apparatus..... I think a very close parallel to the control of aerial navigation is the control which we exercise over shipping, with, of course, the very notable difference that one operates on water and the other in the air. Generally speaking, the object of the legislation is to put ourselves in a position to control aeronautics chiefly commercial, as that is the form we shall likely have in the immediate future in Canada..... The important thing to have in mind in aerial navigation is the protection of life and property." 4

2. The Air Board: After debate on the Bill, the Federal government assumed jurisdiction over aviation after the Air Board Act was passed on June 6th, 1919. <sup>5</sup> Established by virtue

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\* 4. Ibid at p. 2058

5. 9 - 10 Canadian Statutes George V. ch. 11 (1919)

of this statute was the Air Board of seven members, of whom the chairman was required to be a Minister of the Crown, and two of the members were to be appointed as representatives of the Department of Militia and Defence and the Department of the Naval Service respectively, all the members to hold office for a term of three years. The Board, thus constituted, was by the Statute given administrative duties with respect to all matters, civil and military, relating to aircraft; and power was conferred upon it to make regulations relating to the licensing of personnel, aircraft, and air harbours, and to the navigation of the air generally, as well as to submit regulations for the governance of a military air force. The work of the Board fell into three main divisions: (1) control of civil aviation.

(2) the direction of flying operations for other Departments of the Government.

(3) and the direction of the Canadian Air Force.

Before the close of the year, a staff was appointed, regulations were prepared for the conduct of civil flying, and by the beginning of 1920 the stage was set for the beginning of civil aviation on an organized basis. One of the first acts of the Air Board was to make a survey of the Dominion to determine "what public services could be more efficiently and, in the broader sense, more economically performed by air than by existing methods." As a result of the survey and of discussions with the government services concerned, air stations were established in 1920 - the most westerly in Vancouver and the

most easterly in Halifax. <sup>6</sup>

3. Air Regulations of 1920: The Governor-General in Council, on the recommendation of the Chairman of the Air Board pursuant to the provisions of the Air Board Act, issued regulations on December 31st, 1919 for the purpose of regulating and controlling aerial navigation in Canada. The regulations were brought into force on January 17th, 1920 by the Order-in-Council. <sup>7</sup> Speaking generally, these regulations followed the provisions of the International Paris Convention of 1919 on aerial navigation, which had already been signed on behalf of Canada, though not yet ratified. Under them no aircraft was allowed to fly in Canada, unless it had been registered either in Canada or in one of the other contracting States, and unless it bore the proper nationality registration marks. Equally no pilot was allowed to fly, except for instruction, unless he had received a certificate, to obtain, which involved a medical examination, repeated every 6 or 12 months, and the successful passing of tests. Following the 1919 Convention of Paris, the Canadian regulations laid down detailed rules of the road and detailed instructions for the laying out and marking of aerodromes; the marks being such to indicate from the air the size of the aerodrome, the direction of the wind, and at night, any projections involving possible danger to navigation .
4. The National Defence Act of 1922: In the year 1923, there was a great change in the organization of flying services. The Air

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\* 6. Canada Year Book 1938 at .p.

7. Canada Gazette, Jan. 17/20 Supplement. These have been amended and consolidated many times since then. The present day regulations have been approved by P.C. 2575 of the 24th of May, 1951 promulgated in the Canada Gazette on the 13th of June, 1951.

Board remained in office until January 1, 1923 when the new Department of National Defence was established by statute which combined the Department of Militia and Defence, the Department of Naval Service and the Air Board into one Department for purposes of government economy.<sup>8</sup> By amendment the Air Board Act became part of the National Defence Act; the Air Board ceased to exist and its functions were assumed by the Minister of National Defence.<sup>9</sup> The civil operations branch was merged with the Royal Canadian Air Force and continued as part of that branch until July, 1927, when it was again separated from the distinctively military work. At this time, a change in the organization became necessary to meet expanding needs and the control of civil aviation, in all its forms, was placed under the Deputy Minister of National Defence as civil head of the Department.

5. The Aeronautics Act of 1927: The duties and powers of the Minister of National Defence, with respect to civil aviation, were farther defined by the Aeronautics Act of 1927,<sup>10</sup> which was a mere consolidation, being word for word a reproduction of the Air Board Act of 1919 and the Aeronautics Act of 1922, except that it referred to the Minister of National Defence wherever the Air Board was referred to in the old Act. There are, however, certain provisions found in the Aeronautics Act and not in the Air Board Act such as the Governor-in-Council may prescribe compensation for death or injury directly resulting from a flight undertaken in the course of public duty.<sup>11</sup> Subject to approval by the Governor-in-Council, the Minister was given power to

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\* 8. 12-13 Canada Statutes George V. ch 34 (1922)

9. Ibid sec. 7.

10. Revised Statutes of Canada 1927 ch. 3.

regulate and control aerial navigation over Canada and its territorial waters. <sup>12</sup>

6. The Department of Transport Act of 1936: Arrangements were made to merge the Department of Railways and Canals with the Department of Marine, to form the Department of Transport on November 1st, 1936; and with the consent of the Minister of National Defence, those plans were enlarged to provide for moving the control of civil aviation to this newly formed Department. Accordingly, a Bill creating the Department of Transport was approved by Parliament at the session of 1936. <sup>13</sup> This statute empowered the Minister of Transport to exercise all and every one of the duties, powers and functions previously vested, with respect to civil aviation, in the Minister of National Defence by any Act, Order or Regulation. Military and civil aviation was thus separated. Military aviation became a separate branch with its own airworthiness standards and its own regulations governing military operations; and remained under the control of the Department of National Defence. To provide a grouping of services directly related to transport by air, the Air Service branch of the Department of Transport was created, to include the newly acquired civil aviation division, the meteorological division and the radio division. The new branch was placed under the direction of a capable officer of the Department who was instructed to expand all three services to meet the requirements of a coast-to-coast inter-urban air transport service, following the American plan of that day. <sup>14</sup>

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\* 12. Ibid sec. 4

13. 1936 Canada Statutes c. 34

14. House of Commons Debates, Hansard, March 17th, 1944 at p. 1576 and following.

7. The Transport Act of 1938: On July 1st 1938, the Transport Act was assented to and which was declared to be "An Act to Establish a Board of Transport Commissioners for Canada, with authority with respect to transport by railways, ships and aircraft." <sup>15</sup> The Board so established was the former Board of Railway Commissioners for Canada whose members remained in office with a change of name. The Act then went on to define the duties of the Board as follows:

"It shall be the duty of the Board to perform the functions vested by this Act and by the Railway Act with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways, ships, and aircraft; and the Board shall give to this Act and to the Railway Act such fair interpretation as will best attain the object aforesaid." <sup>16</sup>

This provision declared the object of the legislation was to co-ordinate and harmonize all carriers of certain descriptions, that is railways, ships and aircraft. But later provisions of the Act restricted the duties of the Board very considerably in respect of air and water transportation. <sup>17</sup> The net result being that the Board was left with full jurisdiction over transportation by rail, but very limited jurisdiction over transportation by air and water. <sup>18</sup> The section on air transportation empowered the Board to regulate tariffs, investigate complaints and to license aircraft to transport passengers and goods between specified points or places in or outside of Canada. <sup>19</sup> This agency was not another Department of Government but a judicial body which derived

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\* 15. Canada Statutes 2 George VI ch. 53.

16. Ibid section 3, s.s. 2.

17. Ibid sections 12 and 15.

18. "Royal Commission on Transportation Report, 1951, at p.274

19. Supra note 15 sections 13 and 16 .

its powers only from the legislation entrusted to it for administration and not from the Minister of Transport. Its duty was to interpret the legislation and not to initiate projects. In other words, a new air route was designated by the Government as a route by an Order-in-Council under the Act. Then the Board would allocate and give a franchise for this route to any applicant on certain well defined principles, which might be summed up as public convenience and necessity. As well, the Commissioners were bound to follow certain judicial principles in deciding what tolls would be charged. Purely and simply, the Board was a quasi-judicial administrative body.

8. The Aeronautics Act of Canada: The present control over civil aviation is administered by the Federal Government under the authority of the Aeronautics Act <sup>20</sup> and amendments <sup>21</sup> thereto. This Act is in three parts. Broadly speaking, Part I deals with the technical side of civil aviation, comprising matters of registration of aircraft, licensing of airmen, the establishment and maintenance of airports and facilities for air navigation, air traffic control, accident investigation and the safe operation of aircraft. This Part of the Act is administered by the Controller of civil Aviation under the supervision of the Director of Air Services, Department of Transport. Part II of the Act deals with the social and economic aspects of commercial air services and assigns to the Air Transport Board certain statutory functions with respect

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\* 20. Supra Note 10.

21. Amendments: 8 George VI ch. 28, 1944.

9-10 George VI ch. 9, 1945.

14 George VI ch. 23, 1950.

14 George VI ch. 50, 1950.

1 Elizabeth II ch. 14, 1952.



to the regulation of commercial air services. Finally, Part III of the Act deals with matters of Internal Government administration in connection with the Act.

CHAPTER VTHE CONSTITUTIONAL CONFLICT OVER AERONAUTICS

1. Introduction: Throughout the entire area of Canada, this new instrumentality of the air raised an interesting and fundamental conflict between the Dominion and the Provincial Governments as to the right to control and regulate aeronautics, including the granting of certificates to persons to act as pilots, the granting and licensing of aerodromes and air-stations, and the fixing of air-routes. Fundamentally, the question was whether the subject was one on which the Dominion Parliament was alone competent to legislate, or whether it was within the scope of each Province as being a matter related to property and civil rights, and local works and undertakings as to exclude the Dominion from any (or from more than a very limited) jurisdiction in respect of it.
2. Dominion Control of Aeronautics: When interested Parliamentarians first began to consider the House of Commons's Bill<sup>1</sup> for the control and regulation of aeronautics throughout Canada, they considered at the outset whether sovereignty over the airspace, within its territorial boundaries, was solely federal or provincial or both federal and provincial under Canadian constitutional provisions. Opinions varied greatly on this point by our Legislators; and some of their remarks on this subject are worthwile noting, strictly, from an historical point of view.

