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SAFETY AND ECONOMIC REGULATION OF AIR TRANSPORTATION IN CANADA

by Dionigi (Dan) M. Fiorita

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.)

The Institute of Air and Space Law
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Montreal, Quebec, Canada

January 1995

ISBN 0-612-05494-2

Canada

Thesis: Safety and Economic Regulation of Air Transportation in Canada

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Degree Sought: Master of Laws

This thesis is dedicated to two individuals. First, to my partner in life without whose understanding, patience, support, and encouragement, it would never have been written. Second, to Dr. Gerald ("Gerry") Francis FitzGerald, my dearly departed friend and mentor who, by his example, taught me that brashness is not an indication of greatness, and humility is not a sign of weakness. Moreover, he instilled in me a love for air law that will last me my entire life.

ABSTRACT

The Federal Government, in the exercise of its exclusive constitutional jurisdiction over aeronautics, has adopted laws and regulations that address the various aspects of the aviation system. These laws and regulations have evolved significantly from the first piece of Federal legislation passed in 1919.

Some of those laws and regulations have as their objective achieving and maintaining an adequate level of aviation safety, while others are intended to ensure that Canadians have access to an efficient and reliable national air transportation system.

On the safety side, there are laws and regulations that establish standards of quality for the aircraft, standards of competence for air carriers and standards of competence and medical fitness of the personnel. There are also regulations that specify the conditions that must be met in order to register an aircraft in Canada.

On the economic side, there are laws and regulations that set the terms and conditions for the operation of domestic and international air services. In the domestic context, such laws and regulations have gone from strict and almost complete government intervention, to giving effect to recent policies of less regulation and more competition.

These same laws and regulations, while providing the regulatory authority with the necessary enforcement tools, also recognize the need to ensure that it does not act improperly or abusively. For such purpose, the stakeholders have access to several different recourses to challenge the actions of the regulatory authority.

RÉSUMÉ

Le gouvernement fédéral, dans l'exercice de sa juridiction constitutionnelle exclusive en matière aéronautique, a adopté des lois et des règlements qui touchent à divers aspects du système aéronautique. Ces lois et ces règlements ont évolué de façon significative depuis leur première promulgation par le fédéral en 1919.

Certains de ces lois et règlements comportent pour objectif l'atteinte et le maintien d'un niveau adéquat de sécurité aérienne, tandis que d'autres veulent garantir aux Canadiens un accès à un réseau de transport aérien national efficace et fiable.

En matière de sécurité, il y a des lois et règlements qui établissent des normes de qualité pour les aéronefs, des normes de compétence à la fois pour les transporteurs et le personnel. De plus certains règlements spécifient les conditions à remplir pour immatriculer un aéronef au Canada.

Du côté économique, il existe des lois et règlements qui déterminent les modalités pour l'exploitation des services aériens intérieurs et internationaux. Dans le contexte des services intérieurs, la réglementation a fait volte-face récemment, en passant d'une tutelle gouvernementale stricte et quasi totale à une politique de libéralisation économique laissant jouer davantage les forces du marché.

Ces mêmes lois et règlements, tout en procurant aux autorités réglementaires les outils nécessaires à leur application, reconnaissent aussi le besoin de garantir les parties intéressées contre les irrégularités et les abus de ces autorités par le moyen de divers recours.

ACKNOWLEDGEMENTS

I would like to express my sincere appreciation and gratitude to the following individuals, friends and former colleagues, whose expert knowledge of aviation in all its dimensions provided me with guidance and invaluable comments and suggestions: Mr. Don Lamont, Vice President, Flight Operations, Air Transport Association of Canada; Mr. Dave Heakes, formerly Senior Policy Advisor, Airworthiness Branch, Transport Canada; Mr. Maher Khouzam, currently, Chief, Airworthiness Standards, Airworthiness Branch, Transport Canada; Mr. Don MacLean, formerly Superintendent, Aircraft Licensing and Special Flight Operations, Transport Canada; Mr. Grant Mazowita, Director, Legislation and Compliance, Aviation Group, Transport Canada; Mr. Brian Carr, formerly Director, International Air Policy, Transport Canada; Dr. Joseph Z. Gertler, formerly Senior Policy Adviser, International Operations Directorate, National Transportation Agency (currently, aviation consultant); and Mr. Claude Jacques, formerly Assistant General Counsel, and currently Director, International Operations Directorate, National Transportation Agency.

I owe a special vote of thanks and appreciation to Mr. R.T.Y. Yang, a very dear friend and former Director, International Air Policy, Transport Canada, whose depth of knowledge of aviation is unsurpassed.

No words can express the depth of my gratitude to Professor Martin A. Bradley for having given an "angry young man" (his words) a chance to achieve his best in life, and to Professor Dr. Michael Milde for his support and effort in my behalf.

Finally, I owe my thanks to Melissa Knock whose skills served to put together the manuscript on a timely basis and to my spouse Jocelyne Lavoie whose very clear and logical mind ensured a smooth flow of ideas and consistency among them.

TABLE OF ABBREVIATIONS

A.C.	Appeal Cases
AEO	Airworthiness Engineering Organization
AME	Aircraft Maintenance Engineers
ANO	Air Navigations Orders
ATC	Air Transport Committee
AWM	Airworthiness Manual
BAA	Bilateral Airworthiness Agreements
BASA	Bilateral Air Services Agreements
B.C.C.A.	British Columbia Court of Appeal
B.R.	Banque de la Reine
CARAC	Canadian Aviation Regulation Advisory Council
CARS	Canadian Air Regulations
C.C.C.	Canadian Criminal Cases
C.R.C.	Consolidated Regulations of Canada
CTC	Canadian Transport Commission
CTS	Canada Treaty Series
DAO	Design Approval Organization
D.L.R.	Dominion Law Reports
DTC	Dominion Tax Cases
EIM	Engineering and Inspection Manual
FAA	Federal Aviation Administration
FARs	Federal Air Regulations
F.C.	Federal Court
F.C.A.	Federal Court of Appeal
IASL	Institute of Air and Space Law
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
JAA	Joint Aviation Authorities

JALC	Journal of Air Law and Commerce
NAMEO	Notice to Aircraft Maintenance Engineers and Owners
Nfld. S.C.	Newfoundland Supreme Court
N.S.	Nova Scotia
NTA	National Transportation Agency
OC	Operational Certificate
Ont. C.A.	Ontario Court of Appeal
Ont. Dist. Ct.	Ontario District Court
Ont. H.C.	Ontario High Court
O.R.	Ontario Reporter
P.C.	Privy Council
R.J.Q.	Revue de Jurisprudence du Québec
RSC	Revised Statutes of Canada
S.C.	Statutes of Canada
SOR	Statutory Orders and Regulations
T.T.	Tribunal du Travail
U.K.	United Kingdom
UNTS	United Nations Treaty Series
U.S.A.	United States of America
W.W.R.	Western Weekly Reporter

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- PART I -

GENERAL INTRODUCTION

Any discussion of the regulation of aviation (or to use the term found in the relevant legislation, "aeronautics") in Canada must be approached from several different avenues. One must first of all identify the proper Government that has the constitutional authority to enact laws and regulations with respect to aeronautics. Then one must describe such laws and regulations and to which persons, things and activities they apply, and finally how they are applied and enforced.

It is not the purpose of this thesis to provide a comprehensive description and analysis of the rights and responsibilities of the regulatory authority, the manufacturer of aircraft, the operator of aircraft, the provider of services or facilities to aircraft or, the user of air services, in order to determine their respective liabilities in the event of damage or injury. Rather, our discussion focuses on the regulation of air services operating within or to or from Canada and the essential components of such services - the air carrier and its aircraft and personnel. Of necessity, we have excluded from our discussion several very important elements of the Canadian civil aviation system, namely:

(i) the organization, regulation and operation of the Canadian civil airport system;

(ii) the management and regulation of Canadian airspace;

(iii) the aeronautical communication, navigation and surveillance system;

(iv) aircraft accident and incident investigation; and

(v) the civil responsibility regime applicable to the relationship between and among the air carrier, passenger, shipper, aircraft manufacturer, and provider of civil aviation facilities and services.

However, the exclusion of the aforementioned elements will not detract from the completeness of the picture that we will be painting in the text that follows. The reason

is because our objective is to provide a description and analysis of the regulatory requirements to put into place an air service, to create an air carrier and to obtain all of the necessary licences, certificates, permits or other authorizations. All of the elements that we have excluded are either not of a regulatory nature or, if they are, are concerned with the actual operations and activities performed by air carriers with their aircraft after they have obtained all of the necessary licences, certificates, permits or other regulatory authorizations.

No description of a subject as complex as aeronautics can be given without making sure that there is a clear understanding of the meaning of the terminology associated with aeronautics. Thus, as necessary, we will define each term used.

Part II contains a brief overview of the constitutional basis for the Federal Government's jurisdiction respecting aeronautics as well as its scope and the challenges to that jurisdiction.

Part III gives an outline of the historical evolution of the law and regulations relating to aeronautics, the matters regulated, the manner in which they were regulated, and the entities charged with the responsibility for such regulations. It also traces the evolution from a strictly regulated economic environment to one giving effect to the new national transportation policy of less regulation and more competition.

Part IV focuses on the regulation of aviation safety as reflected by the current regulations governing the technical standards that must be met by air carriers and their aircraft as well as the standards of competence that are imposed on the personnel carrying out essential aviation safety functions. It also addresses the regulatory enforcement measures and the recourses available to the regulated to challenge such measures.

Part V provides for the current regulatory requirements for domestic and international scheduled and non-scheduled air services and the regulation of the economic aspects of such services, namely, air carrier licensing, market entry and exit, and tariffs. It concludes with a discussion of the enforcement mechanisms available to the National Transportation Agency and the recourses to which the air carriers have access to challenge the Agency's enforcement actions.

Part VI sets out the conclusions and the future regulatory prospects arising from recent Government of Canada aviation-related policies.

The foregoing having been said, we hope that this thesis will nevertheless create a clear understanding of the Canadian civil aviation legislative and regulatory scheme as well as an appreciation of the associated issues of what we believe to be a most important sphere of human existence and progress.

- PART II -

THE CONSTITUTIONAL JURISDICTION OVER AERONAUTICS

1. Introduction

Canada is a Federal State established by the Constitution Act, 1867[1] and pursuant to which a distribution of legislative powers is provided between the Federal Government and the Provinces. Hence, for persons not familiar with that division of powers, a discussion of aviation regulation in Canada would be incomplete if it did not identify the scope of the jurisdiction of each level of government over the subject-matter and the basis of that jurisdiction. A brief discussion of the constitutional jurisdiction over aeronautics follows.

2. Source and Scope

Although flight as such involving man-made machines[2] predated the Constitution Act, 1867 by eighty-four (84) years, the framers of that Act did not include any specific or indirect reference to "flight by man". As a result, it was not until the decision of the Judicial Committee of the Privy Council in 1932 in the Aeronautics Reference case[3] that the jurisdiction of the Federal Government in the field of aeronautics was affirmed.[4]

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1 Formerly known as the British North America Act 1867, 30 & 31 Vict., c.3, but renamed as the Constitution Act, 1867 by the Constitution Act, 1982 that was enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c.11.

2 The Montgolfier brothers of France flew their first manned balloon in 1783.

3 In re The Regulation and Control of Aeronautics in Canada, [1932] A.C. 54.

4 The Judicial Committee of the Privy Council was requested to sit in appeal from a decision of the Supreme Court of Canada, [1930] S.C.R. 663, which had considered the authority of the Federal Parliament to enact legislation and regulations giving effect to Canada's obligations under the Convention Relating to the Regulation of Aerial Navigation, signed at Paris on October 13, 1919 ("Paris Convention, 1919").

Without entering into a detailed discussion, it may be said that the Judicial Committee of the Privy Council based its decision on the treaty power in s. 132 of the Constitution Act, 1867 while leaving open the possibility that the peace, order and good government power could be an alternative basis for the federal jurisdiction[5].

The Supreme Court of Canada for the first time in 1952 in the Johanneson case[6] was faced with the question of deciding on the jurisdiction over aeronautics and to define the scope of that jurisdiction under a treaty to which Canada had been a party directly and to which s. 132 of the Constitution Act, 1867 did not apply[7].

The Johanneson case established the basis of the federal jurisdiction over aeronautics to be the "peace, order and good government" power[8] because it was considered to be a matter that went beyond local or provincial concern or interests and therefore from its inherent nature was of concern to the whole of Canada.[9]

The Aeronautics Reference case and the Johanneson case established that aeronautics was a subject within the constitutional jurisdiction of the Federal Government. Subsequent court decisions have not challenged seriously that position. What the later decisions have done is define the scope of aeronautics. The Aeronautics Reference case provided some helpful hints by including in aeronautics the technical air navigation matters that were covered by the Paris Convention, 1919 and that were addressed by the Aeronautics Act, R.S.C. 1927 c. 3 - legislation purporting to give effect

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5 See Hogg, Peter W., Constitututional law of Canada, Third Edition (Supplemented) Volume 1, Toronto, Carswell, 1992, at pages 22-20 and 22-21. For a more complete analysis of the evolution of the Federal jurisdiction over aeronautics as determined by the courts see Colin H. McNairn, "Aeronautics and the Constitution" (1971) 49 Can. Bar. Rev. 411 and by the same author "Transportation, Communication and the Constitution - The Scope of Federal Jurisdiction" (1969) 47 Can. Bar. Rev. 355.

6 Johanneson v. Rural Municipality of West St.Paul, [1952] 1 S.C.R. 292.

7 This was the Convention on International Civil Aviation, signed at Chicago, on 7 December 1944 ("Chicago Convention") which replaced the Paris Convention, 1919 that was the subject of consideration in the Aeronautics Reference. When the Chicago Convention came into force for Canada on April 4, 1947, the Paris Convention, 1919 was denounced as was required by Article 80 of the Chicago Convention.

8 Constitution Act, 1867, s. 91, preamble.

9 This was the test that had been pronounced in the case of A.-G. Ont. v. Can. Temperance Federation [1946] A.C. 193.

to that Convention in Canadian domestic law.

The Johanneson case went further and established that questions regarding the location of aerodromes are within the jurisdiction of the Federal Government in respect of aeronautics.

Other, and more recent, decisions of Canadian courts clarified further the scope of the aeronautics power: they found that municipal by-laws could not apply to the design of an airport[10]; height restrictions imposed by the Province of Ontario on land adjacent to the city of Chatham airport were invalidated[11]; a company that operated aircraft used solely in the suppression of forest fires was held to be involved in aeronautics and thus not subject to provincial legislation on human rights;[12] a company that serviced aircraft was considered within the federal aeronautics power[13]; limousine services to and from an airport were not within the aeronautics power[14]; and neither were the porters providing service at an airport;[15] a contractor engaged to construct the runways of an airport was not involved in an aeronautics undertaking;[16] persons providing passenger security screening services were held to be involved in aeronautics and thus governed by Federal labour laws[17]; however, employees of a cleaning company carrying out work at an air carrier's warehouse serving as a storage space for goods were considered not to be indispensable, vital or essential to the aeronautical activities of an airline and thus

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10 Re Orangeville Airport and Town of Caledon et al. [1976] 11 O.R. (2d) 546 (Ont. C.A.).

11 Re Walker et al and Minister of Housing for Ontario Re Walker and City of Chatham, 144 D.L.R. (3d) 86.

12 Re Forest Industries Flying Tankers Ltd. v. Kellough [1980] 108 D.L.R. (3d) 686 (B.C.C.A.).

13 Field Aviation Co. Ltd. v. Alberta Board of Industrial Relations and International Association of Machinists and Aerospace Workers, [1974] 6 W.W.R. (N.S.). 596

14 Murray Hill Limousine Service Limited v. Batson 1965 B.R. 778.

15 Colonial Coach Lines v. Ontario Highway Transport Board [1967] 2 O.R. 25 (Ont. H.C.) confirmed on appeal [1967] 2 O.R. 243 (C.A.) for other reasons.

16 Construction Montcalm Inc. v. Quebec Minimum Wage Commission [1979] 1 S.C.R. 754.

17 Agence de Securité Fortin Inc. c. Union des agents de securité du Québec, Local 924 (1981) T.T. 153.

not governed by the Federal labour laws.[18]

3. Jurisdictional Challenges

From time to time questions or doubts have been voiced as to whether the whole of the field of aeronautics - safety, economic, intraprovincial, interprovincial and international - necessarily excludes some provincial involvement. In particular, questions have been raised in respect of federal laws addressing matters of civil responsibility between air carriers, shippers and passengers such as the Carriage by Air Act[19], and the regulation of intraprovincial air carrier tariffs.[20] However, to date none of these challenges has been successful.

4. Conclusion

It is submitted that one of the reasons for the phenomenal growth of aviation is the unified approach to its regulation that has avoided provincially created barriers. Clearly, on the safety side a multitude of different safety standards from Province to

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[18] Service d'entretien avant-garde c. Conseil Canadien des relations du travail (1986) R.J.Q. 164; 26 D.L.R. (4th) 331.

[19] R.S.C. 1985 c. C-26. The Carriage by Air Act, implemented into Canadian domestic law the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 ("Warsaw Convention") and the Protocol Modifying the said Convention signed at The Hague on 28 September 1955 ("The Hague Protocol"). These two international instruments entered into force for Canada on 8 September 1947 and 17 July 1964, respectively. By virtue of s. 4 of the Carriage by Air Act the Governor-in-Council may make orders or regulations applying the provisions of the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol to carriage which is not international carriage within the meaning of those instruments. What this means by way of example is that potentially carriage by air between Montreal and Toronto could be subjected to the same or similar legal regime as carriage between Montreal and, say, London, England. However, as of November 30, 1994, the Governor-in-Council had not made any such order or regulation and I doubt that it ever will.

[20] See Paquette, Richard, La responsabilité en droit aérien canadien, Montréal, Les Editions Yvon Blais, 1979 at pages 33 to 39. The author discusses several cases and argues that those cases lend support to the proposition that there is a provincial role to be played in aeronautics at least insofar as it concerns matters affecting property and civil rights in the Province. See also McNairn, op. cit., Note 5, supra where the same issue is discussed, at pages 418-430.

Province would have had a significant negative impact on the level of safety. Thus, the need for uniform national standards argues favourably for Federal jurisdiction being exclusive. On the economic side, the same aircraft carries passengers on a purely intraprovincial journey together with passengers on an interprovincial or international journey. As Hogg[21] notes:

> The most plausible reason for subjecting local airlines to the same regime as the interprovincial and international airlines is the fact that both kinds of carriers share the same airspace and ground facilities, so that their operations are necessarily closely integrated. Divided control over navigation and ground facilities would be impossible. It is true that divided control over economic regulation - fares and perhaps routes - would be possible, but it is most unlikely that the Courts would at this late stage be willing to fragment the subject of aeronautics into navigational and economic aspects. The better view is that both aspects of aeronautics come within federal jurisdiction.

In the light of the Federal Government's move towards economic deregulation of the air transport industry, the question of Provincial involvement in the regulation of the economic aspects[22] of intraprovincial air transport may have become academic. On the other hand, since the Federal Government is in effect withdrawing from the field, does this mean that the field has become unoccupied, and if so, would this permit a Province to enact laws and regulations or otherwise to exercise its powers in respect of that field? Probably not, for two reasons: first, because in respect of aeronautics the tendency of the courts is to deny the application of Provincial laws even where the Federal Government has not acted[23], and second because the deliberate withdrawal of regulations by the Federal Government was done in order to achieve the national objective of less regulation

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21 Hogg, op. cit., supra note 5 at pp. 22-22.