Mr. Earnest Lapointe (later the Hon. Earnest Lapointe, Minister of Justice) speaking in the House of Commons on the Air Board Act said:

"By this Bill.....Parliament is establishing its authority over aerial routes and all matters concerning aircraft. But does my honourable friend ( referring to Mr. A.K. Maclean who

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\* 1. Air Board Act, 1919. Supra note 5, Ch. 4.

introduced the Bill) think that if a company, for instance, established a line between Montreal and Quebec, to operate exclusively within the limits of that province, it would be a provincial matter, and that the company in question should not come under the authority of the Parliament unless its undertaking is declared to be for the general advantage of Canada? My honourable friend classifies aerial navigation with marine navigation, but article 92 of the British North American Act declares that a provincial legislature may exclusively make laws in relation to the matters coming within the class of subjects 'hereafter enumerated' and article 10 of section 92 sets forth:-

Local works and undertakings other than such as are of the following classes:-

Lines of Steam or other ships, railways, canals, telegraph and other Works and undertakings connecting the Province with any other or others of the Province or extending beyond the limits of the Province.

Therefore if such a company were operating exclusively within the limits of one province it would be a provincial matter, and I do not think this Air Board could fix the route or control the license to pilots, and other matters in connection with it." 2

Mr. A.K. Maclean, who introduced the Bill for the Minister of Naval Services, replied to the point in question with the following remarks:-

"The constitutional question, of course, arises in connection with this matter, and had it been pointed out to the Fathers of Confederation that we might possibly have this aerial development in later <sup>years</sup>, it would be difficult now to say whether it would have <sup>been</sup> placed in clause 91 or 92 of the British North American Act.

Clearly, the legislation, if enacted, would cover inter-provincial aeronautics, and consequently to that extent the Federal Government would have control. Whether it has control over purely provincial aeronautics is a question open to very much doubt, and possibly it will have to be settled ultimately by the courts. There is a clause in the British North American Act which in affect, states that subjects not assigned to the Provinces fall within Federal jurisdiction. Aeronautics was not placed in the list of subjects assigned to provincial jurisdiction, and therefore it is arguable that the subject falls within Federal jurisdiction. However, any doubt we may entertain on the point does not affect the competency of Parliament to pass this legislation, although later it may be held by the courts that it is only intra-vires in so far it affects interprovincial aeronautics." 3

Another Parliamentarian of great distinction, Mr. Mowat, brought to the fore another interesting point in the debate:-

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2. House of Commons Debates, Hansard, 1919 Session at p. 2052

3. Ibid at p. 2057

".....I would say that the draughtsman has done his work well but there is one thing that he has not had present in his mind in connection with the matter and that is as to the question how aeronautics is going to interfere with the property rights of the public. .... According to law, as it has stood for many hundreds of years, the right of the property extends 'usque ad coelum ab inferno' that is, up to the heavens and down beneath the earth. That is his property. It may be that we have arrived at a stage in the world's history in which a machine has come which will suddenly be launched across his property. While the flier may be far up in the air and could not be said to do very much harm to a man's property, sometimes aeroplanes come very near to a man's house and they do make a great deal of noise. You may have claims made by certain property owners who do not want these things coming over their houses or property. There is nothing in the Act which enables the Government to say that aeroplanes shall have the right to pass over a man's property or to define the conditions under which the right shall be exercised.

I do not share with the Minister (referring to Mr. A.K. Maclean) the doubt that he seems to have as to his power to enact this legislation as having reference to the point raised by my honourable friend, from Kamouraska (referring to Mr. Ernest Lapointe) ..... Property rights will be provincial. You have the right to legislate with regard to that because you have the exhaustive clause of the British North America Act which says that anything which is not Provincial is Dominion. You have besides that the Post Office service, the naval service, and the military service and last but not least, the .... geological service. This brings it into the Interior Department. With all these uses in the different departments of the Government to which the aeroplane might be put, there seems to me to be a preponderating case in support of the contention that these are Dominion matters and would naturally come under the control of the Dominion authorities. How could an air man know where the exact position of the provincial boundary was? When he starts out on his journey he must have some rule or regulation which will carry him to the end of it in Canada without regard to what particular Province in Canada he may be in. I doubt if any one will raise the point that this is a matter for exclusive provincial jurisdiction. If any one does, it behooves the Dominion to fight for Dominion rights with all the powers they have." 4

In reply to the question with respect to property rights which was raised in Mr. Mowat's speech, the following remarks were made by Mr. A.K. Maclean:

"I do not desire to amend the Bill with a view of abrogating any of the common law doctrines in respect to property rights in the air. In view of recent developments the point is one for the courts to determine but I doubt very much if that doctrine would be held to have much validity under the circumstances. I would refer my honourable friend to paragraph 'i' of sec. 4 of the Act which reads as follows:-

- (i) the institution and enforcement of such 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.'

"The sub-section (3) immediately below reads as follows:-

- (3) All regulations enacted under the provisions of this Act shall be published in the Canada Gazette; and, upon being so published, shall have the same force as if they formed part of this Act. <sup>5</sup>

Accordingly, the Bill later received Parliament's assent and the Air Board Act was enacted giving jurisdiction over aircraft and flying operations to the Federal authority. <sup>6</sup> The constitutionality question which this piece of legislation raised, was left in abeyance in view of the non-importance of aviation in Canada, at that time - except perhaps to certain Federal Government services and the early aviation pioneers of this country.

3. The Dominion-Provincial Conference of 1927: On November 3rd, 1927, <sup>7</sup> at a Conference held in Ottawa on Dominion-Provincial relations, between representatives of the Dominion Government and of the Provincial Governments, questions were raised by the representative of the Province of Quebec, the Hon. Louis Taschereau, as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally in Canada - at all events in their application to flying operations carried on within a Province; and as to the interpretation of the word "navigation" in the British North American Act. It was decided, after a lengthy discussion which lasted all morning, that the question of jurisdiction was proper to be determined by the Supreme Court of Canada for hearing and due consideration, pursuant to Section 55 of the Supreme Court Act of Canada which permits references on constitutional conflicts. <sup>8</sup>
4. The Supreme Court Decision on Aeronautics: <sup>9</sup> In 1930, four questions were submitted for hearing and determination by the Supreme Court of

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\* 5. Ibid at p. 2059

6. Supra note 5, Chapter 4.

7. "Official Precis of Dominion-Prov. Conference, Ottawa, 1927. p. 9

8. 1927 R.S.C. Chapter 35, sec. 55.

9. 1930 S.C.R. 663

Canada on the reference by the Governor General in Council relating to the respective legislative powers of the Dominion Parliament and the Provincial Legislatures on Aeronautics. In the unanimous opinion of the members of the Court, <sup>10</sup> it was held that while the Dominion Parliament has a considerable field of jurisdiction over aeronautics under the various heads of section 91, of the British North America Act, 1867, there is also a local field of jurisdiction; and that the Dominion jurisdiction does not extend so far as to permit it to deal with the subject in the broad way in which it attempted to deal with it in the 1919 legislation of the Air Board Act.

Of the questions which were submitted for adjudication, the third and most general was directed to the authority of Parliament to enact the Air Board Act <sup>11</sup> and the fourth related to the validity of the Air Regulations 1920. <sup>12</sup> The first and second questions had to do with the effect on the distribution of legislative authority by the provisions of section 132 of the B.N.A. Act <sup>13</sup> and of the International Convention for the regulation of aerial navigation. On these questions separate judgements were delivered by the Chief Justice and by Duff, Newcombe, Smith and Cannon J.J.; Renfret and Lamont, J.J., concurred in the answers given by Duff J., to the questions submitted.

All the members of the Court were of the opinion that, apart from the existence of the Convention, the powers of Parliament in relation to aeronautics must be restricted to legislation under

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\* 10. C.J.C. Anglin and Duff, Newcombe, Renfret, Lamont and Cannon J.J.  
 11. Supra note 5, Chapter 4.  
 12. Supra note 7, Chapter 4.  
 13. Sec. 132 of the B.N.A. Act reads as follows: "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries."

specific heads of section 91 so far as incidentally necessary, such as "The Regulation of Trade and Commerce", <sup>14</sup> "Postal Service", <sup>15</sup> "Militia", Military and Naval Service and Defence", <sup>16</sup> and "Naturalization and Aliens", <sup>17</sup> and that Parliament acquired no general legislative jurisdiction under the head "Navigation and Shipping". <sup>18</sup>

Smith, J., says that the latter expression refers only to the navigation of the water and shipping plying on the water, referring, in support of this interpretation of it, to the New English Dictionary; <sup>19</sup> and Cannon, J., briefly states the conclusion that "aviation, even if designated as aerial navigation, is not a subject in section 91". <sup>20</sup>

Duff, J., dismisses the argument that this head extends to air navigation and aircraft with the remark that he is "unable to agree that navigation and shipping would 'according to the common understanding of men', embrace the subject of aeronautics". <sup>21</sup> Newcombe, J., deals with the point a little more fully, expressing the view that:

"Navigation and Shipping" are words inapt and unauthorized to connote flight or the utilization of atmospheric resistance or buoyancy for the carriage of craft or traffic. Flight is one thing and navigation another. The way of a flying machine may in some respects be assimilated to the way of an eagle in the air, but not to that of a ship in the midst of the sea, which has been recognized as something different. Navigation consists in the exercise of a right of way, which may be enjoyed in the sea, in tidal and in non-tidal water.....This meaning is emphasized for the purposes of section 91, where the word is associated with "shipping".

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\* 14. B.N.A. Act sec. 91. s.s. 2

15. Ibid s.s. 5

16. Ibid s.s. 7

17. Ibid s.s. 25

18. Ibid s.s. 10

19. Supra note 9 at p. 711

20. Supra note 9 at p. 716

21. Supra note 9 at p. 685

He concludes that:

"If the subject of "Navigation and Shipping" is to be extended to what in the absence of a definitive name, has been described as "aerial navigation", that is a function to be discharged by the enactment of appropriate words and it belongs to the Imperial Parliament, not to this Court." <sup>22</sup>

Having thus excluded the reference of the federal powers to the head "Navigation and Shipping", all the members of the Court proceed to give positive reasons for regarding the subject as falling within the legislative jurisdiction of the provinces under one or other of the heads of section 92.

Anglin, C.J., says that "legislative jurisdiction over intra-provincial flying - and there must be a great deal of it - prima facie belongs to the provinces under section 92, sub-section 13 (Property and Civil Rights)", <sup>23</sup> and Duff, J., concludes that "primarily the matters embraced within the subject of aerial navigation fall within section 92" since -

"The provincial jurisdiction under heads 10 to 16 (of sec. 92) extends through the airspace above, as well as the soil below; and the control of the province over its own property is as extensive in the case of aerodromes and aircraft as in the case of garages and automobiles. The employment of aircraft for survey, exploration, inspection and patrolling, in the management of the public domain, for police purposes, and in the interests of public health (head 7), is as strictly a provincial matter as the employment of any other local agency for such purposes." <sup>24</sup>

Cannon, J., remarks that "the ownership of the airspace is prima facie a subject within the exclusive jurisdiction of the provinces; and they alone can impose restrictions to the rights of the owners of land and to those of the owners of aircraft". <sup>25</sup> Newcombe, J., quotes the maxim Cujus est solum ejus est usque ad coelum, <sup>26</sup> a common law maxim which

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\* 22. Ibid at p. 702

23. Ibid at p. 681

24. Ibid at p. 685

25. Ibid at P. 717

26. Translated the maxim means he who owns the soil also owns everything from the center of the earth up to the heavens. Eubank - 1930 C.B.R. at p. 126



applies in English provinces of Canada, and article 414 of the Quebec Civil Code, <sup>27</sup> which declares that "ownership of the soil carries with it ownership of what is above and what is below it," expresses the view that the Courts have no authority to explain or qualify the principle thus established "so as to admit of the introduction of a public right of way for the use of flying machines consequent upon the demonstrations in recent times of the practicability of artificial flight", and adds that "the appropriate legislature may, of course, provide for airways, notwithstanding the rights of the proprietors", from which, "the right of way exercised within a province by a flying machine must in some manner be derived". <sup>28</sup> The Chief Justice concurred in these views, expressed by Newcombe, Smith and Cannon, J.J.

On the important question of the effect of section 132 and the International Paris Convention of 1919 on the distribution of power by the B.N.A. Act, the opinions of the members of the Court are divergent. All of them agreed that Parliament did not; by virtue of the International Convention, acquire under section 132, exclusive legislative authority to legislate in such a way as to carry out the obligations the Convention imposes on Canada, but they equally agree that Parliament's jurisdiction is paramount, so far as the exercise of its authority is necessary in order that these obligations may be carried out.

Duff J., refers to Attorney General of British Columbia Vs. Attorney General of Canada, <sup>29</sup> and says that "it is now settled, if indeed there ever was doubt upon it, that provincial legislation repugnant to legislation of the Dominion under section 132 is thereby

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\* 27. Quebec Civil Code (annotated) art. 414 at p. 129

28. Supra note 9 at pps. 701, 702.

29. (1923) 63 S.C.R. 293 at pp. 327 - 331; (1924) A.C. 230, at pp. 211 - 213.

superseded", and that the Dominion has full authority under that section "to give full effect to the rules embodied in the Convention and to take effective measures for the enforcement of them". <sup>30</sup>

Newcombe, J., on the other hand, says that:-

"The language of section 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. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by section 132, and while pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, I am unable to interpret the Dominion power as meant to deprive the province of authority to implement its obligations. If that had been the intention, I think it would have been expressed". <sup>31</sup>

Later he expresses the opinion, that:-

"Dominion powers derived under section 132 should.....be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined, "the Dominion being " by that section, authorized to exercise these powers for performing its treaty obligations and equally so for performing those of a province.....irrespective of the question as to where the power resided if section 132 had not been enacted". <sup>32</sup>

Smith J., takes the same view as Duff, J., of the effect of the judgement of the Privy Council in A.G. of British Columbia vs A.G. of Canada. <sup>33</sup> He regards this decision as affording a conclusive answer to the contention that the powers of Parliament arise only on the failure of the provinces to take the necessary measures, and concludes that the powers of the provincial Legislatures exist only while the field is unoccupied, those of Parliament being paramount. <sup>34</sup>

Anglin C.J., concurs with Smith, J., on these points, expressly disagreeing with Cannon, J., who seems to go even farther than Newcombe, J., considering that, although the jurisdiction of Parliament

\* 30. Supra note 9 at p. 694  
33. Supra note 30

31. Ibid at p. 697  
34. Supra note 9 at p. 708

32. Ibid at p. 699

may be paramount, it should be exercised only if the provinces "refuse or neglect to do their share within their legislative ambit with sufficient uniformity to honour the signature of the Dominion", and concluding that, as this situation does not appear from the data submitted, it cannot be said that Dominion legislation on the subject of aeronautics is presently necessary or proper. <sup>35</sup>

Duff, J., is, moreover, of the opinion that since the provisions of the Aeronautics Act were enacted in 1919, before Canada became a party to the International Convention, they remain invalid, notwithstanding their subsequent re-enactment as Chapter 3 of the Revised Statutes of 1927. <sup>36</sup> Anglin C.J., on the otherhand, considers that the validity of such of the provisions of the Act as are necessary to carry out the obligations imposed by the Convention may probably be upheld under section 132 by reason of the fact that the Act as it stands became law only on Feb. 1st, 1928 (due to the enactment as Ch. 3 R.S.C. 1927), long after the date of the Convention, and notwithstanding that its provisions had been previously in force. <sup>37</sup> Cannon, J., states that the Air Board Act was assented to on June 6th, 1919 before the Parliament of Canada could invoke article 132 to secure the power of performing the obligations of Canada under a treaty which was not then in existence; and it requires an existing treaty to give validity to legislation, not merely a prospective convention. Since the Act was re-enacted as chapter 3 of the Revised Statutes of Canada (1927), the Convention was in force, "but at no time has the Parliament of Canada,

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\* 35. Ibid at p. 719

36. Ibid at p. 686

37. Ibid at p. 680

as they had done for the Japanese Treaty, <sup>38</sup> passed an Act providing that the treaty should be thereby sanctioned and declared to have the force in Canada." <sup>39</sup>

Notwithstanding the differences of view thus outlined, all the judges of the Court concede to the Dominion adequate jurisdiction to fulfill all international obligations arising under a Convention of the kind under consideration. Two of them considered that this jurisdiction, so far as its exercise affects the provincial field of legislative jurisdiction, arises only if and to the extent that what is necessary is not done by the provinces, or there is at least a lack of uniformity in the action the provinces take, but in the opinion of the remaining five it arises forthwith upon the treaty being made and independently of anything the Provinces may do or refrain from doing.

In summation, it might be said the Supreme Court's judgement decided the submitted questions adversely to the claims of the Dominion Government and set up distinct limitation on its powers under the B.N.A. Act. The Court, in its findings, felt very strongly that the right to control aerial matters within the Provinces must naturally appertain to the Provinces in virtue of their right to deal with Property and Civil Rights under the federal constitution of Canada.

5. The Privy Council Decision on Aeronautics: <sup>40</sup> The soundness of the answers given in the Supreme Court of Canada was challenged by an appeal to the Judicial Committee of the Privy Council of England. This Board reversed the findings of the Supreme Court and asserted in a very un-

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\* 38. A.G. for British Columbia vs A.G. for Canada 1924 A.C. 203

39. Ibid at p. 719

40. A.G. of Canada vs A.G. of Ontario 1932 1 D.L.R. 58

ambiguous manner the paramount and exclusive legislative and executive authority to implement the obligations of Canada or the Provinces under the Convention of Paris relating to the regulation of aerial navigation. They considered "the governing section to be section 132, which gives to the Parliament and Government of Canada all powers necessary and proper for performing obligations towards foreign countries arising under treaties between the Empire and such foreign countries."<sup>41</sup> The Committee did not rely solely upon section 132 of the B.N.A. Act for authority but brought to the aid of that section the consideration of "the fact that further legislative powers in relation to aerial navigation resides in the Parliament of Canada by virtue of section 91, sub-sections (2), (5) and (7)".<sup>42</sup> The Committee said further that they:

"do not think that aeronautics can be brought within the subject of Navigation and Shipping, although undoubtedly to a large extent, and in some respects, it might be brought under the Regulation of Trade and Commerce (2) or the Postal Services (5). On the other hand, the respondents contended that aeronautics, as a class of subject came within sec. 92 (13), 'Property and Civil Rights' in the Provinces, or (16), ('Generally all Matters of a merely local and private Nature' in the Provinces. Their Lordships do not think that aeronautics is a class of subject within Property and Civil Rights in the Provinces, although here again, ingenious arguments may show that same part of it might be so included.