22 By economic aspects we mean matters related to the fares or rates to be charged, entry and exit from a market, and route extensions. Since the move towards a deregulated airline industry really only concerns "Southern Canada" and then only respecting tariffs since a licence is still required, albeit obtainable without a "public convenience and necessity test", the issue raised may be somewhat premature.

23 Hogg, op. cit., supra note 5 at pp. 22-22.

and more competition. Thus, any attempt by a Province to enter the field and fill the regulatory vacuum left behind, would be running afoul of that national policy. In which case any such provincial legislation would probably be open to challenge not only under the aeronautics power[24] but also under other heads of power such as the trade and commerce power.[25]

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[24] Technically speaking there is no "aeronautics power" in the Constitution Act, 1867. There is the peace, order and good government power pursuant to which aeronautics has been brought within Federal jurisdiction.

[25] Constitution Act, 1867, subs. 91(2).

- PART III -

THE LEGISLATIVE AND REGULATORY FRAMEWORK OF CIVIL AVIATION

1. Introduction

Since the jurisdiction to regulate aeronautics rests with the Federal Government, we will now discuss the historical evolution of the laws passed by the Federal Parliament concerning aeronautics as well as the areas covered, the entities involved and the regulatory methodology relied upon.

The regulation of aviation in Canada may be broken down into two major categories: regulation of aviation safety, and regulation of the commercial activities involving aircraft.

In the safety-related category one finds regulations that establish technical, operational and maintenance standards for the components of an aviation system - the aircraft, the air navigation system, the airport, the aircrew, and other personnel carrying out aviation-related functions. As well, in this category are included the equipment and material used in conjunction with the operation and use of aircraft, airports, the air navigation system, and management of the airspace.

In the commercial-related category one finds regulations that address commercial air transport services[26], any other commercial use of aircraft[27], and bilateral or multilateral commercial aviation relations with other states.

In the safety-related category, the applicable legislation is the following:

(i) The Aeronautics Act, R.S.C. 1985 c. A-2, as amended (hereinafter referred to as the "Aeronautics Act");

(ii) The Air Regulations, C.R.C. 1978 Chapter 2, as amended, made pursuant

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[26] E.g. carriage by air of passengers, cargo or mail.

[27] E.g. specialty air services such as aerial photography, crop spraying, etc.

to the Aeronautics Act; and

(iii) The Air Navigation Orders, as amended, made pursuant to the Air Regulations.

In the commercial-related category, the applicable legislation is the following:

(i) The National Transportation Act, 1987, R.S.C. 1985 c. 28 (3rd Supp.) as amended, (hereinafter referred to as the "NTA, 1987"); and,

(ii) The Air Transportation Regulations, SOR/88-58, as amended, made pursuant to the NTA, 1987; and

(iii) The Aeronautics Act.

Other relevant Statutes are the following:

(i) Carriage by Air Act, R.S.C. 1985 c. C-26, as amended;

(ii) Department of Transport Act, R.S.C. 1985 c. T-18, as amended;

(iii) Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989 c. 3; R.S.C. 1985 c.C-23.4, as amended;

(iv) Excise Tax Act, R.S.C. 1985 c. E-15, as amended;

(v) Transportation of Dangerous Goods, 1992, S.C. 1992 c. 34, as amended;

(vi) Non-Smokers Health Act, S.C. 1988 c. 21, as amended.

However, these other statutes, although relevant to create a complete picture of all of the laws that affect the Canadian civil aviation system, are not, except for legislation dealing with the transportation of dangerous goods, of a purely regulatory nature. Since our focus will be on the regulation of the air carrier, the aircraft, the personnel and the air services, we will not discuss such other laws as it would bring us beyond the scope of this thesis.

2. Historical Development[28]

(a) From Civil to Military to Civil (1919-1952)

The very first piece of legislation relating to aviation adopted by the Canadian Parliament was The Air Board Act[29] of 1919 which had as its purpose to give effect to Canada's obligations under the Paris Convention, 1919[30]. The Air Board Act gave the Air Board power over both technical and commercial aspects of aviation. In this respect, and by way of example only, paragraphs 4(1)(a), (h) and (c), inter alia, gave regulation-making power over licensing of pilots, aerodromes and registration of aircraft. On the other hand, paragraph 4(1)(d) also conferred the regulation-making power regarding the:

> Conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial air service whatsoever, and the licensing of any such services. (Emphasis added).

By an "Act respecting the Department of National Defence"[31] (the "National Defence Act, 1922"), the Minister of National Defence was charged with "all matters relating to Defence, including the Militia, the Military, Naval, and Air Services of Canada".[32] Also, the National Defence Act, 1922 abolished the Air Board and conferred on the Minister of National Defence all of the powers, duties and functions that had been

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[28] For an excellent source of the historical development of civil aviation in Canada from 1859 to 1967 see Main, J.R.K., Les Voyageurs de l'air - Historique de l'aviation civile au Canada 1859 - 1967, Queen's Printer, Ottawa, Canada, 1967. For a statistical history of civil aviation in Canada see Aviation in Canada - Historical and Statistical Perspectives on Civil Aviation, Transportation Division, Statistics Canada, Minister of Supply and Services, Canada, 1986.

[29] S.C. 1919, 9-10 George V, c. 11 (1st session).

[30] Convention Relating to the Regulation of Aerial Navigation, signed at Paris, October 13, 1919.

[31] S.C. 1922, 12-13 George V, c. 34.

[32] Ibid., s. 4.

vested in the Air Board by the Air Board Act[33].

After a minor amendment to the Air Board Act the whole was consolidated in 1927 by "An Act to authorize the control of Aeronautics"[34] which became the Aeronautics Act, 1919[35]. This confirmed the full responsibility for civil aviation in the hands of the Minister of National Defence.[36]

In June 1936, Parliament adopted "An Act respecting the Department of Transport"[37] ("Department of Transport Act") which created the Department of Transport and consolidated into one Department the former three Departments of Railways and Canals, Marine, and Marine and Fisheries.[38] By virtue of section 5, the control and supervision of the civil aviation branch of the Department of National Defence was transferred to the Minister of Transport. In addition, section 6 conferred on the Minister of Transport all of the duties, powers and functions vested up to that time in the Minister of Marine as well as all of the powers, duties and functions over civil aviation that were vested up to that time in the Minister of National Defence.

Moreover, the same Act extended the duties, powers and functions of the Minister of Transport to such boards and other public bodies, subjects, services and properties of the Crown as may be designated by the Governor-in-Council[39]. This would have included any civil aviation boards that may have been created prior to that time. Subsequent amendments to the Department of Transport Act did not substantially alter this basis of jurisdiction of the Minister of Transport over the safety aspects of

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33 Ibid., subs. 7(1) and s. 8.

34 R.S.C. 1927 c. 3.

35 C. 11, s. 1; 1922, c. 34, s. 7.

36 The Act addressed both safety and some economic aspects of civil aviation and provided for the making of regulations for the operation and licensing of any commercial air service (para. 4(d)).

37 S.C. 1936 c. 34.

38 Ibid., ss. 3 and 4.

39 Ibid., subs. 6(3).

aeronautics.[40] However, the Minister's jurisdiction over the regulation of the economic aspects became the subject of later changes.

With the adoption of the Transport Act, 1938,[41] and the creation of the Board of Transport Commissioners for Canada (the "Board"), which was given the duty to perform its functions with the "object of coordinating and harmonizing the operations of all carriers engaged in transport by railways, ships and aircraft...," there was a consolidation of regulatory powers over the economic aspects of air transportation in Canada.[42] The Board was given the power to license aircraft to transport passengers or goods both domestically and internationally, and this power was exercisable notwithstanding anything contained in the Aeronautics Act.[43]

The Transport Act, 1938 introduced the concept of "present and future public convenience and necessity" in the exercise of the licensing functions by the Board. The Board could not issue a license without first being satisfied that the service proposed by the applicant for a licence "is and will be required by the present and future public convenience and necessity."[44]

On July 24, 1944 Parliament adopted "An Act to amend The Transport Act, 1938"[45] which restricted the scope of the jurisdiction of the Board by removing transport by air. Less than a month later Parliament adopted "An Act to amend the Aeronautics Act"[46], which placed transport by air under the jurisdiction of an Air

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[40] See R.S.C. 1952 c. 79; S.C. 1954 c. 30; S.C. 1956 c. 7; R.S.C. 1970 c. T-15; R.S.C. 1985 c. T-18; and S.C. 1987 c. 34, s. 362.

[41] "An Act to establish a Board of Transport Commissioners for Canada, with authority in respect of transport by railway, ships and aircraft", assented July 1, 1938 (S.C. 1938 c. 53) (Transport Act, 1938).

[42] Ibid., s. 3.

[43] Ibid., subs. 13(1). The reference to Aeronautics Act was to the Aeronautics Act, 1919 (R.S.C. 1927 c. 3) or S.C. 1919, c. 11, s. 1; 1922 c. 34, s. 7.

[44] Ibid., subs. 13(5).

[45] S.C. 1944 c. 25 ss. 1, 2, 5, 6, 7, 8, 9, 10, 11 and 12.

[46] S.C. 1944-45 c. 28 assented to on August 15, 1944.

Transport Board established by that amendment.[47]

The 1944 Amendment, inter alia, also accomplished the following:

(a) it divided the Aeronautics Act into three parts: Part I provided for the powers and duties of the Minister over aeronautics; Part II provided for the powers and duties of the Air Transport Board with respect to commercial air services; and Part III set out generally applicable requirements regarding the regulations enacted under the Act;

(b) it named the Minister of Transport as the Minister responsible for civil aviation (subject to the Governor-in-Council designating another Minister from time to time) (s. 2);

(c) it left with the Minister of National Defence for Air the responsibility to exercise those powers conferred on the Minister of Transport but only in any matter relating to defence (s. 2);

(d) it brought into existence an Air Transport Board and conferred on that Board the power to make regulations, subject to the approval of the Governor-in-Council, in relation to almost every aspect of commercial air services which the Act defined as "any undertaking for the transport of goods or passengers by aircraft for hire or reward" (s. 6); and,

(e) it made the issuance of a licence by the Air Transport Board subject to the approval of the Minister and prohibited the issuance of a licence by the Board for the operation of a commercial air service unless:

(i) there was a finding by the Board that the proposed air service "is and will be required by the present and future public convenience and necessity". (subs. 12(3)); and

(ii) the applicant held an operating certificate from the Minister (subs. 12(4)).

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[47] Ibid., s. 6.

The 1944 amendment recognized that there was another important condition to be met by an applicant for a licence to operate a commercial air service - the obtention of an operating certificate from the Minister certifying that the holder thereof is adequately equipped and able to conduct a safe operation as an air carrier over the prescribed route.[48] This separation between "safety" requirements and "economic" requirements was not as clearly delineated in the previous statutes. The provision in question prohibited the Air Transport Board from issuing a licence for a commercial air service "unless and until an operating certificate" had been issued by the Minister. Thus, the existence of a valid operating certificate was a precondition to the issuance of a licence by the Board. However, the 1952 Revision of the Statutes of Canada, changed this provision.[49] No more was the Board prohibited from issuing a licence unless there was first an operating certificate. Instead, the licensee, having received a licence from the Air Transport Board, was prohibited from operating a commercial air service unless the licensee also held a valid and subsisting operating certificate issued to him by the Minister.

The 1944 Amendment included a provision requiring the Minister to exercise his powers subject to any international agreement or convention relating to civil aviation to which Canada is a party.[50] This provision contrasts with the later amendments to the Aeronautics Act which removed that obligation from the Minister and imposed it on the Air Transport Board and its successors, the Canadian Transport Commission and the National Transportation Agency.[51] Presumably, this was done in recognition of the fact that, international agreements or conventions being executive acts (i.e. entered into by the Executive arm of government) bind automatically the Minister who is a member of

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[48] S.C. 1944-45, c. 28 subs. 12(4).

[49] R.S.C. 1952 c. 2, subs. 15 (5).

[50] S.C. 1944-45, c. 28 s. 17.

[51] By virtue of the 1952 Revision, the obligation imposed on the Minister by s. 17 of the S.C. 1944-45, c. 28, was transferred unto the Air Transport Board as reflected in s. 18 of the Aeronautics Act, R.S.C. 1952 c. 2. Also, the same situation is continued under s. 19 of the Aeronautics Act, R.S.C. 1970 c. A-3 and s. 69 of the National Transportation Act, 1987.

the Executive Branch but may not do so with respect to an independent federal regulatory agency such as the Air Transport Board or its successors, unless such international agreements or conventions have been implemented through domestic legislation[52]. In this respect it should be noted that neither the Chicago Convention nor the various bilateral air services agreements are implemented directly into Canadian domestic legislation. However, in the case of the Chicago Convention, regulations made under the Aeronautics Act do reflect, for the most part, the substance of that Convention and its Annexes.[53]

The 1952 revision of the Statutes of Canada,[54] restructured the Aeronautics Act, 1919 as amended, and several new important provisions were introduced empowering the Air Transport Board, inter alia: to inquire into and hear any matter related to areas within its jurisdiction; to make mandatory orders requiring any person to do anything that is required to be done under its jurisdiction; to prohibit any person from doing anything that is contrary to any matter within its jurisdiction. Furthermore, it vested in the Board the "powers, rights and privileges of a superior court of record in

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[52] See the decision of the Supreme Court of Canada in Capital Cities Comm. Inc. v. C.R.T.C. [1978] 2 S.C.R. 141 where at pp. 172-73, Laskin, C.J. stated:

> Turning to the appellants' submissions in the order in which they were made, I am unable to appreciate how it can be said that the Commission is an agent or arm of the Canadian Government and as such bound by the Convention provisions in the same way as the Government. There is nothing in the *Broadcasting Act*, nor was our attention directed to any other legislation which would give the Commission any other status than that of a federal regulatory agency established with defined statutory powers. There is nothing to show that it derives any authority from the Convention or that the Convention, *per se*, qualifies the regulatory authority conferred upon the Commission by the *Broadcasting Act*. Indeed, if the contention of the appellants has any force under its first submission it can only relate to the obligations of Canada under the Convention towards other ratifying signatories. There would be no domestic, internal consequences unless they arose from implementing legislation giving the Convention a legal effect within Canada. (emphasis added)

[53] Bill C-76, entitled "An Act to amend the Aeronautics Act and to amend an Act to amend the Aeronautics Act" (S.C. 1992 c. 4) added to the Aeronautics Act a specific regulatory power enabling the adoption of regulations in respect of the application of the Chicago Convention as amended from time to time.

[54] R.S.C. 1952 c. 2.

respect of 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".[55]

(b) A New National Transportation Policy (1953-1983)

There were no amendments to the Aeronautics Act between 1952 and 1964. The next amendments to the Aeronautics Act occurred in 1964[56] and 1966.[57] The most important of the 1966 amendment was made with the enactment of the National Transportation Act ("NTA, 1967").[58]

The NTA, 1967 constituted the Canadian Transport Commission ("CTC")[59] to replace the Air Transport Board and conferred on it regulatory powers[60] over:

(i) transport by railways to which the Railway Act applies;

(ii) transport by air to which the Aeronautics Act applies;

(iii) transport by water to which the Transport Act applies and all other transport by water to which the legislative authority of Parliament extends;

(iv) transport by a commodity pipeline connecting a province with any other

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55 Ibid., s. 8.

56 This was a consequential amendment arising from the enactment of the Territorial Sea and Fishing Zones Act, S.C. 1964-65 c. 22. s. 7. (R.S.C. 1985 c. T-18).

57 There were two amendments in 1966: S.C. 1966-67 c. 69, ss. 2, 93 and 94 and also S.C. 1966-67 c. 10. The second of the 1966 amendments made by S.C. 1966-67 c. 10 is not of particular relevance for present purposes and will thus not be discussed.

58 S.C. 1966-67 c. 69, s. 2, "An Act to define and implement a national transportation policy for Canada", R.S.C. 1985 c. N-17. The NTA, 1967 was influenced greatly by the 1961 Report of the Royal Commission on Transportation (MacPherson Report) which had been appointed in mid-1959.

59 Ibid., Part I (subs. 6 to 28).

60 Ibid., s. 4. These were powers that were previously exercised by three other government agencies, namely the Air Transport Board, the Board of Transport Commissioners and the Canadian Maritime Commission.

or others of the provinces or extending beyond the limits of a province; and,

(v) transport for hire or reward by a motor vehicle undertaking connecting a province with any other or others of the provinces or extending beyond the limits of a province.

Section 3 of the NTA, 1967 was a key provision because it introduced a national transportation policy for Canada. In essence that policy declared that an economic, efficient and adequate transportation system, making the use of all available modes of transportation at the lowest total cost was essential, not only to protect the interests of the users, but also to maintain the economic well-being and growth of Canada. These policy objectives were to be achieved, inter alia, through: inter-modal competition; each mode bearing a fair proportion of the costs of the infrastructure provided at public expense; and, each mode receiving compensation for any resources, facilities and services provided as an imposed public duty.

The NTA, 1967 strengthened the powers of the CTC over air transport that were found in the Aeronautics Act especially concerning any proceedings before the CTC.[61] A comparison between the NTA, 1967 and the then existing Aeronautics Act shows that,

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[61] See s. 5 of the NTA, 1967 as well as ss. 21 (providing for the duty of the CTC to perform its functions so as to achieve the object of coordinating and harmonizing the operations of all carriers - railways, air carriers, marine, motor vehicle and commodity pipelines); 22 (imposing on the CTC the duty to inquire, study and research, inter alia, into economic aspects of transportation, the relationship between various modes, financial assistance, criteria for federal investment in equipment and facilities, as well as participation in the economic aspects of the work of intergovernmental, national or international organizations dealing with any form of transport under the jurisdiction of Parliament, etc.); 24 (providing for the creation of an Air Transport Committee); 25 (providing for appeals to the Minister from a final decision of the CTC respecting any action taken on an application for a licence to operate a commercial air service or on any decision of the CTC regarding the suspension, cancellation or amendment of any such licence); 27 (providing for notice of proposed acquisition by an air carrier of a transportation undertaking); 63 (empowering the CTC to review, rescind, change, alter or vary any order or decision made by it, or to re-hear any application before deciding it); 64 (providing for the Governor-in-Council, of its own motion or upon application, to vary or rescind any order, decision, rule or regulation of the CTC, as well as for appeals to the Federal Court of Appeal from the CTC upon any question of law or a question of jurisdiction); and, 81 (providing for an inquiry by a person appointed or directed by the CTC into any application, complaint or dispute pending before the CTC, or upon any matter over which the CTC has jurisdiction under the NTA, 1967).

in general, the powers of the CTC under the Aeronautics Act were intended to deal with the regulation of the substantive aspects of commercial air services whereas the NTA, 1967 addressed the process and the policy matters through which those substantive issues were addressed by the applicants, the CTC and the Government (through the Minister of Transport and the Governor-in-Council). There was, however, a certain overlap in respect of commercial air services between the powers and duties of the CTC under the NTA, 1967 and its powers and duties under the Aeronautics Act.[62]

In 1969,[63] Parliament amended the Aeronautics Act, inter alia, by providing a new definition of "aircraft"[64] which recognized the existence of air cushion vehicles (the so-called hovercraft) and by excluding them from the definition; by adding another provision whereby the Governor-in-Council could authorize the Minister to make regulations imposing charges for the use of any service or facility by an aircraft; and,

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[62] In fact, because of this overlap which could result in conflicting regulations being made, Parliament included subs. 26(2) of the NTA, 1967 which provided as follows:

> (2) Where there is a conflict between any regulations made by the Commission under this Act in respect of a particular mode of transport and any regulations made under any other Act in respect of that particular mode of transport, the regulations made under this Act prevail.