In their Lordships view, transport as a subject is dealt with in certain branches both of section 91 and of section 92, but neither of those sections deals specially with that branch of transport which is connected with aeronautics".<sup>43</sup>

To their findings in all these respects the Board added:-

"There may be a small portion of the field which is not by virtue of specific words in the British North American Act vested in the Dominions; but neither is it vested by specific words in the Provinces. As to such small portion, it

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41. Ibid at p. 67  
42. Ibid at p. 70  
43. Ibid at p. 67

appears to the Board that it must necessarily belong to the Dominion under its powers to make laws for the Peace, Order and Good Government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of Canada." <sup>44</sup>

For these reasons the Privy Council came to the conclusion that it was competent for the Parliament of Canada to pass the Air Board Act and authorize the Air Regulations of 1920. In their decision, they virtually read a new power to deal with aerial navigation under the constitution; and showed the readiness of the Privy Council to find a means of placing under Dominion authority the control of national issues in Canada.

6. The Johannasson Case on Aeronautics: Following the Privy Council's decision on the question of jurisdiction over aeronautics, the prevalent general consensus of opinion was that it fell exclusively under Dominion authority. Shortly thereafter, doubt was again created in view of the grounds, stated in the judgment in the 'Radio Case' <sup>45</sup> and in the 'Labour Conventions Case', <sup>46</sup> that the Dominion's power to deal with aeronautics arises only under section 132. The quotation from the first, referring to the Aeronautics Case, is: "The leading consideration in the judgment of the Board was that the subject fell within the provisions of section 132", <sup>47</sup> Lord Atkin in the Labour Conventions Case was also of the opinion that "the Aeronautics Case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries". <sup>48</sup> If these observations were so, it was generally speculated in legal circles that there was a limitation on the Dominion's power to deal only with such aspects of

\* <sup>44</sup>. Ibid at p. 70

<sup>45</sup>. Re: Regulation and Control of Radio Communication, 1932 2 D.L.R. 81, A.C. 304.

<sup>46</sup>. AG. of Canada vs. A.G. of Ontario 1937 1 D.L.R. 673, A.C. 326

<sup>47</sup>. Supra note 45 at p. 82 D.L.R.; p. 311 A.C.

<sup>48</sup>. Supra note 46 at p. 681 D.L.R.

aeronautics as would be necessary to carry out obligations under the International Convention.

This doubt was set aside by the Supreme Court of Canada's judgment, handed down on October 12th, 1951, in the case of Johannesson vs The West St. Paul Rural Municipality<sup>49</sup> wherein it was held that the whole subject of aeronautics or aerial navigation is a matter falling within the exclusive legislative authority of the Dominion Parliament to make laws for the Peace, Order, and Good Government of Canada.

This case essentially involved the question of how much jurisdiction the Parliament and Government of Canada have over aeronautics; whether it was limited to implementing the International "Convention relating to the Regulation of Aerial Navigation", or, if not being so limited, whether it extended to all phases of aeronautics and all matters relating thereto such as, for example, aerodromes as was the matter in issue in this case.

Proceedings in this matter were initiated in the Manitoba Court of King's Bench<sup>50</sup> where Campbell, J., was of the opinion that "the Dominion's power to deal with aeronautics did not go beyond what was necessary to carry out (the obligations under) the Convention".<sup>51</sup> He refers to the Radio Case<sup>52</sup> and the Labour Conventions Case<sup>53</sup> in support of this view. "Assuming, however, that Dominion legislative authority in relation to aeronautics may be found in some heads of section 91, as in head (2) (regulation of trade and commerce), head (5) (postal services) and head (7) (militia and defence)<sup>54</sup>" he continues, "I am of opinion that the licensing and regulation of airports, particularly commercial airports operated by private persons,

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\* 49. 1951 4 D.L.R. 609

50. Re; West St. Paul Rural Municipality 1949 3 D.L.R. 694

51. Ibid at p. 700

52. Supra note 45

53. Supra note 46

54. Supra note 50 at p. 694

cannot by any stretch of the imagination be said to be ancillary or incidental to any of the above heads". <sup>55</sup> Therefore, he concludes that "legislation for the licensing and regulation of aerodromes is not essential to fulfil treaty obligations and as this is a matter of civil rights or local interest, the Dominion is without authority to deal with it", <sup>56</sup> and consequently, provincial legislation may validly be passed.

An appeal from the judgement of Campbell, J., was made to the Manitoba Court of Appeal. <sup>57</sup> Holding in favour of the Province and the municipality, the Appealate Judges in the ratio of 4 to 1 were of the opinion that Dominion legislative jurisdiction in relation to aeronautics, whether under section 132 or under the enumerated heads of section 91 of the B.N.A. Act, does not exclude provincial legislative authority respecting the selection of sites for the location and construction of aerodromes, at least in respect of aerodromes for peace time commercial aviation and intended for other than Dominion Government use. They, however, believed that it was beyond the legislative authority of a Province to license or regulate the operation of an aerodrome or to legislate respecting the continuance or maintenance thereof. Dysart, J.A., with McPherson C.J.M., and Richards, J.A., concurring, was of the firm belief that "the rights over the land in question and over the use of 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 sec. 92 of the B.N.A. Act and are not to be trenched upon by Dominion legislation further than is necessary in the national interest". <sup>58</sup> In the sole dissenting

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\* 55. Ibid at p. 704

56. Ibid at p. 704

57. Johannesson vs West St. Paul Municipality 1950 3 D.L.R. 101

58. Ibid at p. 129



judgement, Coyne, J.A., thinks 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." <sup>59</sup> He concludes that "aeronautics in all its aspects remains wholly within Federal competence as expressly found and decided in the Aeronautics Reference. That judgement was not on appeal before the Labour Conventions Board and the latter could not reverse the decision or strike out what the Aeronautics Board said to be and were really grounds of their judgment. If the Labour Conventions judgment had reduced the significance and grounds to the narrow basis of implementation of the Conventions only, the Temperance Act Judgment <sup>60</sup> puts back the ground that Aeronautics had ceased to be a matter of provincial and local concern and had become a matter of general concern to Canada and thereby became within the legislative and administrative competence of Canada, and that this equally with its role in implementing the Convention, and the finding that aeronautics is not with "Property and Civil Rights", gave constitutional validity to the whole Act and constitutional competence over the whole aeronautics field." <sup>61</sup>

A further appeal was made to Canada's final Court of Appeal, the Supreme Court which, in a sweeping judgment, reversed the decisions of the two lower judicial bodies. <sup>62</sup> Kellock, J., represented the views of all the members <sup>63</sup> of the Supreme Court when he stated that "the subject of aerial navigation is a matter of national

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\* 59. Ibid at p. 109

60. A.G. for Ontario vs Canada Temperance Federation 1946 2 D.L.R.;  
A.C. 193

61. Supra note 57 at p. 114

62. Supra note 49

63. Members were Renfret C.J.C., Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright J.J.

interest and importance". Continuing on he said:

"Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the Provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive. If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that such matters no longer come within the classes of subject assigned to the Provinces. I think, therefore that as the matters attempted to be dealt with by the provincial legislation here in question are matters inseparable from the field of aerial navigation, the exclusive jurisdiction of Parliament extends thereto. The non-severability of the subject matter of "aerial navigation" is well illustrated by the existing Dominion legislation and this legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense". 64

Their Lordships declared also that while the Aeronautics Case of 1932 relied specifically on Section 132 of the B.N.A. Act in that the Aeronautics Act, therein question, was enacted pursuant to a "British Empire" Treaty, nevertheless the renunciation of the Treaty, as of April 4th, 1947, by Canada and its adherence, in its own right, to the Chicago Convention on International Civil Aviation, which became effective on April 4th, 1947, did not abrogate its legislative authority in relation to aeronautics since it is a matter falling under the P.O.G.G. clause of the B.N.A. Act.

The judgment of the Supreme Court in this case is so clear and comprehensive that there is very little one can add except to say that this decision is of great importance in that it has saved Canada from the many perplexing complications so evident in the United States, regarding the respective powers of the States and Federal Governments in relation to aeronautics. The Court recognized that provincial control, over any aspect of aviation, would serve as a barrier to its progress. The advancement of this new field of air

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\* 64. Supra note 49 at p. 624

transportation is to the enrichment and development of our country as well as a very potential arm of national defense in safeguarding our frontiers from foreign encroachment.



CHAPTER VIThe Canadian Carriage By Air Act

1. The Warsaw Convention: Questions of private aerial law were not envisaged or dealt with by the drafters of the multilateral Paris Convention of 1919.<sup>1</sup> With the sudden expansion of aviation after the first World War, the questions assumed more than academic interest. Commercial aviation, like all other means of transportation, immediately produced a long series of legal problems.

On November 30, 1923, the Air Transport Committee of the International Chamber of Commerce adopted a resolution urging the promotion of an international conference with power to draft projects of private international aerial law to be submitted for ratification to all countries. Two years later, the Third Congress of the International Chamber of Congress, held at Brussels in June, 1925, voted:<sup>2</sup>

"The Congress of the International Chamber of Commerce, considering that in various countries interested in commercial aviation, new questions of civil law are constantly arising, involving serious danger of conflicting judgments in the civil courts, decides to take all necessary measures with a view to recommending the convocation of an international convention on civil air law similar to the international convention on public air law signed on October 13, 1919."

In the meanwhile the French Government had taken steps to meet the new demands of commerce. In August, 1923, Premier Poincare informed the chancelleries of the world, of his intention to call an international conference to meet for the purpose of drafting a convention regarding the liability of shippers in international traffic, and in general to decide whether the time was opportune to pursue the study of the codification of the private international law of the air.<sup>3</sup>

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\* 1. Article 18 of the Paris Convention, 1919, contains a provision dealing with patents.  
 2. Colegrove - "International Control of Aviation" at p. 96 refers to "Resolutions of Third Congress, Brussels, June - 1925" at p. 50-51  
 3. Sack - "International Unification of Private Law Rules on Air Transportation & the Warsaw Convention - "Air Law Review, 1933 vol. 4 at

A conference of diplomats from 43 States convened at Paris in November, 1925, at which was discussed a draft multilateral convention, submitted by the French Government as a basis for discussion, concerning the responsibility of the carrier in international air transportation. The delegates modified the French draft convention and then offered it to their Governments for further study prior to convoking a second conference for final adoption. Secondly, they established the Comite-International Technique d'Experts Juridiques Aeriens (C.I.T.E.J.A.), with its seat at Paris, charged with the duty of continuing the work of the conference and studying in particular the possible codification of nine specified subjects of aerial law. The membership of this useful instrument was composed generally of representatives of the principle European States who were lawyers and law professors trained in civil and common law countries. Specifically charged with the redrafting of the project for a convention on liability of carriers in international air traffic, they finally adopted a revised draft at the Madrid session in 1928; whereupon it was transmitted by the French Government to the other States.<sup>4</sup>

All was now ready for the Second International Conference of Private Air Law; and, at the invitation of the Polish Government, on the recommendation of France, representatives of thirty-one States met in Warsaw in October, 1929.<sup>5</sup> After some important compromises, the project of a convention on liability of shippers in international air traffic was adopted on October 12, 1929, under the title of "Convention for unification of certain regulations relative to international air transportation" and was signed by 14 of the States.<sup>6</sup>

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\* 4. Coquoz - "Le Droit Prive Internationale Aerien" at p. 65.

5. McNair - "The Law of the Air". at p. 123

6. Hotchkiss - "The Law of Aviation" at p. 144.

2. The Scope and Application of the Convention: There were no uniform rules of law, prior to the Convention, governing the rights of a passenger or of the owner of goods in aerial transport, or defining the corresponding liability of the carrier. Up to then, these rights and liabilities depended upon the laws of the countries between and over which the international carriage went, and upon the terms of the contract made in particular cases. The laws differed and so did the contracts - the net result being uncertainty and confusion. The Warsaw Convention was enacted to resolve this situation.

The Convention applies only to "international" transportation of persons, baggage and merchandise. Article one therein provides that such "international" transportation is one, in which, "by stipulation of parties", the point of departure and the point of destination are in the territory of two member states; as well, as one between two points in territory of one member state - if an intermediate stop is foreseen in the territory of another member state.<sup>7</sup> Therefore, the scope of the convention does not cover all international carriage, but only such carriage as comes within the terms stated. Thus, if transportation is between Montreal and Paris, Warsaw rules apply because both France and Canada are parties to the Convention. Again if transportation is between the United States and Alaska in an American aircraft with a scheduled stop at Whitehorse, in Canadian territory, then the Warsaw Convention would cover the relations between the carrier and the passenger.

However, if a Canadian aircraft was scheduled to fly from Montreal to Bruxelles via a point in Newfoundland ( both Canada

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\* 7. Grein vs Imperial Airways Ltd. 1937, 1 K.B. 50 at p. 76;  
Philippon vs Imperial Airways Ltd. 1939, A.C. 332 - for  
definition of international transportation under Warsaw Rules.

and Belgium being parties to the Convention) and if the plane was involved in an air crash before leaving Canadian territory, the Convention would apply if the passenger in question held a ticket to Belgium; whereas the relations of the carrier to the injured passenger would not be governed by the Warsaw rules in the case of the passenger holding a ticket only to Newfoundland, even though both passengers were on the same aircraft when the accident occurred.

Paragraph 3 of Article I provides that a series of successive international transportation by several air carriers will be deemed a single international transportation subject to the rules of the Convention, as if it was contemplated by the parties as a single operation, whether it was made on the strength of one contract or of a series of several contracts, and notwithstanding one or more of such contracts have to be performed entirely within the territory of one of the member States. Therefore, the scope and applicability of the Convention is largely determined in each particular case by two things; (a) by determination of who are the separate high contracting parties to the Convention at the time; and (b) by an examination of the terms of the contract of carriage between the carrier and the passenger, or the carrier and the shipper.<sup>8</sup> In other words, the test of applicability of the Convention is the character, not of the voyage made or to be made by the aircraft, but of the transportation contracted by, or for, the given subject (passenger, baggage, merchandise); and in which "by stipulation of parties" points of departure and of destination are in the territories of two member States.<sup>9</sup>

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\* 8. Cooper - "Canada and the Warsaw Convention", Institute of International Air Law papers, McGill U. at p. 2

9. Supra note 3 at p. 350.



3. The Provisions of the Warsaw Convention: The convention consists of a code which lays down certain conditions of contract for international carriage. It defines and limits the rights of passenger and owners of cargo in such carriage, and the corresponding liabilities of the carrier. It not only regulates the enforcement of those rights but imposes upon the carrier a limited liability, in most cases of accident or delay, and an unlimited liability in some. By so doing it makes, indirectly, further provision for safety of carriage.

Articles 3 to 16 of Chapter two, under the heading of "Titre de Transport", provide for the form and contents of the traffic documents to be used (passenger tickets, baggage checks, and airway bills). Absence, irregularity, or loss of the document do not affect the existence, and the validity of the contract of transportation, "which will be nevertheless subject to the rules of the Convention". If a passenger ticket is not delivered, or if baggage or cargo is carried without the issuance of the required baggage check or airway bill, and, in the latter case, if certain detailed provisions are omitted, the carrier is not permitted to avail himself of the limits of liability provided in the Convention.

Articles 17 to 30 in Chapter 3 refer to the general rules of liability of the air carrier under the convention. Responsibility for damage are regulated for in the following cases: - in case of death of, or injury to, a passenger (art. 17); in case of destruction and loss of, or injury to, or damage to, registered baggage and merchandise (art. 18); and, lastly, for damage resulting from the delay of passengers, baggage or merchandise (art. 19)

In case of death of, and injury to, a passenger, the carrier is responsible for damage if the accident, which caused the damage, took place on board the aircraft or in the course of embarkation or disembarking (art. 17). The carrier is also responsible for damage in case of destruction or loss of or damage to checked baggage or cargo if the event, which caused the damage, took place "in the course of air transportation" - by which is meant the period of time during which the property is underguard of the carrier, whether on aerodrome or on board the plane or in another place in case of landing outside of an aerodrome (art. 18). Neither passenger nor shipper need prove negligence or other fault of the carrier as the burden of proof is laid on the carrier, but he has not to prove 'affirmatively' that the damage was caused by an excepted factor. He has only to prove 'negatively' that he, his agents, or employees, are not guilty of any fault by establishing that he or they have taken all necessary measures to avoid the damages, or that it was impossible for him or them to take such measures (art. 20).

Not less, and perhaps even more, important than provisions concerning exemption from responsibility, in certain cases, are provisions on the limitation of liability of the carrier when he is responsible for damages. These provisions deal only with responsibility for passengers and property in the aircraft; and do not cover the case of damage to third persons and to property on the ground, as well as in another aircraft, and to that of other aircraft in case of collision. Nevertheless, the limitation of liability was necessary, even to the extent covered by the Convention, as an encouragement to the air transport industry and

to induce people to invest money in this new branch of the transportation field.

The rules on limitation of liability are mandatory, and all contractual clauses modifying or avoiding them are invalid. The personal liability of the carrier is maintained, but limited to a fixed amount of money (art.22)- not more than 125,000 gold francs for a passenger and not more than 250 francs (gold) per kilogram for checked baggage or cargo and not more than 5,000 gold francs per person as regards objects which the passenger carries himself. This franc is the gold of the so-called Poincare franc, the French unit of currency in effect at the time the Convention was signed. Converted into Canadian currency, the present passenger liability is approximately \$8300 for one passenger. The parties to the contract can stipulate for a higher limit of responsibility for people, and in the transportation of checked baggage or cargo, the owner can declare a special interest in the delivery by paying a supplementary sum for same. In such an instance, the carrier will be liable to pay up to the amount declared unless the carrier proves that the sum declared is greater than the actual value to the consignor at delivery.

As already indicated, the carrier can lose his right to have his liability limited (see art.3,4 and 9). Further to this, article 25 provides that the carrier is not entitled to the provisions of the Convention which exclude or limit his liability if the damage is caused by the "dol" (meaning 'wilful misconduct') of the carrier, or by such conduct on his part as may, in accordance with the law of the Court trying the case, be considered as equivalent to "dol" - that is, wilful misconduct. <sup>10</sup>

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<sup>10</sup> One of the difficulties in the application of the Convention in the U.K. and the U.S.A. has been that the French term "dol" has been

There are many other provisions in the Convention, such as on jurisdiction and procedure with respect to actions for damages, peremption and conflict of laws. All in all, although the scope of application of the Convention is a limited one, notwithstanding, it represents a very important step forward in the matter of uniform regulation, on a sound basis, of private international air law.