[63] S.C. 1968-69 c. 13.

[64] S. 9 of the 1969 Act, contemplated that the new definition of "aircraft", set out in subs. 4(1) thereof, would come into effect on a day to be fixed by proclamation. In fact, this same definition and need for a proclamation were carried over into the 1970 Revised Statutes (R.S.C. 1970 c. A-3). The proclamation that was foreseen was never made and even as late as June 1985 when comprehensive amendments to the Aeronautics Act were adopted by Parliament (S.C. 1985 c. 28) that definition of aircraft had not yet been proclaimed. The principal reason related to the fact that in the absence of any power to regulate "hovercraft" (or "air cushion vehicles") under the Canada Shipping Act (R.S.C. 1985 c. S-9) the Aeronautics Act could be relied upon by the Minister for such regulations (See Air Cushion Vehicle Regulations CRC, Vol I, c.4, p.183). The definition of "aircraft" that was included in the 1985 amendments (S.C. 1985 c. 28) s. 2, gave recognition to this and specifically provided for a two-step process of definition. The first definition was such as to include hovercraft ("any machine capable of deriving support in the atmosphere from reactions of the air") without specifying whether the "reactions of the air" had to be with the surfaces of the craft itself or with the surface of the earth, while the second definition (which was to come into effect upon proclamation and which would replace the first definition) specifically excluded hovercraft (i.e. "other than a machine designed to derive support in the atmosphere from reactions against the earth's surface of air expelled from the machine"). In effect, the definition of "aircraft" found in the R.S.C. 1952, c. 2, para. 6(1)(a) was carried forward until the 1985 amendments changed it. As of November 10, 1994, the new definition had not yet been proclaimed into force.

by adding a provision which enabled the CTC to make regulations without the need to obtain Governor-in-Council approval.[65]

The 1970 revision of the Statutes of Canada consolidated the Aeronautics Act but maintained the organizational structure of powers, duties and jurisdictions that had been established by the earlier Acts.[66]

Amendments subsequent to the 1970 consolidation addressed: aviation security[67] jurisdiction over aviation-related offenses committed outside Canada[68]; the change of control of an air carrier and the acquisition of interests therein by a Province;[69] the Air Canada Act 1977;[70] the carriage of mail governed by the Canada Post Corporation Act;[71] the authority of the Minister to investigate aircraft accidents;[72] and, expropriation.[73]

(c) Safety First and Liberalization (1984-1994)

In March 1985 the then Minister of Transport, the Honourable Don Mazankowski, tabled before the House of Commons sweeping changes to the Aeronautics Act which were "designed to give Canadian aviation its most progressive legislation in

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[65] Previously, the CTC could only make regulations with to the approval of the Governor-in-Council (see R.S.C. 1952 c. 2, s. 13).

[66] R.S.C. 1970 c. A-3.

[67] S.C. 1973 c. 20; and S.C. 1974-75-76 c. 100.

[68] S.C. 1976-77 c. 28 s. 2.

[69] S.C. 1976-77 c. 26, ss. 1 to 4.

[70] S.C. 1977-78 c. 5 s. 26.

[71] R.S.C. 1985 c. C-10.

[72] S.C. 1980-81-82-83, c. 165, s. 36 - Canadian Aviation Safety Board Act.

[73] S.C. 1983-84 c. 40, s. 2.

more than 60 years".[74] Bill C-36, entitled "An Act to amend the Aeronautics Act", brought together major recommendations of the Commission of Inquiry on Aviation Safety headed by Mr. Justice Charles Dubin of the Ontario Court of Appeal ("Dubin Inquiry") that had been established pursuant to Part II of the Inquiries Act[75] and the Aeronautics Act Task Force that had been created in October 1978 within the Canadian Air Transportation Administration of the Department of Transport by the then Administrator, Mr. Walter M. McLeish.[76] Both of these initiatives addressed only the safety side of aviation. There was no attempt at that time to inquire into the economic regulation of commercial air services to the extent that such regulations fell within the jurisdiction of the CTC under Part II of the Aeronautics Act and the NTA, 1967.

The Order in Council that established the Dubin Inquiry set out the reasons for the Inquiry and its mandate. The reasons were basically related to the concerns that had been expressed by the Canadian public about:

(i) the adequacy of federal law, regulations and rules and of practices and

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[74] See Transport Canada Press Release "Information" No. 46/85 dated March 28, 1985. Bill C-36 represented the first truly comprehensive amendment of the Aeronautics Act from the time of the adoption of the Air Board Act in 1919. Earlier amendments were piecemeal resulting in a complicated legislative and regulatory structure. The complexity of the then existing system was being criticized by almost everyone involved in civil aviation. In addition, the absence of an effective enforcement mechanism and loopholes in the regulatory scheme which enabled only administrative enforcement of laws and regulations in some very important and essential areas of aviation activity, called for improvements in order to advance aviation safety. Between 1977 and 1979, three Bills to amend the Aeronautics Act were tabled in Parliament (see for example Bill S-15 tabled for first reading 26 March 1979) but they all died on the Order Paper. These Bills were nearly identical and dealt with the collection of fees, authorized regulations regarding aeronautical products and provided for land-use control around airports. Bill C-36 also addressed these areas but in a slightly different way.

[75] R.S.C. 1985 c. I-11, by Order in Council dated August 3, 1979.

[76] The mandate given to the Aeronautics Act Task Force was: to review the aeronautics legislation - statutory and regulatory - as well as enforcement practices and procedures; the methodology by which regulatory policy was developed, promulgated and disseminated; harmonization of the drafting of legislation in both official languages; and, the drafting of revised regulations. In 1982 the Task Force distributed a public consultation document entitled "Proposals for Amendment to Parts I and III of the Aeronautics Act". This document covered proposals for amendment based on the earlier Bills, recommendations of the Dubin Inquiry, representations from the various branches of the DOT, and the Task Force examination of foreign aeronautics legislation, international obligations and the then existing law.

procedures governing aviation safety in Canada, particularly in relation to small aircraft, remote areas, and uncontrolled airports;

(ii) the sufficiency of enforcement of existing aviation safety legislation and standards, including training, qualification and numbers of federal inspectors;

(iii) the airworthiness and maintenance of aircraft including departmental aircraft; and

(iv) the adequacy of aviation incident reporting and investigation and aviation accident investigation.

An additional mandate of the Inquiry was to investigate and report upon the state and management of the Air Administration of the Department of Transport in relation to a wide range of activities affecting civil aviation, including:

(i) the inspection and certification of aircraft;

(ii) the formulation and enforcement of laws, regulations and rules; and

(iii) the investigation of aircraft accidents and the reporting and investigation of incidents involving aircraft.

These were broad terms of reference indeed and subsequent events showed that the task facing the Inquiry was an enormously difficult and sensitive one. Part of the sensitivity arose from allegations that, in the carrying out of the investigation of the PWA B-737 crash in Cranbrook in 1978, members of the Aviation Safety Bureau of the Department of Transport had destroyed evidence. This had given more credence to the arguments being advanced that the DOT was in a conflict of interest because it was the regulatory authority, the operator of the air navigation system and the investigator of aircraft accidents. This triumvirate of responsibilities was seen as prone to conflicts of interest especially where there was a strong possibility that an accident was caused or contributed to by the action or inaction of the DOT officials.

This conflict of interest question was the subject of several independent studies or inquiries both before and since the Dubin Inquiry (i.e. the Booth Report in 1966; the

McLearn Report in 1973; the Hickman Commission of Inquiry into the Ocean Ranger Disaster in 1982; the Deschênes Study on Marine Casualty Investigation in 1984; and, the Nielsen Task Force Study on Transportation in 1986).

The Dubin Inquiry, after having heard numerous witnesses and having received thousands of pages of evidence over a period of almost two years finally submitted its Report to the Minister of Transport in three volumes issued between May, 1981 and February, 1982. The recommendations of the Inquiry on accident and incident reporting and investigation formed the substance of the first volume. These resulted in the creation of the Canadian Aviation Safety Board[77]. The Canadian Aviation Safety Board was established independent of the Department of Transport but was unimodal in its mandate; limited to civil aviation accidents and incidents only. Needless to say, the principal advantages of an independent accident investigation body are self-evident - the elimination of actual, potential or appearance of conflict of interest with the resulting gain in credibility and public confidence in the objectivity of the findings and recommendations of such a body. Thus, Bill C-36 focused on areas requiring legislative changes other than those covered by that Act.

At the time that Bill C-36 received royal assent on June 28, 1985, the relationship between the Aeronautics Act, the Air Regulations, and Air Navigation Orders was as follows. The Air Regulations were made by the Minister of Transport with the approval of the Governor-in-Council and the Air Navigation Orders were made by the Minister pursuant to powers conferred by the Air Regulations.[78] In addition, there were numerous departmental publications[79] setting out standards[80] and procedures that the

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[77] The legislation that created it was the Canadian Aviation Safety Board Act. S.C. 1980-81-82-83 c. 165.

[78] Although one speaks of Air Regulations and Air Navigation Orders, insofar as the Statutory Instruments Act (R.S.C. 1985 c. S-22) is concerned, they are both "regulations" (see para. 2(1)(b)). Subs. 6(2) of the Aeronautics Act (R.S.C. 1985 c. A-2) provided "Any regulation made under subs. (1) may authorize the Minister to make orders or directions with respect to such matters coming within this section as the regulations may prescribe".

[79] Currently there are about 25 departmental publications that are incorporated by reference in the Regulations and Orders. There were more than 100 departmental publications existing in 1985 on standards and procedures which played a part in the regulation of aeronautics in Canada.

aviation community was expected to implement and abide by. Some of these, such as the Canada Air Pilot, containing the procedures to be followed in making instrument landings at various airports, were incorporated by reference into the Air Regulations or Air Navigation Orders; others were not.

Prior to the passage of Bill C-36, there was no specific statutory power in the Aeronautics Act that enabled the incorporation by reference of standards and procedures not included in Regulations or Orders. Bill C-36 introduced such power.[81]

The Air Regulations were divided into eight Parts each of which (except for Part II covering Registration, Airworthiness Certification, and Markings) dealt with a separate major aeronautical activity (i.e. Part III - Aerodromes; Part IV - Personnel Licensing; Part V - Rules of the Air; Part VI - Air Traffic Control; Part VII - Commercial Air Service Operations; and, Part VIII - Miscellaneous Provisions (e.g. carriage of explosives, enforcement, etc.)).

The Air Navigation Orders were arranged in Series, each of which dealt with a topic covered by the corresponding Part of the Air Regulations. Thus, both Part VII of the Air Regulations and Series VII of the Air Navigation Orders address commercial air service operations. Within each Series of Air Navigation Orders there were several Air Navigation Orders each of which bore its own number concerning a specific aspect of the major topic. Thus, Air Navigation Order Series VII No. 2[82] entitled "Air Carriers Using Large Airplanes Order" covered commercial air service operations of air carriers using large airplanes (such as Air Canada).

Unfortunately, it became more and more difficult to distinguish substantively between the Air Regulations and the Air Navigation Orders. Quite often there was no difference. The Air Navigation Orders route was used when it should have been the Air Regulations and vice versa. The two systems were used interchangeably, depending on

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[80] For present purposes, the term "standards" includes all classifications, specifications, and other requirements that may be incorporated by reference.

[81] See R.S.C. 1985 c. 33 (1st Supp.), subs. 5.9(3).

[82] C.R.C. 1978 c. 21, as amended.

where the new requirement best fit into the regulatory structure of the time.

The new system for subordinate legislation that was proposed by the Aeronautics Act Task Force would have all regulatory requirements of a continuing nature to be adopted as Air Regulations. All requirements which are of a very technical detailed nature or directed at a specific person or which would be of only a limited duration (e.g. the closing of airspace at an airport due to a danger temporarily posed to aviation safety) would be issued as Orders. In fact, this is the system that had been adopted and, until recently, was implemented in phases by the Department of Transport.[83]

In addition, the new regulations were to include many matters which were set out in administrative documents. This would solidify their legal status as statutory instruments and facilitate their enforcement. At the same time, because this approach would have increased vastly the number of regulatory provisions, it became necessary to establish a methodology for arranging them in a clear and logical manner so that the target audience (the aviation community and the users of aviation) could easily understand them and know which regulations applied to them and when. For this reason the Department of Transport initially decided to apply to the new Air Regulations the "Series" and "Numbers" concept that was being followed in the case of the Air Navigation Orders.[84]

More recently[85], however, the Department decided to replace the current Air Regulations, Air Navigation Orders and Air Regulations Series by clear, concise and up-to-date regulations known as the "Canadian Aviation Regulations" (or "CARS").[86] The

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[83] Due to the complexity and enormity of the task, not too much progress was being made.

[84] An example of this new format may be found in the Designated Provisions Regulations which are known as Air Regulations, Series I, No. 3 promulgated by SOR/89-117.

[85] During the summer of 1994.

[86] In essence, the decision to adopt the CARS method was inspired by several factors, including, the need to render the regulatory materials more user-friendly and accessible, efforts towards harmonization of aviation regulations with other countries (e.g. the CARs will use the same numbering system for the airworthiness standards as the United States Federal Air Regulations ("FARs")) and, as well as a result of recommendations from the Report of the Commission of Inquiry into the Air Ontario Crash at Dryden, Ontario in March of 1989, which call for both simple revisions to existing rules and the development of

CARS are to be set out in eight Parts entitled as follows:

Part I	-	General
Part II	-	Identification, Registration and Leasing of Aircraft
Part III	-	Aerodromes and Airports
Part IV	-	Personnel Licensing
Part V	-	Airworthiness
Part VI	-	General Operating and Flight Rules
Part VII	-	Commercial Air Services
Part VIII	-	Air Navigation Services.

The February 25, 1992 Federal Budget required all Federal Government Departments to review existing regulations "to ensure that the use of the Governments's regulatory powers results in the greatest prosperity for Canadians". The Department of Transport was one of three lead departments required to review their regulations. Thus, the Department of Transport undertook a massive exercise to review and publicly justify all its existing regulations. The review also examined regulatory policy, process and its impact on competitiveness.[87]

The aviation rule-making process in Canada, under the present format, involves extensive processing and delays in getting approval. It is viewed by the aviation community as lacking public access and participation. Also, there is a need to bring the various rule-making initiatives to the attention of senior management at an earlier stage of the process as well as to advance and facilitate harmonization with the rules of other national aviation jurisdictions (e.g. FAA and JAA).

On December 2, 1992, the Honourable Don Mazankowski, the then Minister of Finance, in the Conservative Government of Brian Mulroney, delivered an Economic and

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entirely new regulatory programs.

[87] See Transport Canada Publication entitled "Regulatory Review Initiative", Volumes 1 and 2, September 1993. That review will not be discussed here except to indicate that it provided a background for the specific developments that would occur in the rulemaking process concerning aviation.

Fiscal Statement in the House of Commons under the heading "Regulating More Efficiently", in the context of which he made the following statement:

> An Aviation Regulation Council is being established that will directly involve industry in the regulation-making process. This will ensure the relevance of all existing rules and ensure industry has the room it needs to innovate.

This resulted in the creation of the Canadian Aviation Regulation Advisory Council ("CARAC")[88], charged with addressing the issues highlighted above and which will form part of the renewed approach to consultation and rule-making to improve the rule-making process and system of Transport Canada Aviation.

The basic structure of the CARAC[89] includes: (i) a Transport Canada Aviation Regulatory Committee ("TCARC") composed of Transport Canada Aviation senior executives. It will identify and establish priorities for regulatory issues, and consider and direct the implementation of recommendations made to it. The TCARC will also provide advice and recommendations to the Transport Canada Assistant Deputy Minister, Aviation and the Aviation Safety Review Committee ("ASRC"); (ii) Technical Committees with representation from both Transport Canada and the aviation industry whose role will be to review and analyse issues assigned by the TCARC and make regulatory recommendations; (iii) Working Groups composed of specialists representing both government and the aviation industry whose task will be to develop proposals and recommendations for the assigned tasks, and to act on those that are approved for regulatory implementation. Working Groups will be formed by and report to Technical Committees; (iv) a Secretariat will be responsible for the management of CARAC on behalf of the TCARC.

The prime objective of CARAC will be to assess and recommend potential

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[88] The inauguration date of the CARAC is July 1, 1993.

[89] See Transport Canada Publication, TP11733E entitled "CARAC MANAGEMENT CHARTER & PROCEDURES", dated August 1994.

regulatory changes through cooperative rule-making activities. All recommendations for change to the aviation regulatory system are to be made with a view to maintain or improve aviation safety in Canada. Hence, all proposals will be judged on the safety and efficiency that would result from their implementation. Moreover, all new proposals or recommendations for changes to regulations must be accompanied by what is known as a "Reguatory Impact Analysis Statement ("RIAS"). The RIAS will need to include an analysis of the benefits of the proposed change or new regulation against the cost that would be involved.[90]

It should be noted, however, that the CARAC activities will not replace the rule-making procedures now in place within the Government of Canada. Formal public consultation on proposed aviation regulations through the Canada Gazette Part I will continue.

As already stated, Bill C-36 did not address those regulatory areas that were within the jurisdiction of the CTC under Part II of the Aeronautics Act or NTA, 1967. However, almost in parallel with the improvements that were being made to the Aeronautics Act regarding safety, the Federal Government was examining the possibility of reducing regulatory control over economic[91] aspects of commercial air services. The underlying policy[92] for such action was to move toward a market-based control along the lines of, but not the same as, the economic deregulation of the airline industry that

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[90] See Ibid. at pp. 2-3.

[91] When one speaks of "economic" regulation of commercial air services one is normally referring to the regulatory control over matters such as entry into and exit from a market (city-pair); fares and rates, conditions of service, frequency and capacity of service.

[92] In introducing the "New Canadian Air Policy" in May, 1984, the Minister of Transport (The Honourable Lloyd Axworthy) in his address to the House of Commons stated:

> ... we have not proposed to import U.S.-style-deregulation. Rather, this is a truly made-in-Canada approach, sensitive to Canada's particular geographic and social character. It proposes liberalization in a thoughtful and orderly fashion.

had occurred in the United States under the Airline Deregulation Act of 1978.[93]

When the Minister of Transport announced the New Canadian Air Policy in May 1984, his assessment of the airline industry under the then existing regulatory system was that it: ensured that real-life competition was kept to a bare minimum; prevented new entrants into the Canadian aviation market; stymied innovation, stifled diversity and ideas; forced the industry to spend its energies in attempting to satisfy the regulatory authority; and, resulted in many Canadians using American rather than Canadian gateways.[94]

The essence of the New Canadian Air Policy was less regulation and more competition.[95] This was intended to be a demonstration of the "government's confidence in the maturity of Canada's airline industry to respond to the challenges of increased competition".[96] Moreover, it discarded the concept that the airline industry was a public utility and introduced the idea that "commercial competition is the basis of a healthy air transport system".[97]

The procedure adopted at that time was a two-phased approach. The first phase was to liberalize immediately the industry without a change in legislation. This was effected in two ways. First, through the exercise by the Governor-in-Council of its powers, under section 64 of the NTA, 1967, to vary or rescind any decision, order, rule or regulation of the CTC; and, second, by letting the CTC know of the government's expectations that much greater weight was to be given to the benefits of increased

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[93] Pub. L. No. 95-504, 82 Stat. 1707 (1978), October 24, 1978. Prior to the passage of the Airline Deregulation Act of 1978, economic regulation of the airline industry in the U.S. was based on the Civil Aeronautics Act of 1938, which was later re-enacted without significant change as the Federal Aviation Act of 1958 (Act of August 23, 1958, 72 Stat. 731). For a very thorough discussion of the impact of deregulation in the United States, the reader is referred to Dempsey, Paul Stephen "The Empirical Results of Deregulation: A Decade Later, and the Band Played on", Transportation Law Journal, University of Denver, Volume XVII No. 1, 1988.