4. The Adoption of the Warsaw Convention by Canada: Canada was neither a signatory to nor directly or indirectly represented at the Warsaw Convention in 1929, because of her infinitely minor role in international aviation. With the meteoric rise of Canada in 1939 as a potential international air power, this country began to state its position with respect to this new transport field. A bill was tabled in the House of Commons providing for the ratification and adoption of the Warsaw Convention rules as part of the law of the land. This bill was adopted on May 2nd, 1939 providing, among other things, that as from such a day as the Governor-in-Council might by proclamation certify to be the day on which the Convention shall come into force, the provisions of the first schedule (the formal text of the Warsaw Convention) so far as they relate to the rights and liabilities of carriers, passengers, consignees and other persons, should have the force of law in Canada in relation to any carriage by air to which the Convention applied, irrespective of the nationality of the aircraft performing the carriage.<sup>II</sup> The Act further provided that the Governor-in-Council might by proclamation certify who are the 'High Contracting Parties' to the Convention and in respect of

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<sup>IO</sup> (cont'd) to mean 'wilful misconduct'. Supra 7 at p.344.  
<sup>II</sup> 1939 Statute of Canada ch.I2 at p.69.

what territories.<sup>12</sup> After assent to this statute had been given, the second World War intervened; and it was only eight years later by a Proclamation dated Jan. 30, 1948, published in Part II of the Canada Gazette on March 10, 1948,<sup>13</sup> the Warsaw Convention was declared to come into force as regards Canada with effect from Sept. 8, 1947, subject to the reservation that the first paragraph of Article 2 of the Convention shall not apply to international carriage by air performed directly by Canada.<sup>14</sup> On June 10, 1947, the Canadian Legation at Warsaw, advised the Polish Government ( where ratifications and accession to the Warsaw Convention were by its terms to be deposited) as follows: -

"I have the honour to inform you that the Government of Canada has decided to accede to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12th, 1929; and desires hereby to give your Excellency notice of this accession, in accordance with the provisions of Article 38 of that Convention".

Canada thus took advantage of the formal provisions of Article 38 of the Convention and her accession became effective on September 8, 1947.<sup>15</sup>

5. Inter-Commonwealth Air Transport under the Convention: The rules of the Warsaw Convention do not cover all international carriage, but only such flights between two High Contracting Parties. The

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\* 12. Ibid at sec. 2.

13. "Consolidation of Statutory Orders and Regulations, Canada", at p. 229 Vol. I .

14. Art. 2. para 1 reads as follows: "This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article I".

15. Supra note 9 at p. 10.  
1948 U.S. Aviation Reports at p. 111 .  
1947 Aviation Reports at p. 650.

preamble. (as officially translated into English) recites:-

"The President of the German Reich, the Federal President of the Republic of Austria,.....His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India,.....Having recognized the advantages of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the carrier, have nominated to this end their respective Plenipotentiaries, who being thereto duly authorized, have concluded and signed the following Convention. 16

If the King, referred to above, is a "single high contracting party" 17 for Great Britain, Ireland, the British Dominions and India, it would be necessary to admit that the members of the British Commonwealth were not separate high contracting parties, as between themselves, so as to make the Warsaw rules applicable to flights between such Commonwealth territories, as for example between Canada and the United Kingdom. Whether or not this is correct in accordance with the Constitutional Law of the British Commonwealth, it would have the serious practical disadvantage of greatly restricting the application and scope of the Warsaw Convention.

To appreciate some of the problems involved, it is necessary to give some thought to the manner in which the Warsaw Convention was technically drafted and actually signed and thereafter accepted. In form the Convention follows the traditional pattern set for international agreements between heads of States. The preamble refers to "His Majesty the King of Great Britain, Ireland and the British Dominions Beyond the Seas, Emperor of

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\* 16. Treaty series 1947 No. 15

17. Colegrove - "International Control of Aviation" at p. 184 refers to Ch. I, Art. (1) Section 2 of the Convention.

India" <sup>18</sup> with no specific mention of any Commonwealth members. The Convention was signed, "For Great Britain and Northern Ireland" by the three named British Plenipotentiaries; and separately "For the Commonwealth of Australia" and "For the Union of South Africa". <sup>19</sup> This procedure was in continuance of the form employed at the Paris Peace Conference in 1919 and the Washington Naval Conference of 1921, whereat the negotiated treaties were signed by the Plenipotentiaries on behalf of all the governments of the British Empire represented at the Conference. <sup>20</sup> The Convention was subsequently ratified by His Majesty on May 15th, 1933, on behalf of the United Kingdom, the Channel Islands and the Isle of Mann. <sup>21</sup> To give effect to the Convention, the Carriage By Air Act 1932, was adopted wherein the British Parliament provided that "His Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the Convention" and in respect of what territories. <sup>22</sup> Likewise, the Australian Carriage by Air Act, 1935, provided that the Governor-in-Council might give notice as to who are the contracting parties and the territories concerned. <sup>23</sup> By the New Zealand Carriage by Air Act in 1940, it was provided that any order-in-council under the British Act certifying who are the high contracting parties should be conclusive evidence as to such facts. <sup>24</sup> As late as the 1939 British Order-in-Council, it

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\* 18. Supra note 16.

19. Shawcross and Beaumont - "Air Law" 2nd Ed. pp. 574-575

20. Glazebrook - "Canadian External Relations" at p. 363

21. Shawcross & Beaumont - "Air Law" - 2nd Ed. at p. 682. also 1948 U.S. Aviation Reports.

22. Ibid at p. 682. No. 2004.

23. Supra note 8 at p. 8 and 9.

24. Ibid at p. 9.

was certified that His Majesty was a high contracting party for certain named territories, including the United Kingdom, various colonies, the Commonwealth of Australia and the Dominion of New Zealand.<sup>25</sup> The form of this order indicated that His Majesty was the High Contracting Party for these territories. Further investigation indicates that this Order is similar in form and scope with respect to Australia and the United Kingdom in the Australian Order; also, the New Zealand Act recited that "His Majesty has acceded to the Convention in respect of New Zealand."<sup>26</sup> Finally, all the British Orders-in-Council show "His Majesty, the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India" as the High Contracting Party in respect not only of the United Kingdom and the Colonies but also of the Commonwealth countries which have ratified or acceded to the Warsaw Convention.<sup>27</sup> The Order of 1948, uses the formula - "It is hereby further certified that His Majesty in right of Canada is a High Contracting Party to the said Convention."<sup>28</sup> All these facts lent force to the argument that His Majesty is a "single High Contracting Party" and for the purpose of determining who were the high contracting parties it would be necessary to admit that the members of the Commonwealth were not separate High Contracting parties as between themselves.

In all these proceedings, stated above, Canada appears to have taken little if any part. It adopted its own Carriage

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25. Supra note 21 at p. 859 note 3133.

26. Supra note 8 at p. 9.

27. Supra note 21 at p. 341 (note 359)

28. Ibid at p. 880 note 3179.



by Air Act <sup>29</sup> on May 2nd 1939. Amongst other things, the Act provided that the Governor-in-Council might by proclamation certify who are the high contracting parties to the Convention and in respect of what territories. This was so done eight years later by an Order-in-Council effective July 1, 1947. <sup>30</sup>

A new and important Order-in-Council was issued by the British Government on August 1, 1951, known as the "Carriage by Air (Parties to the Convention) Order, 1951". <sup>31</sup> The United Kingdom, not the King, is named in this Order as a high contracting party in respect of territories of the United Kingdom and various Colonies. Canada, the Commonwealth of Australia, New Zealand, India, Pakistan, the Republic of Ireland, the United States of America and other States are named as separate parties. <sup>32</sup> Attached to this Order is an explanatory note which states, among other things, that the schedule to the Order ( naming the territories) has taken account of the constitutional changes occurring since the 1939 Order was made, and that Australia, Ceylon, India, New Zealand, Pakistan, and the Republic of Ireland, "in respect of whose territories His Majesty the King was shown as High Contracting Party in previous Orders, are now themselves certified as High Contracting Parties". <sup>33</sup> This new Order becomes conclusive also as to New Zealand under the form of the New Zealand Carriage by Air Act. <sup>34</sup> To complete its separate participation in

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\* 29. 3 Geo. VI ch. 12 .  
 30. Canada Gazette July 5th, 1947.  
 31. Supra note 8 at p. 10.  
 32. Ibid at p. 10.  
 33. Ibid at p. 9.  
 34. Ibid at p. 9.

the Convention, Canada published in the Canada Gazette of Friday, November 21, 1952, a new proclamation reciting that Canada had acceded to the Warsaw Convention in accordance with the third paragraph of Article 38 thereof, and certifying as to who were the contracting parties and in respect to what territories. <sup>35</sup>

The schedule attached to the Order shows Canada, the United Kingdom of Great Britain and Northern Ireland, the Commonwealth of Australia, New Zealand, the Republic of India, Pakistan, Ceylon, and States outside the British Commonwealth, as parties in respect of their separate territories. <sup>36</sup>

So far as the Warsaw Convention is concerned, it now seems clear that each member of the Commonwealth is a separate and distinct High Contracting Party; and that inter-commonwealth flights constitute international transportation thereby making the Warsaw rules applicable for all intent and purposes.

6. The Constitutionality of the Carriage By Air Act: It would appear from the sweeping decision of the Johanneson Case that aeronautics is exclusively under the jurisdiction of the Federal Parliament. <sup>37</sup>  
The judgment handed down declared that aerial navigation had attained such dimensions as to affect not only the body politic of the Dominion but also the Peace, Order, and Good Government of Canada. Consequently, it would appear to be conclusive of the right of the Canadian Parliament to make effective the Warsaw Convention, so far as Canada is concerned, by the enactment of the Carriage by Air Act of 1939.

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\* 35. Canada Gazette, Part 11, West, Dec. 10, 1952 at p. 1018.