[94] See address by the Minister of Transport to the House of Commons, May 10, 1984.

[95] Ibid.

[96] Ibid.

[97] Ibid.

competition when judging airline licence applications.

In his address to the House of Commons of May 10, 1984, the Minister of Transport stated:

> ... This means the government expects the CTC to give much greater weight to the benefits of increased competition when judging airline licence applications. As the CTC will play a vital role in their transition stage, we are counting on its cooperation and good judgement.
>
> Full deregulation or open entry cannot take place without a change in the existing legislation that demands the CTC to assess the "public convenience and necessity" of each application. However, current legislation clearly grants the CTC the latitude to authorize the kind of competition I foresee. Broader entry into the market is our goal. With the CTC's cooperation, we can ensure much greater ease of entry into what has often seemed to be a closed club." (emphasis added)

Clearly, a very strong message was sent to the CTC to cooperate in the implementation of the New Canadian Air Policy. It should be noted that neither the Aeronautics Act nor the NTA, 1967 provided for directions to be given by the Government to the CTC as to how the CTC was to exercise its authority. However, in view of the fact that CTC licensing decisions were appealable to the Minister[98] and that the Governor-in-Council had the power to vary or rescind any "order, decision, rule or regulation"[99] of the CTC, it is not surprising that the CTC would pay attention to the policies or statements issued by the Government.

The New Canadian Air Policy recognized that full deregulation or open entry could not take place without a change in the then existing legislation because of the statutory requirement for the CTC to satisfy itself that a proposed commercial air service is and will be required by the present and future public convenience and necessity, before

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[98] See s. 25, NTA, 1967.

[99] Ibid., subs. 64(1).

issuing a licence.[100]

An example of the implementation of the New Canadian Air Policy through the exercise by the Governor-in-Council of its power to vary or rescind under section 64 of the NTA, 1967, may be found in the "Order Varying and Rescinding CTC Decisions Respecting Bradley Air Services Limited ("First Air")".[101] As a result of that Order, the restrictions that had been imposed by the CTC limiting the type and group of fixed-wing aircraft that First Air could operate as well as the restriction limiting First Air to serving Montreal at Mirabel International Airport only, were removed.

The process that was followed by the Minister of Transport in ensuring that all unwarranted restrictions on licences would be removed, involved forwarding letters to all air carriers holding domestic unit toll licences[102] for services between points in southern Canada,[103] to apply to him for removal of restrictions on their licences. Northern Canada was excluded from the New Canadian Air Policy on the basis that it could not yet sustain the sort of competition that the government had envisaged.

When the Conservative government of Brian Mulroney came to power in the fall

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[100] See subs. 16(3) of the Aeronautics Act, R.S.C. 1970 c. A-3 as it was in 1984. The phrase "present and future public convenience and necessity" was discussed extensively by the Review Committee of the CTC in the matter of the application by Canavia Transit Inc. for review of Air Transport Committee (ATC) Decision No. 6529 dated August 28, 1981 (Decision 1982-02 dated March 5, 1982 of the Review Committee). However, subs. 16(4) of the Aeronautics Act enabled exemptions from the public convenience and necessity requirement for non-scheduled commercial air services. Thus, the CTC was requested to use its exemption power in deciding on applications from such air carriers. The only requirements that would continue for such air carriers were that they be financially and technically fit.

[101] SOR/84-482 dated 21 June 1984, made by the Governor-in-Council on the recommendation of the Minister of Transport, pursuant to subs. 64(1) of the National Transportation Act, 1967. Numerous other CTC decisions and orders were varied or rescinded in the same manner (e.g. Order Varying CTC Orders and Decisions Respecting Air Atonobee Limited - SOR/84-483). By mid-September 1984, Orders under s. 64 of the NTA, 1967 had been issued removing restrictions from the licences of fifteen air carriers with twenty-four applications from other carriers that were pending.

[102] These were the Class 1, 2 or 3 licences as defined in the then existing Air Carrier Regulations, 1978 C.R.C. c. 3, as amended.

[103] "Southern Canada" was defined in the Policy as being that area south of the 50th parallel from the Atlantic Ocean to the Ontario-Manitoba border and south of a diagonal line from that point of intersection to the intersection of the 55th parallel and the Manitoba-Saskatchewan border, and south of the 55th parallel from that point to the Pacific Ocean.

of 1984, it set out to give the movement towards a more liberalized transportation environment its own trademark and, on July 15, 1985, introduced a Policy Paper entitled "Freedom to Move - A Framework for Transportation Reform".[104] The Policy Paper provided that the new policy for the economic regulation of transportation would be based, inter alia, on the principles that:

(i) less regulation, leading to less government interference, will encourage innovation and enterprise;

(ii) greater reliance on competition and market forces will result in lower unit costs, more competitive prices, and a wider range of services to shippers and the public;

(iii) inflexible, restrictive regulation is an obstacle to growth, innovation and competitiveness; and,

(iv) Canadians require a regulatory process that is open, accessible, and not excessively costly or time-consuming.[105]

The move towards less regulation and more competition was not in any way intended to have any negative impact on safety. In this regard, the Policy Paper provided:

> ... At the same time the Government remains committed to air safety. In June, Parliament passed amendments to the Aeronautics Act.... The passage of the Aeronautics Act amendments places safety regulations on a sound, modern footing, in keeping with the Government's determination that economic regulatory reform must not have adverse implications for public safety.[106]

The previous Minister had limited his New Canadian Air Policy of May 10, 1984 to the air mode. The July 1985 Policy Paper, however, addressed all transport modes in

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[104] Freedom to Move - A Framework for Transportation Reform. Ottawa: Transport Canada, July 15, 1985.

[105] Ibid., at p. 4.

[106] Ibid., at p. 25.

the context of intermodal and intramodal competition.[107]

With respect to the air mode, the principal proposals that were made were basically the following:[108]

- entry to any class of domestic commercial air service would be open to any carrier meeting a "fit, willing and able" requirement as opposed to the "present and future public convenience and necessity" test that was being applied. Any operator submitting evidence of adequate liability insurance and possessing a Canadian Department of Transport operating certificate attesting to the adequacy of its equipment and its ability to conduct a safe operation, would be granted a licence;
- exit from a market (i.e. discontinuance of service) would require a minimal notice;
- route determination and schedules of domestic air carriers would be exempted from regulation, thus enabling carriers to offer routes and schedules to meet their perceived public demand;
- tariffs for domestic carriage would no longer be regulated on an ongoing basis except for a review procedure on fare increases upon complaint with the power to overturn or reduce excessive increases; and
- consistent with Canada's obligations under bilateral air services agreements, there would be continued regulatory control of market entry to international scheduled services and of international tariffs. However, the government would pursue reduction of regulations on international routes through bilateral negotiations, such as those ongoing with the United States.

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[107] Ibid., at pp. 5 and 17. It was proposed in the Paper to revise the National Transportation Act, 1967 to promote actively competition among air, marine, rail and road sectors (intermodal), as well as within the various modes (intramodal); to encourage new multimodal service; and, to relax restrictions on mergers and acquisitions.

[108] Ibid., at pp. 6 and 26. These proposals were adopted fully by Parliament except that for any air services between or to or from Northern Canada (defined as the "Designated Area" - see discussion at pages 100-101 and note 311, infra) certain restrictions continue to apply in respect of increases in basic fares, entry and exit from a market (discussed at pages 100-102, 106-109 and 113-117, infra).

The tabling of the new legislation "an Act respecting national transportation", [109] was preceded by an extensive process of consultation complemented by the Sixth Report of the Standing Committee on Transport entitled "Freedom to Move - Change, Choice, Challenge", which was tabled in the House of Commons on Wednesday, December 18, 1985. The new National Transportation Act was finally passed by Parliament and it received Royal Assent on Friday, 28 August 1987 (hereinafter referred to as the National Transportation Act, 1987 or "NTA, 1987").[110]

In addition to giving legislative effect to the government's policy of less regulation and more competition, the NTA, 1987 also amended the Aeronautics Act by repealing Part II thereof (which contained the powers of the CTC), and by consolidating all of the powers of the CTC in respect of air transportation into the NTA, 1987 under a new agency called the "National Transportation Agency" ("Agency").[111]

The Agency was established on January 1, 1988. It was conceived as the overseer of economic regulatory reform in the transportation industries under Federal jurisdiction[112]. In light of its role of regulating the transition to less regulation, the Agency was intended to operate differently in several fundamental respects from its predecessor, the CTC:

> The prevailing philosophical and policy direction was reflected in the development of an Agency that is more an overseer of market forces than a regulator of transport.
>
> The Agency's mandate involves actions intended to reduce administrative impediments, maximize accessibility by the public and

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[109] First tabled as Bill C-126 on June 26, 1986 and later as Bill C-18 in November 1986.

[110] S.C. 1987 c. 34; (R.S.C. 1985 c. 28(3rd Supp.). The essence of the philosophical difference between the NTA, 1967 and the NTA,1987 lies in the new law's intended purpose of giving effect to the pro-competitive thrust of the Government's policy as reflected in Freedom to Move (supra note 104). The NTA, 1987 included major amendments intended to increase competition between and within modes.

[111] Ibid., ss. 276 and 368.

[112] Report of the National Transportation Act Review Commission entitled "Competition in Transportation - Policy and Legislation in Review", Vol. 1, Minister of Supply and Services Canada Ottawa, 1993 at p. 184.

> encourage a multimodal approach to transportation issues. Its structure abandons the modal committees of the former CTC. Such a structure was believed to be more conducive to intermodal as well as intramodal competition. The shift reflects an intended transition from regulator to investigator; from policymaker to catalyst for dispute resolution. The harmonization of regulatory oversight across different modes was seen as pivotal to realizing the principles of Freedom to Move".[113]

3. Conclusion

Aviation regulation had indeed come a long way. It had passed from civilian to military hands and back to civilian hands. It had gone through enormous technological advances in the navigation system and the "flying" machines. It had gone from strict economic regulatory controls to looser but still present controls where the public interest warranted. It had grown in leaps and bounds as a result of the surplus military transport aircraft and military pilots following WWII. Internationally, cooperation and standardization had produced aviation communication, navigation and surveillance systems that made long haul flights ordinary. Organizationally, the regulatory authority had gone from the Air Transport Board to the Minister of National Defence, to the Minister of Transport after which point it was divided into safety and economic aspects - the Minister retained safety and the economic aspects went to the Board of Transport Commissioners for a time, only to be reassigned to the new Air Transport Board and subsequently to the Canadian Transport Commission and the National Transportation Agency, in that order.

This brings us to where we are today but gives us no indication of where we will be tomorrow. That will be the subject of someone else's thesis for there will certainly be much to say. After all, a new aviation era is upon us - going from ground-based to space-based communication, navigation and surveillance systems, moving to the privatization of airlines - leading to foreign investments in national airlines, resulting eventually in multinational airlines that will challenge, and even strain, the existing

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[113] Ibid., at p. 184.

domestic and international regulatory framework.

- PART IV -

AVIATION SAFETY

1. Introduction

In order to have a better understanding of the regulatory scheme as it applies to aviation safety, it is necessary to have first a clear idea of the concept of safety in the aviation context. Hence, the purpose of the discussion that follows under this heading.

Regulations which establish technical, operational and maintenance standards for the various components of the civil aviation system - the aircraft, the air navigation system, the airport, the aircrew and other personnel carrying out aviation-related functions, as well as all equipment and material used in conjunction with the operation and use of the aircraft, the air navigation system and the airport, have as their objective the achievement of an adequate level of aviation safety. What is aviation safety? What is an adequate level of aviation safety? Does it mean a level of safety where no accidents will happen? Or, does it mean a level of safety where a certain number of accidents are considered to be acceptable? If so, where and how is this threshold to be established? Who decides what is an adequate level of safety in aviation? The Government, the public, the industry or, all three? How is the adequate level maintained and by whom? Is aviation today as safe as it can be?

We do not purport to know all of the answers to the foregoing questions but we would submit that one can achieve an adequate level of aviation safety through the identification and recognition of the risk factors involved in aviation, the analysis of those risk factors, and by taking a subsequent series of actions to reduce the risks to an acceptable level. This would include the early detection of deficiencies in the system, equipment or personnel and the correction of those deficiencies before they contribute to the cause of an accident. In other words, preventing accidents through the

identification and timely correction of aviation deficiencies is one of the best ways of achieving aviation safety.

An adequate level of aviation safety is that level which, in the light of the circumstances and the nature of aviation, the public is prepared to accept. This means that the acceptable level of safety could vary in time and in place. For example, in the early years of aviation people were prepared to accept a higher risk of accidents because at that time the equipment and the operators of the equipment were in an early stage of development. As aircraft became more sophisticated, better and more reliable technology was used, and the risks inherent in aviation became fewer and fewer. With more reliable equipment and better trained operators through the use of sophisticated flight simulators as an adjunct to the traditional training, came enormous improvements in the level of safety. With better and more enforcement of regulations as well as safety promotion and education, came the confirmation that aviation safety was the responsibility of all those involved and not just the regulatory authority or the operator. Aviation, being a technologically complex activity, requires a regulatory authority-industry partnership if it is to achieve its highest possible level of safety while maintaining the speed and comfort that makes aviation the preferred mode for medium to long distance transport.

The acceptable level of aviation safety varies as to place because the environment - both the physical geographical environment and the human environment (i.e. the attitudes and expectations of the aircraft operator and the passenger) - in which an aircraft is operated influences greatly its reliability and durability. For example, it would be unrealistic to expect the same level of aviation safety in an environment where weather conditions are quite often inhospitable to both men and machines, as the level of safety that is possible in an area with moderate weather providing near-ideal flight conditions for most of the year. Also, the attitude of people towards aviation safety and their expectations from aviation differs from place to place around the world.

Not surprisingly, the sophistication and reliability of large transport category aircraft, because of the numerous redundant systems[114] built into them, make them safer for the carriage of passengers than small[115] aircraft which are currently not required to have the same strict redundancy built into them. In the Canadian experience the statistics on accidents involving aircraft bear this out. In the Annual Report for 1988 of the Canadian Aviation Safety Board[116] it is stated as follows:

> As in previous years, only a small minority of accidents to Canadian registered aircraft occurred to unit toll aircraft. In 1988, eight accidents involved either scheduled or non-scheduled unit toll operations (about 1.6 per cent of the total). Similarly, 127 accidents, 25.7 per cent, involved charter operations [these involved aircraft under 12,500 lbs. Maximum Certificated Take-Off Weight], and 249 or 50.3 per cent involved private

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114 When an aircraft is designed, the structural components that are critical to safety must comply with the airworthiness requirements in one of two ways: The first involves the concept of "safe life" which means that a structural component or assembly must be designed to retain its strength and integrity throughout its useful life. Landing gears, propeller blades, and engine blades are examples of safe life aeronautical components. The second way is to design the structure to satisfy the concept of "fail-safe". Here safety is assured through redundancy. What this means is that the designer must show through a variety of analyses of possible failure modes, that if the fail-safe part breaks down or ceases to function, another redundant or back up part is available to do its job well enough and long enough to permit at least a safe landing. For instance, a typical fuselage panel is designed with double strips that stop cracks from progressing while the additional members of the panel pick up the loads until the cracks can be detected and repaired, usually at the next scheduled maintenance. (See study of the National Research Council of the United States, reproduced in part in Vol. 3, Dubin Inquiry Report, at pp. 528-529.)

115 I.e. aircraft whose Maximum Certificated Take-Off Weight ("MCTOW") is at or below 5,700 kg (12,500 pounds).

116 (See pp. 5, 6 and 7 of the Annual Report 1988 of the Canadian Aviation Safety Board, Minister of Supply and Services Canada, dated 31 March 1989.) The Annual Reports of the successor to the CASB, the TSB, do not provide a breakdown of statistical data between the so-called large and small aircraft and the type of operation in which they are used. The Canadian Aviation Safety Board (CASB) was established by the Canadian Aviation Safety Board Act, S.C. 1983 c. 165. The CASB was unimodal and was concerned with aviation accidents and incidents only. It was recently (as of 1989) replaced by the multimodal Canadian Transportation Accident Investigation and Safety Board ((CTAISB but known more commonly as the "TSB") created by Bill C-2, assented to June 29, 1989 and found in S.C. 1989 c. 3. (R.S.C. 1985 c. C-23.4) The new Board investigates accidents, incidents or unsafe conditions for all modes of transport, i.e. air, marine, rail and commodity pipelines. The Act confirms that the object of the Board is to advance transportation safety. Moreover, the Act also confirms that in making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability (see R.S.C. 1985 c. C-23.4, s. 7).

operators. The remaining accidents involved state, flying clubs and specialty aircraft.

According to the Transportation Safety Board (TSB)[117] during the 1980s only a small proportion of Canadian aircraft accidents involved Level I or Level II[118] air carriers, and this pattern has continued in recent years. Currently Level I and Level II air carriers account for some 95 per cent of fare-paying passengers and approximately 33 per cent of total flying hours. However, they have only accounted for two per cent of total accidents over the last five years.[119]

Three aircraft operated by Level I air carriers were involved in accidents in 1992, however, none resulted in any fatalities. In fact, Level I carriers have not been involved in a fatal accident since 1983.[120]

The vast majority of the Level III to VI air carriers are small carriers involved in charter, contract or specialty operations. Aircraft operated by such air carriers were involved in 199 accidents in 1992 - representing about 45 per cent of the aircraft involved in all accidents.[121]

Private operations included pleasure flying by individuals and business flying by companies. These normally account for the largest proportion of accidents - 50 per cent over the last five years. In 1992 private operators were involved in 224 aircraft accidents. This was an increase from the 1991 figure of 215 but somewhat lower than

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117 Information derived from the TSB Statistical Summary, Air Occurrences 1992, Minister of Supply and Services (Canada) 1993, at pp. 6-7.

118 Commercial air carriers are classified for statistical purposes according to Levels (I to VI) depending upon the size of their operation. Level I carriers include, for example, Air Canada and Canadian Airlines International.

119 Ibid., p. 7.

120 Ibid.

121 Ibid.

the 1987-1991 annual average of 245. This sector also accounts for the largest proportion of fatal accidents.[122]

It would be both simplistic and inaccurate to conclude from the above that the smaller the aircraft the greater the chances of being involved in an accident. There are too many other potential factors that could contribute to an accident to make such a conclusion possible. However, everything else being equal, the risk of mechanical or structural failure is clearly greater in small aircraft than in sophisticated transport category jet aircraft.[123]

In a study that was carried out by the National Research Council of the United States relating to the airworthiness certification of transport category aircraft used by the major passenger airlines, it was concluded as follows:

> Aircraft safety demands a "forgiving" design that is tolerant of failure, careful production that is of the highest quality, and excellent maintenance that gives painstaking attention to detail throughout the life of the airplane. The rare fatal accident that involves airframe or equipment is almost without exception the result of a failure of at least two, and occasionally all three of these factors.[124]

The aircraft and every other aspect of aviation is based on the concept of redundancy. As we have already stated above, the aircraft is designed with fail-safe

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122 Ibid.