36. Ibid at p. 1021.

37. Johanneson vs West St. Paul Municipality 1951 D.L.R. 609

It is quite obvious that some of the provisions of the Warsaw Convention cuts across a field which had previously been exclusively dealt with by Provincial Laws. For instance, various Provincial Acts across the Dominion deal with compensation to relatives of deceased persons where the circumstances disclose negligence on the part of some person or persons. The general concensus of legal opinion is that Dominion legislation will supersede those Acts on occasion if the provisions in question are reasonably necessary as "ancillary" or "incidental" to such legislation; even though such provisions would, if they stood alone, be regarded as legislation in relation to a matter coming within the enumerated subjects in section 92 of the British North America Act, and therefore for the Provinces to enact. This is generally true with respect to legislation in relation to a matter coming within an enumerated Class of Subjects in section 91 of the Act. However, the question as to whether the Dominion can likewise enact ancillary legislation under the residuary clause (the POGG clause) still remains a controversial issue.<sup>38</sup> It has been generally determined that the

38 A.G. of Ontario vs. A.G. of Canada 1894 A.C. 189  
 Toronto vs. C.P.R. 1908 A.C. 54  
 A.G. for Canada vs. A.G. for B.C. 1930 A.C. III  
 PATA vs. A.G. for Canada 1931 A.C. III  
 Toronto vs. The King 1932 A.C. 98.  
 Montreal vs. Harbour Commissioner of Montreal 1926 A.C. 299.

general power can be exercised by the Dominion in two different situations, (1) in relation to matters, which though ordinarily is a matter for the Provinces to legislate in relation to, have become matters unquestionably of national interest and importance; (2) matters which fall to the Dominion under the general residuary clause if such given matters do not come within any of the classes of subjects enumerated in sections 91 and 92. Therefore, in view of the foregoing remarks, the validity of the entire Carriage by Air Act of 1939 would not appear to be ultra vires of the Dominion and open to judicial attack .



CHAPTER VIITHE AIR TRANSPORT BOARD

1. The Formation of the Board: When World War II had reached what it was hoped would be the final phase of the battle, plans were being studied in the light of the experience of past years for the reconstruction and development of civil air transportation in Canada. It was decided that a new agency should be established to direct the post-war economic development of civil aviation. On March 17th., 1944, the Rt., Hon. C.D. Howe, who was then directing the Government Air Services Branch, speaking on the Government's Air Policy stated:-

"It is proposed to establish a new Board to be called the Air Transport Board, which will confine all its activities to air traffic, and which, in addition to performing the regulatory duties now lodged with the Board of Transport Commissioners, will be charged with the responsibility for advising the government on ways and means of bringing about a rapid and well planned expansion of transport by air... ..It is felt that the creation of a Board, to be concerned solely with transport by air will ensure prompt attention to all matters, affecting air transport that may call for consideration by the government and be of great assistance to government and to private enterprise in the post-war period"

A Bill was introduced in 1944 to amend the Aeronautics Act of 1922<sup>1</sup> in order to give effect to the Government's announced policy on domestic civil aviation. This amendment was later enacted by Parliament and assented to on August 15th, 1944, and came into force in Sept. 1944. The effect of the amendment was the formation of a Board consisting of three members, a chairman and two members appointed by the Governor-in-Council under the provisions of the Aeronautics Act, who took over the duties, which previously had been performed by the Board of Transport Commissioners, in regulating civil aviation, assigning air worthiness certificates, and licensing aviation enter-

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\* 1. House of Commons Debates. Hansard. March 17, 1944.

prises within Canada. In addition, the Board was to function in an advisory capacity to the Government with respect to ways and means of advancing civil aviation. The Board was to take the initiative in laying out routes, within Canada and overseas, which promised possibilities of profitable operation; and was to guide the Government in seeing that these routes were operated by Canadians who were capable of carrying out such undertakings. The proposed air board's functions were to be similar to the functions of the Civil Aeronautics Board of the United States. The latter board functions within the Department of Commerce and through executive powers of the President. The Air Transport Board was to be a board within the aeronautics branch of the Department of Transport and was to get its power through the Minister of Transport. The Air Policy was to be determined by the Government and administered with the advice of the Board.<sup>2</sup>

2. Composition of the Board:<sup>3</sup> There are three members which go to make up the Air Transport Board, one of whom is designated as Chairman. All are appointed by the Governor-in-Council under the provisions of the Aeronautics Act.<sup>4</sup> The members hold office during good behaviour for a period of ten years but may be removed by the Governor-in-Council at any time for cause. The Board members, or a quorum of two Members, act as a Board in all matters in the exercise of the statutory powers and in the performance of all the duties provided for the Board under the Act. No member of the Board can either directly or indirectly engage in manufacturing or selling aircraft or in the transport of goods or passengers by aircraft for

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\* 2. House of Common's Debates, Hansard, April 20th, 1944 p. 2223  
 3. Material on this subject has been drawn from the Act, the A.T.B.'s Legal Adviser (Mr. MacDonald), Gov't personnel records and personal observation.  
 4. 1927 R.S.C. chapter 3.

hire or reward; and no member of the Board can be a shareholder, member, director or partner of any company, association or firm engaged in manufacturing or selling aircraft or in the transport of goods or passengers by aircraft for hire or reward.<sup>5</sup> The Board holds regular meetings, usually twice weekly; minutes of the meetings are kept, in which every official action under the Act is recorded, together with important administrative rulings. Decisions, Orders, rules, circulars and other public documents are issued by and in the name of the Board.

For the purpose of performing its functions and duties the Board is organized into branches which in turn are divided into divisions. There is the Secretarial Branch which, in addition to the performance of the many and detailed duties normal to the Secretary of an active body, exercises supervision over the Administrative and Inspection Divisions. The former deals with organization, accomodation, personnel, supplies, library, preparation of estimates, control of expenditures and administration generally; while the latter carries out field inspections and investigations of air services with respect to all matters within the jurisdiction of the Board.<sup>6</sup>

The Legal Branch is responsible for advising the Board on all legal matters pertaining to the Board's powers and duties; drafts legislation, regulations and orders; provides counsel at public hearings conducted by the Board or Board Members and advises the Government on both public and private International Air Law. This Branch is headed by the Legal Adviser who is also Executive

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\* 5. Ibid at sec. 7 s.s. (7)

6. Supra note 19 Chapter I at p. 20 - 22.



Director of the Board in which capacity he is responsible for advising the Board on all policy matters. Under this Branch there is also the Examiner who is responsible for the organization of public hearings conducted by the Board or Board Members and the conduct of hearings on all matters assigned to the Examiner by the Board. The Examiner also deals with enforcement of the Act and Board regulations and supervises the operation of the Licensing Division. This afore-mentioned division receives, processes and prepares for submission to the Board applications for licenses and permits to operate commercial air services; prepares dockets for public hearings, sends out decisions, licences, renewal of licences, foreign air carrier permits and Orders relating to licences and permits. The Departmental Solicitor, who is also Assistant Examiner, is primarily responsible for matters of international air law such as bilateral agreements and liason with the International Civil Aviation Organization. In addition he deals with matters such as contracts, leases of aircraft, insurance, transfers of commercial air services.

There is the Traffic Branch which is responsible for (a) administration of Regulations and Rules relating to the construction and filing of tariffs, the construction and filing of service schedules and free and reduced rate transportation; (b) Applications and complaints relating to tolls, tariffs, service schedules and services, (c) maintaining records of tariffs, schedules and free and reduced rate transportation; and (d) reporting to the Board anything of major interest relating to traffic matters.

The Board originally had an Economic Branch, the functions of which were assumed on January 1st, 1947, by a new Bureau of Transportation Economics which was established by the Air

Transport Board and the Board of Transport Commissioners; and which is administered by the latter body. This Bureau now performs for the Board the duties of undertaking all economic and statistical surveys in connection with present and future air transport routes; analyses and reports on public convenience and necessity of proposed commercial air services; maintains and analyses appropriate statistical records relative to the field of air transport; supervises the administration of the directives of the Board pertaining to investigations upon the financial structure of companies engaged or desirous of engaging in air transport; and establishes and supervises the uniform system of accounts prescribed by the Board.

The Board's organization consists of a staff of less than 50, all of whom are employed in Ottawa with the exception of a small staff of the Canadian Representative on the Council of the International Civil Aviation Organization in Montreal.

3. The Functions of the Board: Under the Act, the Board is given wide powers to make rules for the regulation of its proceedings and the performance of its functions and duties. <sup>7</sup> From time to time, it must make investigations and surveys relating to the operation and development of commercial air services and to other matters in connection with civil aviation. Recommendations in reference to these investigations and surveys must be made to the Minister of Transport. This function as advisers to the Government on aviation policy <sup>is</sup> something new for Canada and it is hoped that it will be helpful in bringing about the rapid development of civil aviation, both internal and external.

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\* 7. Supra note 4 Part II section 11.

The A.T.B. has the power to license, regulate and control commercial air services in and over Canada. It may make regulations requiring air carriers to file returns with respect to their capital, traffic, equipment, working expenditure and any other matters relating to the operations of commercial air services. They may require any person to furnish information respecting ownership, transfer, consolidation, merger or lease of commercial air services. Further, they may regulate that all agreements in respect thereto must be filed; and may go so far as to prohibit the transfer, consolidation, merger or lease of commercial air services. Regulations respecting traffic tolls, and tariffs may be made to any Canadian carrier - domestic or international and provisions may be made for the disallowance, suspension or substitution of a tariff or toll. Further, the Board may regulate and establish classifications or groups of air carriers or commercial air services; and may exclude any carrier or commercial air services from the whole or any part of the Act, regulations or order. Amongst other things, they may prescribe the terms for licences, for renewals, for maximum hours and other working conditions for air crews of carriers; and prescribing penalties for the contravention and non-compliance of these regulations.