123 In its Report entitled "Safety Study: Commuter Airline Safety", issued in November 1994, the National Transportation Safety Board ("NTSB") of the United States called upon the United States FAA to place most commuter flights under the regulations it imposes on the major carriers or the functional equivalent so that commuter airline passengers would have the same regulatory safety protections granted to passengers flying on Part 121 Aircraft (more than 30 seats) of the Federal Air Regulations ("FARS") applying to the major airlines. Some of the critical differences that were noted by the NTSB were: pilot flight time limitations; dispatch procedures; flight attendant requirements; the type of airport that can be used; and the mandatory age - 60 retirement for Part 121 pilots (there is no mandatory retirement age for Part 135 Aircraft (30 or fewer seats) pilots. See NTSB News Release SB-94-29/6481, dated November 15, 1994 and the National Transportation Safety Board "Commuter Airline Safety: Safety Study", NTSB/SS-94/02, Washington, D.C., November 1994.

124 Vol. 3, Dubin Inquiry Report, at p. 512.

features to different degrees depending on its size and intended use. There is also redundancy in the crew complement since theoretically one pilot could fly any aircraft. There are fail-safe requirements in the communication, navigation and surveillance systems. By way of example, a pilot who receives instructions from an air traffic controller is required to read back those instructions so that the controller can confirm that his instructions were well understood.

Aviation safety must have a system approach to achieve the highest level of safety that can be achieved while retaining or preserving the benefits inherent in air travel. This means that each component part of the system must not only perform its own role in a safe and efficient manner, but must also have the responsibility to monitor (and take over if necessary) the performance of each of the other component parts with which it is in direct contact during any operation or activity involving aircraft. In this respect, I refer to the submission made by the former Administrator of the Canadian Air Transportation Administration (now known in part as the Aviation Group of Transport Canada) to the Dubin Inquiry, in which he described the goal of the Air Administration as being the achievement for the terminal, the way and the vehicle, of a common approach to failure management such that a fail-safe concept exists.[125]

One may state that the Aeronautics Act has two principal objectives: first, the promotion and development of aeronautics for the purpose of achieving a safe, efficient and economical air transportation system that is accessible to as many Canadians as possible; and, second, to ensure that aeronautics activities or operations are carried out in as safe and proper manner as possible. In order to achieve these two principal objectives, the Aeronautics Act confers on the Minister the responsibility for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics. Also, in recognition that many aeronautics-related activities are potentially dangerous if left to be performed without any guidance or standards, the Aeronautics Act provides for the promulgation of regulations intended to provide the required guidance and standards as to who may perform what activities, when they may

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125 Brief to the Dubin Inquiry by Mr. W.M. McLeish.

be performed or not performed, how and where they are to be performed, and by what instrumentality they may be performed. These are discussed below.

2. The Aircraft

The aircraft, its pilot and a suitable place from which to take off and to land are the most basic elements of aviation. For our purposes, we will only address aircraft, and then, only those used in commercial air services.[126] Moreover, since we are focusing on the regulation of air transportation, we will only speak of aircraft used in the carriage of passengers, goods or mail and thus exclude from our discussion aircraft used in specialty services[127]. Before any aircraft may be used on a commercial air service, the aircraft must be registered, properly marked, and certified as airworthy. A discussion of each of these requirements follows.

(a) Aircraft Registration and Markings[128]

The applicable laws and regulations are the following:

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126 "Commercial air service" is defined as "any use of aircraft for hire or reward". See Aeronautics Act, s. 3.

127 These are the same specialty services that are excluded under the NTA, 1987 and the Air Transportation Regulations by virtue of subs. 68(2) of that Act and s. 3 of those Regulations. They are the follwing: air flight training service, aerial inspection service, aerial construction service, aerial photography service, aerial forest fire management service, aerial spraying service, aerial advertising service, aerial fire-fighting service, aerial sightseeing services, aerial survey services, aerial weather altering services, air cushion vehicle services, glider towing services, helilogging services, parachute jumping services, and air transportation services for the retrieval of human organs for human transplants.

128 This Section (a) is an updated and revised version of an article written by this author entitled "The Registration of Aircraft and the Recordation of Security Interests in Aircraft (Canadian Practice)" which appears in volume 18, OKLAHOMA CITY UNIVERSITY LAW REVIEW, Spring 1993. The author wishes to thank the Editor in Chief of the OKLAHOMA CITY UNIVERSITY LAW REVIEW for having consented on behalf of the REVIEW to the reprinting (in whole or in part) of the said article for purposes of this LL.M. thesis.

(i) Aeronautics Act[129], subs. 3(1) and para. 4.9(b);

(ii) Registration Regulations, Identification Regulations and Leased Aircraft Regulations[130]

(iii) Air Regulations[131], Part II (certain provisions only)

(iv) Air Navigation Orders[132], Series II, No. 1; and

(v) Chicago Convention[133], Articles 17, 18, 19 and 20 and Annex 7[134] to the Convention.

Canada is a Contracting State to the Chicago Convention. Under the provisions of Article 17 of the Chicago Convention, aircraft have the nationality of the State in which they are registered. Also, Article 18 of the Chicago Convention establishes that an aircraft cannot be validly registered in more than one State at the same time, but its registration may be changed from one State to another. Finally, in Article 19, the Chicago Convention makes it clear that registration or transfer of registration of aircraft

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129 References to "Aeronautics Act" in this and subsequent pages shall mean the Aeronautics Act R.S.C. 1985 c. A-2 as amended by S.C. 1985 c. 28; S.C. 1987 c. 34, s. 276; and, S.C. 1992 c. 4. References to particular sections, subsections, paragraphs or subparagraphs shall be those provisions as consolidated by R.S.C. 1985 c. A-2 and c. 33 (1st Supp.) and as amended by S.C. 1992 c. 4.

130 Those provisions of the Air Regulations dealing with aircraft identification, marking and registration have been amended to bring them in line with current practices and procedures and the needs of the aviation community. The amendments are known as The Aircraft Marking and Registration Regulations, (Air Regulations, Series II No. 2), SOR/90-S91, as amended by SOR/91-504 and SOR/94-378 (hereinafter "Registration Regulations") and the Identification of Aircraft and Other Aeronautical Products Regulations, (Air Regulations, Series II No. 1), SOR/90-590 as amended by SOR/91-503, SOR/92-957 and SOR/94-378, (hereinafter "Identification Regulations"). Also of relevance are the Leased Aircraft Registration Regulations, SOR/90-592, (hereinafter "Leased Aircraft Regulations").

131 References to "Air Regulations" in this and subsequent pages shall mean the regulations made under the Aeronautics Act as consolidated in C.R.C. 1978 Vol. 1, c. 2, as amended.

132 Reference to "Air Navigation Orders" in this and subsequent pages shall mean the Air Navigation Orders made pursuant to the Air Regulations.

133 Reference to the "Chicago Convention" in this and subsequent pages shall mean the Convention on International Civil Aviation signed at Chicago on December 7, 1944 and entered into force for Canada on April 4, 1947 (CTS 1944/36, 15 U.N.T.S. 296, ICAO DOC-7300/6) as amended up to October 31, 1994.

134 Annex 7 is entitled "Aircraft Nationality and Registration Marks". Reference to "Annexes to the Convention" means the International Standards and Recommended Practices adopted under Article 37 of the Chicago Convention and designated as "Annexes".

in any Contracting State is to be made in accordance with the laws and regulations of that State.

The Registration Regulations give substantive effect in Canada to the provisions of the Chicago Convention just described.

Canada is not a Contracting State to the Convention on the International Recognition of Rights in Aircraft, signed at Geneva, on June 19, 1948 (the «Geneva Convention»)[135]. Consequently, Canada does not maintain the public record contemplated by Article 1(d) of the Geneva Convention. The question of the creation and protection of rights in aircraft in Canada is a very complex mosaic of varying provincial laws. Efforts to create a central registry in Canada for rights in aircraft that would enable Canada to ratify the Geneva Convention have so far not been very successful.[136]

Before discussing the substantive provisions of the Registration Regulations one must set out the definition of some of the key terms that will be used. These are found in section 2 thereof:

> «Canadian aircraft» means an aircraft that is registered pursuant to section 22;
> «Contracting State» means a state that is a party to the Convention on International Civil Aviation signed on behalf of Canada on December 7, 1944;
> «owner», in respect of an aircraft, means the person who has legal custody and control of the aircraft;

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135 310 U.N.T.S. 152; ICAO DOC-7620.

136 For a comprehensive discussion of the current Canadian situation regarding the registration and protection of rights in aircraft as well as the efforts made towards the creation in Canada of a central registry for security interests (rights) in aircraft, see Fiorita, D.M., The Registration of Aircraft and the Recordation of Security Interests in Aircraft (Canadian Practice), Okla. City U.L. Rev., vol. 18, No. 1, Spring 1993, p. 57, at pp. 73-85. Other interesting and relevant publications are: Ziegel, Jacob S., The New Provincial Chattel Security Law Regimes, 70 Can. B. Rev. 681; MacLaren, Richard H., Secured Transactions in Personal Property in Canada, Second Edition, Carswell, Toronto, 1992; Bunker, Donald H., The Law of Aerospace Finance in Canada, Institute of Air and Space Law, McGill University, 1988; and, Cuperfain, Joel, A Canadian Central Registry for Security Interests in Aircraft: A Good Idea But Will It Fly? (1991) 17 Can. Bus. L. J. 380.

> «registered», in respect of an aircraft, means registered pursuant to sections 18 and 22 or pursuant to the laws of a foreign State;

The Registration Regulations[137] require the Minister to establish, maintain and publish a register of aircraft known as the «Canadian Civil Aircraft Register». For each Canadian aircraft there must be entered

> (i) the name and address of each registered owner;
> (ii) the registration mark; and
> (iii) such other particulars concerning the aircraft as the Minister considers necessary for registration, inspection and certification purposes.

The Canadian Civil Aircraft Register neither purports to nor contains any reliable information as to title or other interests in the aircraft registered therein. This is so even if some of the documentation which must be submitted for purposes of registration may contain such information. In other words, the existence and validity of any legal interests in an aircraft have no relation to the Canadian Civil Aircraft Register. The Register's principal functions are: first, to identify the persons who have the legal custody and control of an aircraft in order to facilitate safety regulation and enforcement; second, to facilitate administrative control of Canadian aircraft; and, third, to enable Canada to fulfil those obligations and exercise those rights that arise for Canada under international law, conventions or agreements, in its capacity as State of registry of an aircraft[138]. It is not

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137 S. 50.

138 See Chicago Convention, supra note 133, Articles 17-21. Examples of rights and obligations of the State of registry under an international convention are Articles 26 and 12 of the Chicago Convention. Article 26 confers on the State of registry of an aircraft the right to be involved as an observer in the investigation of any accident involving an aircraft having its nationality that occurs within the territory of another State and Article 12 imposes on the State of registry the responsibility of ensuring that such aircraft respect the rules and regulations of the State in whose airspace the aircraft is flying at any time.

the purpose of the Register to provide for the establishment or protection of title or other interest (security or otherwise) in an aircraft.

The technical details and criteria regarding aircraft registration are found in Volume II of the Canadian Aeronautics Code, a publication being developed by the Department of Transport to consolidate all regulatory and non-regulatory material in various subject areas involving aviation.

The Registration Regulations provide for only three types of registrations for aircraft: as a state aircraft; as a commercial aircraft; or as a private aircraft[139].

Although the Registration Regulations provide definitions for state and private aircraft, they do not provide for an effective definition of «commercial aircraft»[140].

The Registration Regulations require that, to be the registered owner of a Canadian aircraft, an individual must be 16 years of age or older[141]. Additionally, the individual must be a Canadian citizen or a permanent resident[142]. A corporation may qualify as a registered owner if:

(i) the corporation is incorporated by or under the laws of Canada or a province;

(ii) its principal place of business is in Canada;

(iii) not less than two thirds of its directors are Canadian citizens or permanent residents;

(iv) its executive head is a Canadian citizen or a permanent resident; and

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139 Ibid., subs. 22(1).

140 S. 2 provides that a commercial aircraft is one registered pursuant to paragraph 22(1)(b). S. 22(1)(b) provides only that the Minister may register an aircraft as a commercial aircraft subject to subsection 22(3). Subs. 22(3) in turn requires only that the applicant for commercial registration hold an operating certificate for the type of aircraft the applicant wishes to register. Hence, the definition is circular.

141 Subs. 19(1), Registration Regulations.

142 Ibid., subs. 19(1)(a).

(v) not less than 75 per cent of the voting interest in the corporation is in fact owned and controlled by corporations that meet the requirements of this subsection or by Canadian citizens or permanent residents.[143]

In the case of a private aircraft that is owned by a corporation that is incorporated by or under the laws of Canada or a province but which does not meet the other requirements set out above[144], the Minister is required to register it anyway provided that the corporation is the sole owner of that private aircraft[145]. This provision also applies until October 1, 1995 to corporations that are registered co-owners of a private aircraft on the day on which the Registration Regulations came into force[146].

Because the Registration Regulations (as they now appear) made substantive amendments to the earlier regulations, there are some transitional provisions which apply the old requirements to a limited extent until October 1, 1995[147].

When dealing with an application for registration of an aircraft as a commercial aircraft, the Registration Regulations prohibit the Minister from registering it as such unless the applicant holds an operating certificate in respect of the particular aircraft type (as opposed to model) for which the application is being made[148]. The Registration Regulations allow the operation for commercial purposes of an aircraft that is registered as a private aircraft, with the written authorization of the Minister and subject to such conditions as the Minister, may specify in the authorization for the safe and proper operation of the aircraft[149].

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143 Ibid., subs. 19(2).

144 Ibid., subs. 19(2).

145 Ibid., subs. 20(1).

146 Ibid., subs. 20(2). The Registration Regulations entered into force on September 12, 1990.

147 Ibid., subs. 19(3) and s. 20.

148 Ibid., subs. 22(3).

149 Ibid., subs. 22(4).

Notwithstanding that an individual or corporation is qualified to be the registered owner of a Canadian aircraft, an aircraft cannot be registered in the name of that individual or corporation unless that individual or corporation has the «legal custody and control» of the aircraft for which the application for registration is made[150]. This means the possession of and operational control and responsibility for the aircraft.

Thus, an applicant must accompany his application with evidence that establishes that he has the legal custody and control of the aircraft. The Registration Regulations do not specify what that documentation should be, but the Aeronautics Code contains some information in this regard. A key point to note is that the Registration Regulations are silent with regard to the nature of the transaction that has placed the legal custody and control of the aircraft in the hands of the applicant. Thus, whether by lease, conditional sale, or mortgage, it is only the result that is looked at. If the transaction, whatever its nature, gives the applicant legal custody and control of the aircraft, the applicant may apply to have the aircraft registered in his name - assuming, of course, that all the other requirements are also met.

The former provisions governing the registration of aircraft in Canada were found in Part II of the Air Regulations[151] promulgated pursuant to the Aeronautics Act. Those Regulations specifically provided that an aircraft that was the subject of:

> (i) a chattel mortgage;
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> (ii) a bona fide lease; or
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> (iii) a conditional sale or hire purchase agreement that reserved to the vendor the title to the aircraft until payment in full of the purchase price or the satisfaction of some other condition,

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150 Ibid., subs. 18(1) and definition of "owner" found in s. 2 thereof.

151 C.R.C. 1978 c. 2.

could be registered in the name of the mortgagor, lessee or purchaser[152]. For those named transactions, the legal custody and control was accepted as resting with the mortgagor, lessee or purchaser, as the case may be, without any further proof. In the case of other transactions involving aircraft, further proof had to be made showing that the legal custody and control rested with the applicant.

On the other hand, the Registration Regulations which replaced Part II of the Air Regulations, while reflecting the realities of current times by leaving open the nature or type of transaction that may be involved, and focusing instead on the end result, will require the applicant in each case to prove that he has the legal custody and control. This would be so even in the case of those transactions accepted as doing just that under the old provisions. As a matter of practice, however, it is inconceivable that the Minister would turn down an application that would have met the former test since the intent of the Registration Regulations was to facilitate such transactions not to frustrate them.

Where the application for registration concerns an aircraft that was last registered in a foreign State, or that is a new aircraft that was manufactured in a foreign State, evidence must be submitted that establishes that the aircraft is not registered in the foreign State[153]. Normally, this is done by telex or facsimile sent directly between the civil aviation authorities of the two States involved, at the request of the applicant. This provision is necessitated by Articles 18 and 19 of the Chicago Convention to which we have already referred at pages 45 and 46.

The Registration Regulations provide for the granting of a provisional, temporary or continuing registration depending on the nature and purpose of the application[154]. For example, in the case of an aircraft that is to be operated for the purpose of importing it into Canada and which is not already on the registry of another State, a provisional registration would be granted by the Minister.

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152 Ibid., s. 206.

153 Subs. 18(2), Registration Regulations.

154 Ibid., subs. 22(2).

If an application is made for registration but, because all the documentation, record entries, and other administrative steps necessary for the granting of a continuing registration cannot be completed forthwith, the Minister may grant a temporary registration[155]. However, a temporary registration may only be granted if it is in the public interest to do so (as that interest is determined by the Minister)[156].

If the applicant meets all the requirements and all the documentation, record entries and other necessary administrative steps have been taken, the Minister may grant a continuing registration if it would be in the public interest[157].

Once the aircraft is registered, the Minister issues the applicant the appropriate Certificate of Registration, which must always be carried on board the aircraft[158].

Not everything that flies needs to be registered. The Registration Regulations provide that a hang glider, a model aircraft, a military aircraft or, an aircraft of a class or type that the Minister exempted from the requirement of registration, are not required to be registered[159].

Subsection 17(2) of the Registration Regulations provides for a general prohibition against aircraft being operated in Canada unless they are:

> (i) registered in Canada,
>
> (ii) registered in a State that is a Contracting Party to the Chicago Convention, or

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155 Ibid., subs. 22(2)(b).

156 Ibid., subs. 22(2)(b).

157 Ibid., subs. 22(2)(c).

158 Ibid., s. 25 and 26.

159 Ibid., subs. 17(1). The exemption would be made pursuant to subs. 5.9(2) of the Aeronautics Act.

(iii) registered in a foreign State that has an agreement in force with Canada that allows an aircraft that is registered in that foreign State to be operated in Canada[160].

Subsection 17(2) implements into Canadian domestic laws, those provisions of the Chicago Convention regarding interstate flying and the acceptance of each State Party to that Convention of the aircraft registered in another Contracting State in its airspace and territory. This applies to both general aviation aircraft and to aircraft engaged in scheduled or non-scheduled international air services - subject, of course, to the other provisions of the Chicago Convention, such as, Articles 5, 6 and 7, which specifically address certain uses of those aircraft.

In the case of an aircraft that is not registered in one of the States described in subsection 17(2) of the Registration Regulations, it may only be operated in Canada with the written authorization of the Minister and subject to whatever conditions the Minister may specify necessary for its safe and proper operation[161].

As a practical matter, however, given that, as of December 30, 1994, there were 183 Contracting States to the Chicago Convention - which is without any exaggeration quasi-universal participation - this particular provision is of little, if any, substantive significance to the everyday business of aircraft registration in Canada.

Another provision of the Registration Regulations[162] sets a limit on the length of time that a Canadian air carrier or an individual, who is a Canadian citizen or permanent resident, may operate in Canada an aircraft that is not registered in Canada. That limit is 90 days in any consecutive twelve-month period. Hence, by way of example, if a U.S. registered aircraft is leased to a Canadian air carrier, there would be an automatic limit of 90 days to the operation of that aircraft in Canada by the Canadian lessee.

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160 Ibid., subs. 17(2).

161 Ibid., subs. 17(4).

162 Ibid., subs. 36(1).

Fortunately, this 90-day limit may be exceeded by obtaining an exemption from the Minister under the Aeronautics Act[163]. The Aeronautics Act enables the Minister to exempt, inter alia, any person or aircraft from the application of any regulation if the Minister is of the opinion that the exemption "is in the public interest and is not likely to affect aviation safety"[164]. Thus, the test that the applicant must meet is twofold. First, the applicant must convince the Minister that the exemption is in the public interest. It would not be sufficient to show that the exemption would not be against the public interest. The applicant must show that the public interest would be benefitted. This is a positive interest test which is quite difficult to meet. Second, the applicant must show that the exemption is not likely to affect aviation safety. This latter requirement is easier to show since one need only demonstrate that aviation safety would not be affected and not that it would be improved or benefitted.

Since in practice such exemptions are not obtained easily, a foreign lessor and a Canadian lessee that anticipate a transaction that would require the operation of a foreign registered aircraft in Canada for longer than 90 days, would be wise to seek the required exemption as early as possible in their relationship.

Also, for a foreign registered aircraft to be operated on a commercial air service in Canada by a Canadian air carrier, the special permission of the Minister is required[165].

It may be stated from the foregoing that the regulatory controls on the operation by a Canadian carrier of a foreign registered aircraft are quite stringent. The policy behind such regulations is one of encouraging the changing of the registration of the foreign aircraft to a Canadian registration. Presumably, this is to enable better regulatory control and provide the Canadian authorities with the international jurisdiction contemplated under the Chicago Convention. It is also a question of the exercise of sovereignty and its protection, otherwise one could be faced with the situation where all,

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163 Subs. 5.9(2).

164 Ibid.

165 S. 702, Air Regulations.

or substantially all, the aircraft operated by a Canadian air carrier would be registered elsewhere[166].

On October 23, 1985, Canada ratified the Protocol Relating to an Amendment to the Convention on International Civil Aviation, signed at Montreal on October 6, 1980 (affectionately referred to as «Article 83 bis»)[167]. Article 83 bis will not be analyzed here as it would require a whole separate thesis. Our sole purpose in raising it is simply to point out that consistently with the objective of Article 83 bis, the Canadian regulations not only encourage registration of aircraft on the Canadian Civil Aircraft Register but also enable the retention of a Canadian registration in the case where a Canadian registered aircraft is leased to a foreign operator[168].

The Leased Aircraft Registration Regulations[169] (the «Leased Aircraft Regulations») enable the Minister, where it is in the public interest, by Order to authorize the continuation of the Canadian registration of an aircraft, notwithstanding that the person to whom it has been leased and to whom the legal custody and control has been transferred, does not qualify to be the registered owner of a Canadian aircraft[170]. During the period that the order is in force, the aircraft continues to be registered on the Canadian Civil Aircraft Register in the name of the registered owner and not re-registered in the name of the lessee. This provision is specific to leases of aircraft and in our view, it cannot be relied upon where a Canadian registered aircraft is sold to a foreign purchaser.

Except in the case where an order has been obtained from the Minister under the Leased Aircraft Regulations, if the legal custody and control of a Canadian aircraft

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166 These requirements also prevent "flags of convenience" for aircraft.

167 As of December 20, 1994 only 81 ratifications of Article 83 bis out of the required 98 had been deposited.

168 See *infra*, note 169.

169 SOR/90-592. Adopted pursuant to subsection 4.4(2) and paragraph 4.9(b) and (h) of the Aeronautics Act.

170 Subs. 3(1) of the Leased Aircraft Regulations.

changes, the registration of the aircraft expires[171]. Where, however, the person to whom the legal custody and control has been transferred, is qualified under the Registration Regulations to be the registered owner of a Canadian aircraft and applies to register the aircraft in Canada, the aircraft is considered to have an interim registration in the name of the new owner[172]. The interim registration is only valid, however, for a limited period of time (i.e. the earliest of 60 days after the date of the change in the legal custody and control; the day on which there is a further change in the legal custody and control; or, the day on which a continuing registration is issued)[173].

Where the change in the legal custody and control involves an aircraft that, prior to the change, was registered as a private aircraft, the fact that it has an interim registration is not sufficient to allow it to be operated in a commercial air service. In fact, the Registration Regulations specifically prohibit it[174].

If an order is issued authorizing the lease of a Canadian aircraft to, say, a foreign air carrier, the authorization order may include a requirement that the aircraft be inspected and monitored as the Minister considers necessary during the term of the lease. The costs of the inspection and monitoring are to be paid to the Minister by the registered owner[175].

The original order authorizing the retention of the aircraft on the Canadian Civil Aircraft Register is based on there being a positive finding that it is in the public interest. Where it ceases to be in the public interest, the Minister may revoke that order. The registration of the aircraft involved is cancelled as of the date of the revocation[176].

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171 Subs. 32(1) of the Registration Regulations.

172 Ibid., subs. 32(1).

173 Ibid., s. 33.

174 Ibid., subs. 33(3).

175 Subs. 3(2) and (3), Leased Aircraft Regulations.

176 Ibid., subs. 3(5).

In such event, although the Canadian registration of the aircraft may be revoked, nothing would prevent the lessee of the aircraft from applying for a registration certificate in the jurisdiction where the lessee is qualified to have a certificate of registration issued in his name. The revocation by the Minister of the authorizing order, in itself, has no effect on the validity of the lease (unless there is a specific provision in the lease making the continued existence of the lease depend on the continued existence of a Canadian registration). The revocation of the order only results in the cancellation of the registration of the aircraft from the Canadian Civil Aircraft Register.

There are also special provisions dealing with the change of the legal custody and control by way of a lease of commercial aircraft having a maximum take-off weight of not more than 5,670 kg (12,500 pounds) between the air carrier that is the registered owner and another air carrier[177].

An aircraft can only be registered in the name of a «person»[178]. This means that only a legally recognized and enforceable «personality» that can exercise rights and carry out obligations in its own name, may be registered as owner of an aircraft (e.g. a corporation legally constituted under Federal or Provincial laws or, a natural person)[179]. An association of individuals or corporations, unless it has been incorporated, cannot be the registered owner of an aircraft. Similarly, an aircraft cannot be registered in the name of an unincorporated business or partnership. In such cases, it would be necessary for the aircraft to be registered either, in the name of each of the individuals or corporations forming the unincorporated association, business or partnership or, in the name of only one of them (e.g. in the case of a limited partnership, in the name of the General Partner). Moreover, where a person has possession of an aircraft and holds the aircraft not in his own name but as bailee, it is submitted that the Registration Regulations do not provide for the registration of the aircraft in the name of the bailee. The question is less clear in the case of a trustee.

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177 Ibid., s. 4.

178 Registration Regulations, para. 18(1)(a)(ii).

179 Ibid., subs. 19(1)-(3) (providing only for registration to individuals and corporations).

The foregoing may be explained by the fact that the purpose of the regulatory scheme for registration requires that there be a legal entity against whom enforcement action may be taken, in the event of a violation of the regulations, and also on whom rests the obligation for the continuing airworthiness of the aircraft.

We have already stated that the registration of a Canadian aircraft expires where there is a change in the legal custody and control of the aircraft. A change in the legal custody and control will occur in most cases whenever there is a change in the legal possession and operational control and responsibility over an aircraft. For example, a change in the legal custody and control may occur by way of the sale of an aircraft (accompanied by possession); by way of a lease (both when the lease comes into effect - when the transfer occurs from the lessor to the lessee - and upon the termination of the lease - when the transfer occurs from the lessee to the lessor); and, upon the winding up of a corporation.

Where the change in legal custody and control involves a private aircraft it cannot be operated for commercial purposes during the period that it has an interim registration[180]. However, where the change in legal custody and control concerns an aircraft that was registered as commercial, it can be operated on a commercial air service with an interim registration pending the issuance of the continuing one.

(b) Airworthiness of Aircraft

The Applicable laws and regulations are the following:

(i) Aeronautics Act, ss. 3(1) and 4.9(b)

(ii) Air Regulations, Part II (certain provisions only)

(iii) Air Navigation Order, Series II, Nos. 4 et seq.

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180 Registration Regulations, subs. 33(3).

(iv) Chicago Convention, Articles 31, 33, 34, 39, 40, 41 and 42 and Annexes 6[181], 8[182] and 16[183] to the Convention.

An aircraft must be "airworthy". The Air Regulations define "airworthy"[184] in respect of an aeronautical product[185] as meaning "in a fit and safe state for flight and in conformity with the applicable standards of airworthiness". Even where an aircraft is airworthy, it still cannot be flown in Canada unless there is in force with respect to it a certificate of airworthiness[186], a flight permit[187] or, a validation for flight[188] in Canada, issued by the Minister. Moreover, there must also be compliance with all

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181 Annex 6 is entitled "Operation of Aircraft" and has three Parts: Part I - International Commercial Air Transport - Aeroplanes; Part II - International General Aviation - Aeroplanes; Part III - International Operations - Helicopters.

182 Annex 8 is entitled "Airworthiness of Aircraft. Certification and inspection of aircraft according to uniform procedures". Canada's national standards exceed the minimum requirements established by Annex 8.

183 Annex 16 is entitled "Environmental Protection: Volume I - Aircraft Noise; Volume II - Aircraft Engine Emissions."

184 Air Regulations, s. 101.

185 The term "aeronautical product" is an umbrella term employed in Canada, the U.S. and many European countries to include those aircraft, parts and appliances in respect of which regulatory controls are necessary to ensure the safe operation of aircraft. The Aeronautics Act in subs. 3(1) defines it as "any aircraft, aircraft engine, aircraft propeller or aircraft appliance or part or the component parts of any of those things". Bill C-76, tabled in the House of Commons on June 11, 1990 (adopted and in force since March 19, 1992, S.C. 1992 c. 4) added computer systems and hardware to this definition.

186 "Certificate of airworthiness" is defined in s. 101 of the Air Regulations as "a conditional certificate of fitness for flight issued in respect of a particular aircraft under Part II of these Regulations or under the laws of the State in which the aircraft is registered".

187 "Flight permit" is defined in s. 101 of the Air Regulations as "a permit issued pursuant to s. 211". A flight permit is in effect an aviation document that is issued instead of a certificate of airworthiness in respect of certain types of aircraft (e.g. an amateur-built aircraft or a private aircraft other than a hang-glider or an ultralight) or in the case of operation of an aircraft for experiment, test, demonstration or other special flight. (Air Regulations, subs. 211(4) and (5) as well as Air Navigation Order Series II, No. 3.)

188 This is required in the case of a foreign-registered aircraft in respect of which there is in force a restricted certificate of airworthiness or equivalent flight authority issued by the country of registry.

conditions upon which the certificate of airworthiness, flight permit or, validation for the flight, was issued.[189]

The Minister in the exercise of his powers under the Air Regulations[190] has caused to be published an Airworthiness Manual ("AWM") and an Engineering and Inspection Manual ("EIM"),[191] in which he has specified "standards of airworthiness".[192] The AWM is based on U.S. Federal Aviation Regulations ("FARs")[193] 23, 25, 27, 29, 31, 33 and 35; Joint Aviation Regulations (JARs)[194] 22 and VLA; ICAO Annex 16,[195] Vols. I & II; and Aviation Technical Standard Orders

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189 Air Regulations, s. 210.

190 Air Regulations, subs. 211(1).

191 The EIM has been replaced for the most part by the AWM except insofar as concerns the so-called "operational" standards. Where there is a conflict between the AWM and EIM, the AWM takes precedence.

192 "Standards of airworthiness" means, for the design, manufacture or maintenance of an aeronautical product, the description, in terms of a minimum standard, of the properties and attributes of the configuration, material, performance or physical characteristics of that aeronautical product and includes the procedures to ascertain compliance with or to maintain that minimum standard, as set out in the applicable parts of the AWM and EIM and those other publications referred to in the Air Regulations, s. 101 under the definition of "standards of airworthiness".

193 These are the so-called "design" FARs which have served as the basis for the Canadian requirements and to which modifications have been made as required for Canadian purposes.

194 JAR 22 refers to Sailplanes and Powered Sailplanes and JAR-VLA refers to Very Light Aircraft. Twenty-three* European countries have been working together to develop common airworthiness regulations, known originally as Joint Airworthiness Requirements, so as to facilitate the development and certification of joint projects and to ease import and export of aeronautical products. The joint regulations have extended from design to maintenance and operations. In order to reflect their wide range of interests they are now called Joint Aviation Authorities (JAA). See ICAO Document A27-WP/111 dated 18 September 1989 presented by the European Civil Aviation Conference to the 27th Session of the Assembly of ICAO in September 1989, entitled "Developments in Aviation Safety Regulation Within Europe - The Joint Aviation Authorities (JAA)". Although the requirements developed are "Joint", their application by the twenty-three States involved is by varying degrees as some of them are also using the U.S. FARs.

*The twenty-three countries are: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Monaco, The Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

195 Supra note 183.

of the United States.[196] The AWM also incorporates unique Canadian additional technical conditions.

Briefly, airworthiness standards are aimed at ensuring the basic safety of the aircraft and its contents. Required communications and avionics equipment must meet specified design standards. Equipment not required by regulation must meet standards for the integrity of the installation, and for non-interference with the proper functioning of equipment that is required by regulation or, that is essential for the basic airworthiness of the aircraft.

Until the early 1980s, aircraft airworthiness certification was carried out by the domestic airworthiness authority of the State where the aircraft was manufactured and then validated by each country to which that aircraft was exported. Most States' detailed and comprehensive certification codes were based on the U.S. FARs often with national additions.

Until approximately 1982, Canada did not have an accurate or uniform statement of Canadian airworthiness standards. This, according to Mr. Justice Charles Dubin, presented

> confusion not only for the civil aviation inspectors and airworthiness inspectors...but also for the manufacturers as well as the purchasers of aircraft" and placed "unnecessary obstacles in the way of the aeronautical industry.[197]

In view of these difficulties, Mr. Justice Dubin recommended,[198] inter alia, that:

(i) Canada adopt a comprehensive Airworthiness Code;

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196 This refers to the Aviation Technical Standard Orders referenced in Advisory Circular 20-110B, Appendix 1, Index of Aviation Technical Standard Orders dated April 12, 1984, published by the Federal Aviation Administration of the Government of the United States. They are the basis for similar standards included in the AWM as c. 537.

197 Dubin Inquiry Report Vol. II at p. 523.

198 Recommendations No. 110, 112 and 113 found in the Dubin Inquiry Report, Vol. II.

(ii) the U.S. FARs (both the design FARs and the operating FARs) be used and adapted as the model for the Canadian Code, supplemented by such special conditions based on Canadian experience and as required for Canadian aviation purposes; and

(iii) airworthiness standards be related to the proposed use of an aircraft rather than its weight.

As a result, in July 1982, the Department of Transport adopted the AWM and incorporated by reference into the Canadian requirements appropriate Parts of the U.S. FARs. Prior to the adoption of the U.S. FARs, both U.S. and British standards were equally acceptable. In the mid-eighties, however, Canada developed its own airworthiness standards as a voluntary code in the form of the AWM. With the adoption of the CARs[199] concept earlier this year, a new Part V entitled "Airworthiness"[200] is being developed to complete the regulatory process.

Where the Minister is satisfied that an aircraft conforms to the applicable standards of airworthiness or, is of a design in respect of which a type approval[201] has been issued and is still current, he must issue a certificate of airworthiness in respect of that aircraft.[202] The certificate of airworthiness really only attests to the fact that, at the time that it was issued, the aircraft in respect of which it was issued, was airworthy. The continued validity of that certification rests in the hands of the registered owner.

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199 Supra note 86.

200 The numbering of the airworthiness CARs is intended to correspond to the numbering system that had been adopted for the AWM.

201 A "type approval" is an aviation document issued by the Minister in respect of an aircraft type (as opposed to a certificate of airworthiness which is issued in respect of each aircraft). It is issued by the Minister where he receives an application for approval of an aeronautical product design and he is satisfied that the aeronautical product design conforms to the applicable standards of airworthiness that are in force at the time that the application for a type approval is made. (Air Regulations, ss. 101 and 214) More recently, there have been plans to commence using the term "type-certificate" which is the same term used by the U.S. FARs.

202 Air Regulations, subs. 211(2).

Every certificate of airworthiness issued in respect of an aircraft is issued on condition that the aircraft will be maintained in accordance with a maintenance program that meets the standards of airworthiness established by the Minister, and the proper entries will be made in the Aircraft Journey Log by an authorized person,[203] certifying that the aircraft is airworthy or, released for return to service, whichever is applicable. Moreover, the maintenance and entries must be made at the times and in accordance with the procedures set out in the AWM, CARs, Air Regulations and Air Navigation Orders.[204]

In a study relating to airworthiness certification of large passenger aircraft used by the major commercial airlines, the National Research Council of the United States set out the enormous challenge that faces those responsible for ensuring the airworthiness of such aircraft:

> The manufacture of modern jet transport aircraft is an organizational tour-de-force. Components of the aircraft - wings, tail and landing-gear assemblies, fuselage sections, doors and latches, avionic and radio equipment - arrive at the assembly plant from all over the world. In hangars the size of several football fields, work crews tow the airplanes through a dozen or more positions on the production line, until each finished airplane eases from the hangar ready for testing and approval for flights.
>
> Once an airplane is in service, the airline performs myriad maintenance operations on it - daily checks, periodically scheduled maintenance, major overhauls, repairs of unexpected damage and replacement of failed components. The number of aircraft in daily service for each air carrier, the complexity of the airplane, the distances between centers of operations, and the variations in procedures and practices among airlines all figure into a maze of maintenance operations in which millions of actions are performed by thousands of individuals.
>
> As a consequence, there are many opportunities for assuring that each aircraft is built and maintained to established safety standards. With

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203 "Authorized person" means a person who holds a valid aircraft maintenance engineer licence (AME) or a representative of a company or any other person who is authorized under the AWM or EIM to certify that an aircraft is airworthy or released for return to service. (See Air Navigation Order Series II No. 4, entitled Order Respecting Conditions and Procedures for Keeping a Certificate of Airworthiness, s. 2.)

204 Air Navigation Order Series II No. 4, s. 3.

> careful workmanship, failures are preventable. By alert examination, errors are detectable. Carelessness and inattention, by contrast, often lead to mistakes and mishaps.[205]

The above citation also brings out the different stages involved in the life cycle of an aircraft: first, the aircraft must be designed to comply with prescribed design standards appropriate to its type and intended use; second, it must be shown by test and analysis to comply with those standards; third, it must be manufactured to conform to the approved design;[206] and, fourth, it must be maintained in accordance with an approved maintenance program, including the taking of any mandatory corrective action that may be specified by Airworthiness Directives,[207] issued in respect of any defects

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205 Quoted from pp. 528-529 of Vol. 2 of the Dubin Inquiry Report.