4. The Jurisdiction of the Board: The Board has full jurisdiction to inquire, to hear and determine any matter where it appears that any person has failed to do something required to be done by the Act or any regulation, license, permit, order or direction made under the Act by the Board; or violating any of these things. Jurisdiction lies as well where it appears that the circumstances may require the Board, in the public interest, to adopt any procedure which by law it is authorized to do under the Aeronautics

Act. <sup>8</sup>

5. Judicial Functions of the Board: The Board has wide judicial powers in its own right and can decide certain judicial matters. It is similar in that respect to the Board of Transport Commissioners<sup>9</sup> - and only in that respect. Under the Act, the Board may conduct inquiries and hearings and may make mandatory orders. It has the authority to order and require any person to do any act, matter or thing as such person is or may be required to do under the Act. In this respect, they have full jurisdiction to hear and determine all matters, whether of law or fact.<sup>10</sup>

For the purposes of conducting its hearings and enforcing its orders, the Board has all the powers, rights and privileges vested in a Superior Court of Record with regards to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry of and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction.<sup>11</sup>

Any decision or order made by the Board, for the purpose of enforcement, is considered to be a rule, order or decree of the Exchequer Court or of any Superior Court of any Province of Canada; and is enforced in like manner as any rule, order or decree of such Court.<sup>12</sup> The procedure authorized by section 49 of the Railway Act is followed in making a decision or order of the Board into a rule, order or decree of such Court.<sup>13</sup> This

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\* 8. Ibid section 7A; amendment made 1950 Can. Statutes ch. 23

9. This Board is solely a judicial board administering the Transport Act and has no advisory functions to the Government as with the A.T.B.; 1938 Can. Stat. ch. 53

10. Supra note 4 section 7A (2); amendment made 1950 Can. Stat. ch. 23 sec. 5

11. Ibid sec. 7A (3)

12. Ibid sec. 7A (4)

13. Ibid sec. 7A (5); amendment made 1945 Can. Stat. ch. 9 sec. 3

procedure consists of either adopting the usual practice of the court in such matters; or, in lieu thereof, by having the Secretary of the Board make a certified copy of such decision or order (which is signed by the Chairman and sealed with the official seal) and forwarding it to the proper officer of any Superior Court of any Province in Canada, who enters the same as of record, and it thereupon becomes by statutory law a rule, order or decree of such Court. <sup>14</sup>

The Board is vested with the authority to order any person resident or present in Canada to be examined under oath before, or produce books, papers, documents or articles to, the Board, or any member of the Board, or before or to any person named for the purpose by the order of the Board; and to compel the attendance of such witness after examination, and/or the production of the books, papers, documents or articles. For the enforcement of such orders and punishment for disobedience, all powers that are exercised by any Superior Court in Canada, for such purposes are vested in the Board. However, it is made clear by the Act that no person shall be compellable against his will to attend for such examination or production at any place outside the province in which he is served with the order of the Board for this purpose. Every person attending pursuant to a subpoena is, in the discretion of the Minister of Transport, entitled to receive fees and allowances as if he were summoned before the Exchequer Court of Canada. Further to the above, the Board is entitled to issue rogatory commissions to take evidence in a foreign country, and to make all proper orders for that purpose and for the return and use of the evidence so obtained. <sup>15</sup>

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\*14. 1927 R.S.C. ch. 170 sec. 49 of the Railway Act.

15. Supra note 4 sec. 7B (1 and 2) amendment made 1945 Can. Stat. ch. 9 sec. 3

6. Appeals From Board to the Supreme Court: An appeal lies from the Board to the Supreme Court of Canada upon a question of jurisdiction or a question of law, or both - but never on a question of fact alone. Leave must first be obtained from a Judge of that Court upon application which must be made within a month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as the Judge under certain circumstances shall allow - and upon notice to the parties and the Board; and the costs of such application lies in the discretion of the Judge. On the hearing of an appeal, the Court is entitled to draw all such inferences as are not inconsistent with the facts expressly found by the Board, and which are necessary for determining the question of jurisdiction or law, as the case may be; and the Court must certify its opinion to the Board, and the Board is then compelled to make an order in accordance with such opinion. The Court has, as well, the discretionary power to fix the costs to be paid upon such appeals; and the rules and practice applicable to appeals from the Exchequer Court apply to appeals from the Board.<sup>16</sup>
7. Appeals from the Board to the Minister: An appeal may be made to the Minister of Transport against action by the Board in refusing a license, in suspending, cancelling or amending a license or in attaching to a license conditions to which a carrier objects.<sup>17</sup> The Board is authorized by the Act to make rules limiting the time and prescribing the manner in which appeals to the Minister may be made.<sup>18</sup> The Board has not yet made such rules because the Board has never found it necessary to limit appeals or circumscribe an

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16. Ibid sec. 18

17. Ibid sec. 12 s.s. 8 and 10

18. Ibid sec. 12 s.s. 11; amendments 1944-45 Can. Stat. ch. 28 s. 6  
1945 Can. Stat. ch. 9 s. 28-9

applicant in any way. Since the establishment of the Board over eight years ago, there have not been half a dozen formal appeals to the Minister, none of which have taken place in the last two years. In practice there is no time limit and there is no established form. Such appeals as have been made were in the form of a letter containing a statement of the grounds for appeal, together with any supporting documents.<sup>19</sup> While section 12 of the Act does not limit appeals to the Minister on question of fact, it is generally thought that appeals to the Minister would be largely based on fact, while appeals to the Supreme Court must be on questions of law or jurisdiction. On questions of fact, law or jurisdiction, there have been not more than a dozen appeals to the Minister and none to the Supreme Court.

8. The Procedure followed in Applications for Licences: An application, which first must be prepared and submitted in accordance with the Board's instructions,<sup>20</sup> is filed in Ottawa. After the application is received, the Licensing Division examines it as to form to see if all essential information has been provided by the applicant. If complete in form, it is sent for review to the Bureau of Transportation Economics for study and analysis as to the public necessity for or public<sup>interest</sup> in the proposed service; and for analysis of the financial position of the company. It is also sent to the Traffic Branch for comment on the proposed Tariff and Tolls. Concurrently with this internal processing, the application for the licence is advertised by the insertion of a notice in the newspapers of the

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\* 19. Supra note 19 chapter I at p. 15

20. Air Transport Board Circular No. 8, 1951, Ottawa.

area to be served and by the mailing of a copy of the notice to all interested parties in the district. The notice invites those persons, desiring to do so, to file representations with the Board on or before a date named which is normally 30 days from the date of the notice. When the date for receiving representations has expired, the Licensing Division then makes a report on the application to the Board including therein the internal Board comments and outside representations if any. The Board then decides on the action to be taken. It may grant or deny the application arbitrarily in which case an appropriate decision will be prepared, or the Board may order a public hearing. Arbitrary action to deny an application is seldom taken; and immediate approval is given, ordinarily, only when the application is unopposed or no important policy consideration is involved and the application discloses a substantial degree of public interest. The more usual course is to direct that a public hearing be held. <sup>21</sup>

9. The Procedure followed at Public Hearings: The important cases are heard by the full Board or by one or more Members while the public hearings of the lesser cases are conducted by the Examiner. In either case the procedure is substantially the same. First a notice of hearing is published in the newspapers in the area and copies of notice are mailed to all interested parties. The hearing is usually held in a Court House, City Hall or other building having sufficient accomodation, in a place as close as possible to the place from which the proposed operations will be carried out in order that as many interested persons as possible may attend.

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\* 21. Supra note 19 chapter I at p. 29



The hearing itself follows civil court procedure as closely as possible. All evidence is taken on oath and a verbatim record is made by a Court stenographer. The applicant presents his evidence and that of his witnesses. Persons opposing the application may cross-examine each witness and the applicant may then re-examine to clear up points raised in cross examination. At the conclusion of the applicant's case the opposants then present their evidence in like-manner. The applicant may then submit rebuttal evidence if he so desires. After the presentation of the evidence has been concluded by all parties present, argument is then made on the evidence submitted.

The Board or Examiner allows a reasonable latitude in the examination and cross-examination of witnesses in view of the fact that a public hearing is not a court trial but an inquiry by means of which the Board adds to the knowledge it has with respect to the application and the applicant. In addition, Counsel for the Board and the Board Members question the witnesses as they see fit, but the orderly flow of the proceedings is preserved by withholding Board questioning until after the examination of the witnesses has been completed by the parties.

The procedure followed by the Board in its public hearings related to applications for licences to operate commercial air services is also employed in public hearings with respect to other matters. The Board's powers to hold hearings are very broad and and cover almost every phase of the operation of commercial air services. 22.

10. Approval of Minister to License Applications: After the public hearing the Court stenographer transcribes the evidence and furnishes

copies of the transcript to the Board. This transcript and the information is considered and the Board reaches a conclusion which is recorded in a formal decision. If the decision is favourable, it is submitted to the Minister for approval and if the Minister approves the Board's decision, a license is issued. If, however, the Board's decision is to deny the application, prior Ministerial approval is not necessary, but section 12 (8) of the Act provides that the applicant may appeal the decision to the Minister.

11. The Life-Expectancy of the Board: The Royal Commission on Transportation recommended, on Feb. 9, 1951, the complete amalgamation of the Board of Transport Commissioners, the Maritime Commission, and the Air Transport Board into one body with the object of co-ordinating and harmonizing the widely-scattered operations of surface transport throughout the breadth of Canada. <sup>23</sup> Action on this matter by the Federal Government is expected at the end of this year. <sup>24</sup>.

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\* 23. "The Report of the Royal Commission on Transportation", 1951 at p. 274

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