206 These include Performance, Controllability and Manoeuvrability, Trim, Stability, Stalls, Ground Handling, Vibration and Buffeting and a number of systems and engine characteristics. The Developmental flight testing is carried out by the manufacturer under an Experimental Flight Permit (see supra note 187). The Certification flight testing is carried out by the Manufacturer after a proposed flight test program has been reviewed and approved by the DOT. Some aspects of the program may be conducted by the company, usually by Design Approval Representative pilots. Departmental test pilots participate in the test program making the final determination of compliance particularly in areas where subjective judgment may be required. However, the preferred approach of the DOT would seem to be joint flight test programs with both company and DOT pilots participating.

207 An "Airworthiness Directive" (or AD) is issued by the airworthiness authority. Its purpose is to address any serious problems or defects that may develop or that are discovered while an aircraft is in service. They are issued by the airworthiness authority after consultation with the aircraft manufacturer and other supporting technical specialists. An AD requires specific mandatory corrective action to be taken in a specific manner and within a specified time period. The continued validity of a Certificate of Airworthiness or Flight Permit is dependent upon compliance with all conditions of an AD. This includes both Canadian and foreign-originating ADs to the extent that foreign manufactured aircraft are being operated by Canadians or are on the Canadian Civil Aircraft Register. Other publications that recommend (as opposed to order as in the case of an AD) corrective action issued by the Canadian airworthiness authority in response to confirmed problems (the seriousness, frequency and urgency of which determine its nature) are: the Service Difficulty Alert (an early warning non-mandatory notification); Service Difficulty Advisory (similar to the Alert but deals with problems of a less serious and more general nature) and the General Aviation Inspection Aids. There are also publications called Service Bulletins (or "SBs") which are issued by the manufacturer of an aeronautical product and distributed directly to registered owners of aircraft manufactured by them. They are recommendations only but could form the basis upon which an AD is issued thereby making the provisions of a referenced SB mandatory. This could happen if operators had experienced failures not originally known at the time of the issuance of the SB.

which may compromise safety that may develop or that are discovered while the aircraft is in service.

Maintenance Review Boards with representatives from the manufacturer, operators and airworthiness authorities establish the initial maintenance program for transport category aircraft, whether or not they carry passengers. The smaller normal category aircraft are usually maintained using the manufacturer's recommendations endorsed by the airworthiness authorities. The initial maintenance program will be altered on the basis of service experience with the approval of the airworthiness authority. The program also takes into account unusual operational uses or environments which may require additional or more frequent inspections.

How does the Canadian airworthiness authority accomplish or deal with the enormous task of ensuring the integrity of the airworthiness system? It does this through its system of airworthiness supervision, inspection and enforcement. In addition, it relies on a system of delegation,[208] within specified limitations, to qualified individuals employed by the manufacturer or used in a consultant capacity, which has been in place since 1968. These persons are known as Design Approval Representatives ("DARs").[209] Delegation has also been extended to Design Approval Organizations and Airworthiness Engineering Organizations under Chapter 505 of the AWM.[210]

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208 Begun with the promulgation of N-AME-AO 45/68, "Notice to Aircraft Maintenance Engineers and Aircraft Owners" in 1968 which has recently been replaced by Chapter 505 of the AWM. N-AME-AO 45/68. Delegation is authorized under the Aeronautics Act subs. 4.3(1) without limitation as to whether the person is or is not an employee or official of the Federal Government.

209 In general, DARs are independent professionals (but there are also some who are employees of the manufacturer) to whom the Minister has delegated authority to expedite the examination of engineering data required to obtain DOT approval for an aircraft or aircraft part or the repair and modification of previously certificated aircraft. There are also DARs employed by aircraft operators, who are sometimes referred to as "Operating DARs". Justice Dubin in his Report supported the continued existence of DARs subject to their being licensed or accredited by the DOT (Recommendations 129, 131, 132 and 133 of the Dubin Inquiry Report).

210 Procedures for delegation of design approval authority are contained in Chapter 505 of the AWM. A delegation to an Airworthiness Engineering Organization (AEO) applies to the engineering branch of an air carrier while a delegation to a Design Approval Organization (DAO) applies to the design engineering branch of a manufacturer of aeronautical products.

Canada conforms to well understood and generally applied international practices in exercising regulatory control and supervision of the airworthiness of aircraft. To facilitate ready international exchange of aeronautical products with minimum duplication of certification effort, Canada has entered into formal Bilateral Airworthiness Agreements,[211] Technical Arrangements on Airworthiness (Authority to Authority), Agreements/Arrangements/Memoranda of Understanding limited in scope (Authority to Authority) or, Memoranda of Understanding on Cooperation (Authority to Authority). The following is a breakdown of the present status (as of December 20, 1994):

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211 The incentives and philosophy of Bilateral Airworthiness Agreements (or "BAAs") for Canada are described very clearly and effectively in an internal Transport Canada paper entitled "Bilateral Airworthiness Agreements - A Business and a Philosophy" by Mr. Maher Khouzam, Chief, Airworthiness Standards, (dated 1991.09.26). We quote from that paper below:

> The similarity or equivalence of the airworthiness standards and control systems for acceptance of aeronautical products by a country, to the standards and systems we use in Canada constitute our basis for negotiation a BAA with that country.
>
> The main drive for entering into an agreement is economic.
>
> The acceptance of:
>
> - the findings of compliance to our standards, by the exporting authority (exchange of aeronautical products);
> - the maintenance services (performance of modifications and maintenance); and
> - the responsibility to specify appropriate corrective actions (airworthiness directives);
>
> reduces our direct involvement with foreign manufacturers and maintainers.
>
> The other aspect of the BAA is political. Powerful and often used, the cooperation and assistance of the authorities creates an ideal climate for the development of a communication network between specialists and experts, augmented by a sense of complicity.
>
> With the development of the US-Canada BAA in 1984, we opened the doors for a new era of BAAs with definite emphasis on assistance and cooperation. The new BAAs with the appropriate economic and political environment, are fostering the harmonization of the three major airworthiness Codes: the Canadian Airworthiness Manual, the U.S. Federal Aviation Regulation (FARs) and the European Community Joint Aviation Requirements (JAR).

(i) Bilateral Airworthiness Agreements (State to State)

- United States/Canada Bilateral Airworthiness Agreement, dated August 31, 1984; and its revised Implementation Schedule, dated May 18, 1988.[212]
- Agreement between the Government of Canada and the Government of the French Republic on Airworthiness, dated June 15, 1987.
- Agreement on Airworthiness between the Government of Canada and the Government of Italy, dated February 18, 1991; and its Schedule of Implementation Procedure for the Canada/Italy Bilateral Airworthiness Agreement.

(ii) Technical Arrangements on Airworthiness (Authority to Authority)[213]

- Technical Arrangement on airworthiness between the Aviation Regulation Directorate, Transport Canada, and the Department of Civil Aviation, The Netherlands Ministry of Transport and Public works, dated April 21, 1987.
- Technical Arrangement on airworthiness between the Aviation Regulation Directorate, Transport Canada, and the Luftfahrt-Bundesamt, Federal Republic of Germany, dated April 24, 1987.
- Technical Arrangement of airworthiness between the Aviation Regulation Directorate, Transport Canada, and the Safety Services Group, United Kingdom Civil Aviation Authority, dated April 27, 1987.

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212 Originally entered into in 1929, revised in 1938 and 1971 and renewed in 1984. More recently (September 1994) negotiations were undertaken between Canada and the U.S. with the purpose of replacing the BAA by an agreement that will address the promotion of aviation safety in all its dimensions. As of December 20, 1994 negotiations where still ongoing.

213 The Technical Arrangements are being raised to BAA status through the Canadian Department of Foreign Affairs.

(iii) Agreements/Arrangements/Memoranda of Understanding Limited in Scope (Authority to Authority)

- Bilateral Airworthiness Understanding between the Transport Canada, Aviation Regulation Directorate, and the Central Administration of Civil Aviation Polish People's Republic, dated October 3, 1979.
- Technical Understanding between Transport Canada and the Israel Civil Aviation Administration concerning Reciprocal Acceptance of Airworthiness Certification, dated October 2, 1975.
- Memorandum of Understanding on acceptance of aeronautical products between Canada and the People's of the Republic of China, dated August 17, 1982.

(iv) Memoranda of Understanding on Cooperation (Authority to Authority)

- Memorandum of Understanding on Airworthiness Between the Interstate Aviation Committee of the Commonwealth of Independent States and the Republic of Giorgia, and Transport Canada Aviation, Department of Transport, on Behalf of Canada, dated February 25, 1993.
- Memorandum of Understanding on Airworthiness between the Civil Aviation Inspectorate of the Czech Republic and Transport Canada Aviation, Department of Transport, Canada, dated June 27, 1993.
- Memorandum of Understanding on Airworthiness Between Direccion Nacional de Aeronavigabilidad of the Republic of Argentina and Transport Canada Aviation, Department of Transport, Canada, signed by Canada on October 12, 1993.

There are no requirements for BAAs, Technical Arrangements or Memoranda of Understanding under international conventions or in Canadian laws and regulations.

BAAs are not intended to be trade agreements, and as already stated, the objectives of these Agreements, Technical Arrangements, and Memoranda of

Understanding are to facilitate the acceptance of aeronautical products exported from one country to another with minimum duplication of certification effort, and to ensure cooperation in the resolution of service difficulties. These objectives have to a large extent been achieved because they have eliminated the need for the airworthiness authority of the State where the aeronautical products are being imported, to become familiar with the product and the means by which its airworthiness was determined. This was something which required considerable application of resources and thus since it is no longer necessary, time, effort and money are spared to be made available elsewhere where the need exists.

Canada has entered into two Memoranda of Understanding[214] on the lease of aircraft that provide for the delegation of those functions identified in Article 83bis to the Chicago Convention[215]. However, given that Article 83 bis is not yet in force, the Memoranda of Understanding do not provide for the delegation of the responsibility imposed on the State of registry under the Chicago Convention in respect of those functions.

Once aircraft are in service, each ICAO Contracting State (including Canada) accepts the validity of the certificates of airworthiness of an aircraft issued by other ICAO Contracting States for aircraft operated in or into their territories having a foreign registry and operated by a foreign operator.[216]

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214 Memorandum of Understanding on the Lease of Aircraft Between la Direction Générale de l'Aviation Civile (France) and the Aviation Group, Department of Transport (Canada), dated March 18, 1991; and, Memorandum of Understanding on the Lease of Aircraft Between The Netherlands Minister of Transport, Public Works and Water Management, and the Canadian Minister of Transport, dated December 23, 1992 (updated September 23, 1994 by deleting the termination date). These two Memoranda of Understanding have served as the model for the ICAO draft text reproduced in Appendix D to the Attachment to the Report on Agenda Item 3 entitled "Development of provisions taking account of leasing on continuing airworthiness", prepared by the Third Meeting of the Continuing Airworthiness Panel (Montreal, 7-18 October 1992) found in CAP/3-WP12 at pp. 3-A-30 to 3-A-37.

215 See supra note 167.

216 Chicago Convention, Article 33 provides as follows:

> Certificates of airworthiness and certificates of competency and licences issued or rendered valid by the Contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the

Because aircraft and air navigation facilities still rely on the intervention of human beings to keep them flying or operational, it is necessary to develop and adopt appropriate standards, practices and procedures to ensure that those persons involved in essential aviation functions - such as piloting, controlling or maintaining - possess the necessary qualifications. This is discussed belows.

3. The Personnel

The Applicable laws and regulations are the following:

(i) Aeronautics Act, ss. 3(1), 4.9(a) and 6.5

(ii) Air Regulations, Part IV

(iii) Air Navigation Order, Series IV Nos. 1, 2 and 6

(iv) Chicago Convention, Articles 32, 33, 39, 40 and 42 and Annex 1[217] to the Convention.

The second element of the aviation system is, of course, the personnel. This includes the flight crew members,[218] cabin crew,[219] air traffic controllers,[220] aircraft

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requirements under which such certificates or licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention. (emphasis added)

217 Annex 1 is entitled "Personnel Licensing. Licensing of flight crews, air traffic controllers and aircraft maintenance personnel". It contains the International Standards and Recommended Practices with respect to age, knowledge, experience, etc., for all aviation personnel licences. Canada is a Contracting State of ICAO and thus its licensing standards are, in most respects, in accordance with the ICAO Standards and Recommended Practices; however, flexibility based on national experience may be applied as for example, in the licensing of monocular vision private pilots.

218 "Flight crew member" is defined as "a crew member acting as pilot-in-command, co-pilot, flight navigator, flight engineer or second officer of an aircraft during flight time". (Air Regulations, s. 101). See also definition in s. 2 of Air Navigation Order Series VII No. 2.

219 "Cabin crew" is not defined in the Air Regulations or Air Navigation Orders but "crew member" is defined as "a person assigned to duty in an aeroplane during flight time". (Air Navigation Order, Series VII No. 2, s. 2). Also, "cabin attendant" is defined in the same Air Navigation Order as "a crew member, other than a flight crew member, assigned to duty in a passenger-carrying aeroplane during flight time".

maintenance engineers[221] and such other persons providing services to the safe operation of aircraft and the air navigation, surveillance and communication system (e.g. Flight Service Station Specialists).[222]

At present the Air Regulations and Air Navigation Orders only require that flight crew members, air traffic controllers and aircraft maintenance engineers hold licences issued by the Minister before they can exercise their functions.[223] Interestingly enough, cabin attendants are not licensed, even though they play an important role in the preparation and evacuation of passengers from an aircraft in the event of an emergency landing or accident, applying first-aid treatment and in providing a visible uniformed presence of authority in the aircraft cabin during flight time. This latter role no doubt serves to encourage order and calm on board the aircraft especially on longer flights and relieves the flight crew from having to patrol the cabin from time to time.[224]

The qualifications that a person must meet in order to obtain one or more of the licences referred to above are to be found in Volumes 1, 2 and 3 of the Personnel

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220 "Air traffic controller" is not defined in the Air Regulations but he is a person that has the responsibility of providing "air traffic control service" which is defined as a service specified in Part VI of the Air Regulations, provided for the purpose of:

> (a) preventing collisions
> (i) between aircraft, and
> (ii) on the manoeuvring area between aircraft and obstructions, and
> (b) expediting and maintaining an orderly flow of air traffic". (Air Regulations, s. 101)

221 The Aircraft Maintenance Engineer (or "AME") is the holder of an AME licence issued by the Minister pursuant to s. 404 of the Air Regulations who, depending on the endorsement on his licence, may certify aircraft or aeronautical products as airworthy or released for return to service following maintenance performed on the aircraft or aeronautical product. (See Aircraft Maintenance Engineer Licences Order, Air Navigation Order Series IV No. 6). (SOR/89-542).

222 A "Flight Service Station Specialist" (FSS) provides Flight Information Services at a Flight Service Station. Those services include, the provision of a means for flight planning and access to weather and navigation system status, information, en route and airport advisory services, monitoring of navigation aids, and alerting of search and rescue facilities for overdue aircraft.

223 See Air Regulations 400 and 402 as well as Order Respecting Personnel Licences, Air Navigation Order Series IV, No. 1, SOR/90-232.

224 For a thorough discussion of the issues associated with the question of expansion of the types or classes of licences for aviation personnel, see Volume 3 of the Dubin Inquiry Report at pp. 977 and following.

Licensing Handbook[225] and in the relevant Air Navigation Orders.[226] The classes of licences available and the privileges attached to them are also found in the same publications. The Minister maintains control over the qualifications and conduct of the licensees through his power to suspend, cancel, or not renew a licence or permit.[227]

By virtue of Article 33 of the Chicago Convention, Contracting States agree to recognize as valid the licences of flight crew members issued or rendered valid by another Contracting State, provided that the requirements under which such licences were issued or rendered valid, are equal to or above the minimum standards established from time to time by ICAO.[228] However, the reality of interchangeability of flight crew member licences has not yet been universally achieved among all ICAO Contracting States.

Since a nation's air transportation system is in many cases, especially for Canadians, the life line for commerce and communication, it is of greatest importance that it be safe, reliable and efficient. Hence, those who participate in that system and on whom the public depends for its needs, must be qualified. The regulatory requirements for air carriers are discussed below.

4. The Air Carrier

The Applicable laws and regulations are the following:

(i) Aeronautics Act, subs. 3(1), s. 4.7, paras. 4.9(a), (b), (d), (g), (h), (i) and s.5.

(ii) Air Regulations, Part VII.

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225 Published, as amended from time to time, under authority of the Minister of Transport by the Minister of Supply and Services (Canada).

226 See Air Navigation Order Series IV Nos. 1, 2 and 6.

227 Air Regulations, 407 and Aeronautics Act s. 6.8, 6.9(1), 7(1) and 7.1(1).

228 See Annex 1, supra note 217.

(iii) Air Carrier Security Regulations,[229]

(iv) Air Navigation Order, Series VII, Nos. 2, 3 and 6.

(v) Chicago Convention, Articles 5, 6 and 96 and Annex 6[230].

For the purposes of this chapter we are concerned only with those laws and regulations that address air carriers[231] in the context of the requirements of aviation safety. Moreover, we are concerned only with those air carriers that operate a commercial air service carrying passengers, goods or mail as integral players in the Canadian air transportation system using fixed-wing aircraft.[232]

A person is prohibited from operating a commercial air service in Canada unless that person holds a valid and subsisting certificate issued by the Minister certifying that he is adequately equipped and able to conduct a safe operation as an air carrier.[233] Therefore, from the aviation safety point of view, before one can become an "air carrier" one must satisfy the Minister that one is "adequately equipped and able to conduct a safe operation as an air carrier".

Furthermore, a Canadian air carrier[234] holding a Canadian Operating Certificate

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229 SOR/87-707 as amended by SOR/90-137.

230 Annex 6 is Entitled "Operation of Aircraft: Part I - International Commercial Air Transport - Aeroplanes; Part II - International General Aviation - Aeroplanes; Part III -International Operations - Helicopters.

231 "Air Carrier" is defined as "any person who operates a commercial air service". "Commercial air service" means "any use of aircraft for hire or reward"; and "hire or reward" means "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft". See subs. 3(1) of the Aeronautics Act.

232 Thus, we are excluding from our consideration specialty air services; and air carriers using rotary-wing aircraft. For specialty air services description and listing see National Transportation Act, 1987 subs. 68(2) and Air Transportation Regulations, s. 3 or supra note 125.

233 Air Regulations, s. 700. The "certificate" that is issued by the Minister is commonly called an "Operating Certificate" or "OC" and normally contains such special terms and conditions for the safe and proper operation of the air service as the Minister deems necessary. (Air Regulations, s. 701).

234 "Canadian Air Carrier" was defined in the Air Regulations, s. 101 as an air carrier that:

(a) is a Canadian citizen
(b) is a permanent resident, as defined in subsection 2(1) of the Immigration Act, 1976, or

may only operate, on a commercial air service in Canada, Canadian aircraft that have been registered as commercial aircraft in the Canadian Civil Aircraft Register. If a Canadian air carrier wants to operate, on a commercial air service in Canada, an aircraft registered in another ICAO Contracting State, he must obtain the special permission of the Minister[235].

The Minister, in the exercise of his powers under the Aeronautics Act[236] and Air Regulations[237], has promulgated three Air Navigation Orders - Air Navigation Order Series VII No. 2,[238] Air Navigation Order Series VII No. 3[239] and Air Navigation Order Series VII No. 6[240], which set out the standards and procedures for air carriers. Thus, for the purposes of aviation safety, the Minister has divided the air carriers into three categories: those using large aeroplanes[241]; those using small

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(c) carries on business principally in Canada and
(i) is incorporated or registered in Canada, or
(ii) has its head office in Canada.

However, this definition was revoked in 1990 by SOR/90-757 and as a result there is no definition of "Canadian air carrier" in any of the Air Regulations or Air Navigation Orders made under the Aeronautics Act. The issue of nationality of the air carrier in the context of aviation safety matters arises only indirectly in the case of the registered owner of a Canadian aircraft who must meet the "citizenship" requirements set out in subs. 19(1) for an individual and subs. 19(2) for a corporation under the Registration Regulations. See supra notes 139 and 140.

235 Air Regulations, s. 702.

236 Aeronautics Act, para. 4.9(g).

237 Air Regulations, s. 703 and 104.

238 Entitled "Order Respecting Standards and Procedures for Air Carriers Using Large Aeroplanes" (C.R.C. 1978 chapter 21, as amended).

239 Entitled "Order Respecting Standard and Procedures for Air Carriers Using Small Aeroplanes in Air Transport Operations" (C.R.C. 1978 c. 22, as amended).

240 Entitled "Order Prescribing Standards and Procedures for Air Carriers Using Rotorcraft in Air Transport Operations" (C.R.C. 1978 c. 62, as amended).

241 "Large aeroplane" is defined in Air Navigation Order Series VII No. 2, s. 2 as "an aeroplane of more than 12,500 pounds maximum certificated take-off weight". (5,760 kg.)

aeroplanes[242]; and those using rotorcraft.[243] Since air carriers using rotorcraft (i.e. helicopters) for the carriage of passengers, goods or mail do not occupy a significant place in the overall air transportation network in Canada, we will focus our discussion on the other two categories of air carriers.

(i) Air Carriers Using Large Aeroplanes

A person wishing to become an air carrier must apply to the Minister for an Operating Certificate in accordance with Air Navigation Order VII No. 2, section 4. The applicant must show that he has the qualified managerial personnel necessary to operate the proposed commercial air service and that such personnel are employed on a full-time basis in those or equivalent positions set out either, in the Air Navigation Order or, as may be approved by the Minister in the light of the nature of the commercial air services proposed.[244]

The Air Navigation Order also specifies that in order to serve as Director of Flight Operations (or Operations Manager) or as Director of Maintenance and Engineering (or Maintenance Manager) the background, qualifications and experience of the individual named must be satisfactory to the Minister.[245] In the case of the Chief Pilot or Chief Inspector, an individual can only serve as such, if he meets the requirements for that position set out in Schedule 1 to the Air Navigation Order.[246]

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242 "Small aeroplane" is defined in Air Navigation Order Series VII No. 3, s. 2 as "an aeroplane of 12,500 pounds or less, maximum certificated take-off weight". (5,760 kg.)

243 "Rotorcraft" is defined in Air Navigation Order Series VII No. 6, s. 2 as "a power-driven heavier-than-air aircraft supported in flight by the reactions of the air on one or more rotors".

244 The positions are the following: (a) Managing Director; (b) Director of Flight Operations (or Operations Manager); (c) Director of Maintenance and Engineering (or Maintenance Manager); (d) Chief Pilot; and (e) Chief Inspector. (See Air Navigation Order Series VII No. 2, s. 5).

245 Air Navigation Order Series VII No. 2, subs. 6(1).

246 Ibid., subs. 6(2).

Apart from the managerial requirements, the applicant for an Operating Certificate must also show that he meets the standards and procedures prescribed by the Minister relating to:

(i) aircraft maintenance (this includes having an approved[247] maintenance manual);

(ii) flight operations (this includes such things as having an approved flight watch system; rules on operations related to weather conditions and fuel and oil supply; and, provision of an Operations Manual[248] (which contains all of the items set out in Schedule II to Air Navigation Order Series VII No. 2, to enable the operations personnel to perform their duties in a proper manner));

(iii) crew member requirements;

(iv) crew member training and qualification (this includes: a ground and flight training program; emergency procedure training; pilot flight training; flight engineer training; flight navigator training; cabin attendant training; line indoctrination (i.e. specific training on a particular aircraft type while in service); recurrent training; pilot qualification; use of flight simulators; route and airport qualifications; flight navigator qualifications; and flight engineer qualifications; and

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247 "Approved" means approved by the Minister, and "maintenance" means any function performed in the servicing, rectification or inspection of an aeroplane or component parts thereof (Air Navigation Order Series VII No. 2, s. 2).

248 The Operations Manual must be consistent with the Air Regulations, Air Navigation Orders, Operating Certificates and the applicable regulations of any country within or over which the air carrier intends to operate. (Air Navigation Order Series VII No. 2, s. 32). This provision gives effect to Canada's obligations under Article 12 of the Chicago Convention which requires that Canadian aircraft comply with the rules and regulations relating to the flight and manoeuvre of aircraft in force in the territory of the State overflown.

(v) a system establishing maximum flight time, maximum flight duty time, maximum flight deck duty time and minimum rest period.[249]

Once the applicant meets all of the conditions for an Operating Certificate, the Minister is required to issue a numbered certificate stating that the air carrier is adequately equipped[250] and able to conduct a safe operation in accordance with the Air Regulations, Air Navigation Orders and the operations specifications forming part of the Operating Certificate.[251]

Until March 19, 1992, the Minister did not have any statutory power to refuse to issue an Operating Certificate if the applicant met all of the technical and documentary requirements. There was, however, a provision in the Air Regulations (s. 810) that was relied upon, but because it was not specifically authorized by the underlying legislation, namely, the Aeronautics Act, this was not considered to be solid legally in light of the Canadian Charter of Rights and Freedoms[252]. Therefore, Bill C-76[253] introduced a new section 6.71 into the Aeronautics Act that reads as follows:

> 6.71 (1) The Minister may refuse to issue a Canadian aviation document, where the Minister is of the opinion that the public interest and, in particular, the record in relation to aviation of the applicant or of any principal of the applicant warrant it.
>
> (2) The Governor-in-Council may make regulations defining the word "principal" for the purposes of subsection (1).

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249 This requirement was introduced by SOR/87-326 dated 8 June 1987. The purpose of this amendment was to prevent, to the extent possible, excessive fatigue which could contribute to or result in aircraft accidents.

250 "Being equipped" does not mean necessarily possessing or owning all of the facilities and personnel required. It could also include the situation where an applicant has the legal right to such facilities and personnel through contractual arrangements with other entities that provide the facilities, services or personnel.

251 Air Navigation Order Series VII No. 2, s. 7.

252 Constitution Act, 1982, Schedule B.

253 S.C. 1992 c. 4.

The background to this amendment is the Dubin Inquiry that found that certain persons were operating illegal commercial air services (i.e. without a licence or in violation of their licence conditions). If they were caught, they simply incorporated another company and began the process over again. This was thought to result in an unsafe situation for the following reasons:

(i) these operators were not following the Transport Canada safety regulations; and

(ii) they competed unfairly with the licenced carriers who, by complying with their licence conditions and the safety regulations, incurred higher operating costs than the illegal operators.[254]

An Operating Certificate contains, a number, the name of the air carrier and a description of the operations authorized, the date of issue, and the operations specifications.[255]

Moreover, for the safety of passengers on board an aeroplane, the air carrier is required to establish procedures to ensure that each passenger is secured in his seat during take-off and landing and at any other time considered necessary by reason of turbulence or any emergency that occurs during flight.[256]

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254 See Dubin Inquiry Report, Vol. 2 at pp. 506 to 509. The Dubin Inquiry recommendations resulted also in the inclusion in the Aernautics Act provisions authorizing the forfeiture of aircraft used in illegal operations (see s. 7.4 of the Aeronautics Act).

255 Air Navigation Order Series VII no. 2, s. 8. The operations specifications set out the nature of the operations authorized; the types of aeroplanes authorized for use; en route authorizations and limitations, including base and areas of operation; special airport weather minima authorizations; procedures for control of aeroplane weight and balance; and any other information necessary to satisfy the minister that the air carrier is equipped and able to conduct a safe operation.

256 Ibid., s. 18.

The air carrier in its operations must not only comply with the Air Regulations and Air Navigation Orders but also with the operations specifications and conditions forming part of his Operating Certificate.[257]

(ii) Air Carriers Using Small Aeroplanes

The process for obtaining the required Operating Certificate to operate as an air carrier is the same as in the case of air carriers using large aeroplanes.[258] There are some differences in the managerial positions required. For example, instead of a Director of Maintenance and Engineering (or Maintenance Manager) Air Navigation Order Series VII No. 3 calls for a Chief Maintenance Engineer and there is no requirement for a Chief Inspector.[259] The qualifications, background and experience of the Director of Flight Operations (or Operations Manager) must also be satisfactory to the Minister.[260] The Chief Pilot and Chief Maintenance Engineer must meet the requirements set out in Schedule A to Air Navigation Order Series VII No. 3.[261]

Apart from the managerial requirements, the applicant for an Operating Certificate to operate small aeroplanes on a commercial air service must also show that he meets the standards and procedures set out in Air Navigation Order Series VII No. 3 relating to generally the same areas and in respect of the same matters as are required of an air

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257 Ibid., s. 9, imposes the obligation in respect of the operations specifications and conditions on the OC. Unless an air carrier has been authorized otherwise in its operations specifications, it must operate its large aeroplanes in compliance with Air Navigation Order Series VII No. 2. (see s. 3 thereof.).

258 Air Navigation Order VII No. 3, ss. 4 and 5.

259 Ibid., s. 5.

260 Ibid., subs. 6(1).

261 Ibid., subs. 6(2).

carrier operating large aeroplanes. The differences are only in degree and nature but not in substance and objectives.[262]

(iii) All Air Carriers - Aviation Security

In addition to the foregoing, all air carriers must also give effect to those regulations made pursuant to the Aeronautics Act[263] for the purposes of protecting passengers, crew members and aircraft and preventing unlawful interference with civil aviation and ensuring that appropriate action is taken where such interference occurs or is likely to occur.[264] Briefly, these regulations require owners or operators of Canadian aircraft to establish, maintain and carry out, at aerodromes and on the aircraft such security measures as may be prescribed by the regulations or approved by the Minister.[265] In Canada, it is normally the Department of Transport that supplies the equipment and facilities for aviation security purposes, but it is the air carriers who have the responsibility for manning the positions and using the equipment. In many foreign countries, it is the State agencies that supply the equipment, facilities and human

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262 If the applicant is only proposing to operate, for example, two small aeroplanes, the facilities required need not be too elaborate but they should be commensurate with the nature and scope of the operations foreseen and enable the applicant to fulfil all of the safety requirements.

263 See s. 4.7.

264 See the Air Carrier Security Regulations (SOR/87-707). They address the detection and prevention of acts of illegal seizure of aircraft and sabotage of aircraft and civil aviation facilities used for navigation. They give effect to Canada's obligations under the Chicago Convention (including Annex 17 thereof); and whatever obligations are imposed in respect of aviation security pursuant to: Convention on Offenses and certain other acts Committed on Board Aircraft, signed at Tokyo, September 14, 1963 ("Tokyo Convention, 1963")(ICAO Doc. 8364); the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, on December 16, 1970 ("The Hague Convention, 1970")(ICAO Doc. 8920); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971 (ICAO Doc. 8966) as well as its Supplementary Protocol of February 24, 1988 (ICAO Doc. 9518)("Montreal Convention, 1971" and "Montreal Protocol, 1988"); and the Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference,(ICAO Doc. 8973/4).

265 Aeronautics Act, para. 4.7(2)(a). Para. 4.7(2)(b) deals with owners or operators of aircraft registered outside Canada.

resources required for aviation security. The issue of who should have the responsibility for maintaining aviation security in Canada is a controversial one. The airlines argue that it is the State who is responsible for protecting the public from all criminal acts, including acts of terrorism aimed at civil aviation, and that such responsibilities cannot, and should not, be delegated to the airlines.

The best and strictest regulations in the world will not guarantee an adequate level of aviation safety unless they are observed. Although, for the most part, people will comply with the regulations either because they believe in the rule of law or, for their own self-interest, there are others that will not. Thus, the regulatory authority must have an enforcement arm to watch over the regulated. Also, to prevent abuses and injustices, there must be in place sufficient recourses for the regulated to challenge the actions of the regulatory authority. These are discussed below.

5. Enforcement[266] and Recourses

(a) Compliance Philosophy

The compliance philosophy[267] of Transport Canada recognizes that voluntary

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266 The current term used is "compliance" thereby focussing on the result that is intended to be achieved rather than on the methodology used in getting there.

267 See "Regulatory Compliance Manual" Transport Canada Publication TP3352E, Fifth Edition, April 1992, para 1.2, at p. 1-2. This enforcement philosophy was subjected to close scrutiny and criticism in the decision of the Federal Court of Canada rendered on February 6, 1990 in the case of Swanson and Peever v. Her Majesty the Queen [1990] 2 F.C. 619, confirmed on appeal [1992] 1 F.C. 408. The Court, in deciding in favour of the plaintiff's claim, found that Transport Canada had failed in properly enforcing the Air Regulations and attributed one-third responsibility to Transport Canada for the crash of an aircraft. The Federal Court (Trial Division) stated at p. 639:

> Transport Canada has a very difficult task to enforce the Regulations strictly in the interest of public safety without at the [sic] time interfering unduly with commercial aviation which often has to be carried out under difficult conditions. A fine balance must be maintained, but if there is any doubt emphasis must be placed on public safety as the Dubin inquiry clearly indicated. While no doubt some of its recommendations have been carried out, and the Regulations amended and tightened somewhat subsequently, the general attitude of delay apparent in the Department and use of persuasion rather than draconian measures in enforcement of the regulations still remains. Clearly too much

compliance with the rules is a better way of achieving safety than the taking of enforcement action against a person after the fact. Thus, activities aimed at preventing non-compliance, such as safety promotion campaigns and safety educational and training programs, are the preferred route. However, in a system based on voluntary compliance, the basic assumption is that individuals are rational, responsible and law-abiding in their own right and self-interest. Whenever these factors are absent or fail to motivate an individual to comply with the rules, enforcement action becomes necessary.[268] For such purpose the Aeronautics Act provides the Minister with several enforcement tools. They are administrative sanctions (i.e. the suspension, cancellation or refusal to renew a Canadian aviation document or, the assessment of a monetary penalty) and prosecution. These two enforcement tools are discussed below.

(b) Administrative Sanctions

(i) Suspension, Cancellation or Refusal to Renew

Canadian aviation documents, namely, licences (pilot, aircraft maintenance engineer and air traffic controller) and certificates (operating certificates, airport certificates, certificates of registration and certificates of airworthiness) are issued on the basis of demonstrated compliance with certain established standards of fitness and competence. In recognition of the Minister's responsibility for aviation safety in Canada, the Aeronautics Act reaffirms that the ultimate authority for determining whether a person or thing meets the established standards is the Minister of Transport. This reaffirmation may be derived from the statutory powers that are provided under the

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reliance is placed on promises by airlines, and specifically Wapiti in this case, to do better in future after a series of violations have been reported. I do not believe that the quantification of the blame however should be punitive in nature and therefore attributing one-third responsibility would appear to be justified by the facts of this Case. (emphasis added)

268 Ibid., para. 1.2 at p. 1-6.

Aeronautics Act for the Minister to refuse to issue or to renew, suspend or, cancel a Canadian aviation document, when the standards that are established by him are not met (as in the case of an application for the issuance of an aviation document) or, cease to be met (as in the case of an aviation document that has already been issued).

The Aeronautics Act created the Civil Aviation Tribunal[269] ("CAT") and conferred on it the jurisdiction to consider and review certain decisions of the Minister in respect of administrative sanctions against the holder of Canadian aviation documents. The jurisdiction of the CAT must be determined by examining the statutory recourses provided by the Aeronautics Act in the event of the suspension, cancellation or, refusal to renew a Canadian aviation document by the Minister. Hence, the meaning to be attributed to the term "Canadian aviation document"[270] as defined is of primary importance in delineating the jurisdiction of the CAT. The Aeronautics Act provides for a statutory recourse to the CAT in the following cases:

(i) where the Minister suspends, cancels or refuses to renew a Canadian aviation document on medical grounds;

(ii) where the Minister suspends or cancels a Canadian aviation document on the basis of incompetence;

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269 Aeronautics Act, Part IV (ss. 29 to 37) established the Civil Aviation Tribunal (or "CAT" as it has become commonly known) with the jurisdiction to hear requests for review of decisions of the Minister assessing monetary penalties and from certain other administrative sanctions imposed by the Minister. The CAT is unique in that it deals only with aviation-related matters and that it does not consist of a single appointed board or authority. It draws on the expertise of many aviation specialists from across Canada, depending on the nature of the administrative sanction that was the subject of the Minister's decision or action. Its creation was brought about by the apparent dissatisfaction of the aviation community with the previous legislation and regulations which provided no statutory recourse for Canadian aviation document holders. Document holders were left with informal "appeals" to the Minister and an application for judicial review to the Federal Court of Canada under s. 18 or 28 of the then Federal Court Act, both of which were seen as being ineffective, too time-consuming and costly.

270 Para. 7.1(1)(c), Aeronautics Act. Defined in s. 3 of the Aeronautics Act, as:

> any licence, permit, accreditation, certificate or other document issued by the Minister under Part I to or with respect to any person or in respect of any aeronautical product, aerodrome, facility or service.

(iii) where the Minister suspends or cancels a Canadian aviation document on the grounds that the holder thereof or any aircraft, airport or other facility in respect of which the document was issued no longer has the qualifications on which the issuance of the document was based;

(iv) where the Minister suspends or cancels a Canadian aviation document on the grounds that the holder thereof or any aircraft, airport or other facility, in respect of which the document was issued, no longer meets or complies with the conditions subject to which the document was issued;

(v) where the Minister suspends or cancels a Canadian aviation document because the Minister is of the opinion that the public interest and, in particular, the record in relation to aviation of the holder or any principal of the holder warrant it[271];

(vi) where the Minister suspends or cancels a Canadian aviation document on the grounds that the holder thereof has contravened any provision of the Aeronautics Act, Part I, or any regulation or order made thereunder; and

(vii) where the Minister suspends a Canadian aviation document on the grounds that an immediate threat to aviation safety exists or is likely to occur.

Conspicuously absent from the foregoing are any statutory recourses in situations where the Minister refuses to renew a Canadian aviation document on grounds other than medical or, refuses to issue[272] a Canadian aviation document.

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271 Para. 7.1(1)(c), Aeronautics Act, added by Bill C-76, "An Act to amend the Aeronautics Act and to amend an Act to amend the Aeronautics Act", tabled on June 11, 1990, in force as of March 19, 1992 (S.C. 1992 c.4). The holder in such a case would have a recourse to the CAT in the same way as if the suspension or cancellation had been made for ceasing to have the qualifications.

272 Bill C-76 also added a new section 6.71 to the Aeronautics Act empowering the Minister to refuse to issue a Canadian aviation document where the Minister is of the opinion that the public interest and, in particular, the record in relation to aviation of the applicant or of any principal of the applicant (i.e. in the case where the applicant is a corporation) warrant it.

The absence of any specific statutorily recognized recourses[273] in these two situations, and the fact that the CAT may not substitute its own decision for that of the Minister in some of the other cases described below (i.e., the CAT is limited to a review only and referral back to the Minister), attests to the fact that the ultimate responsibility for aviation safety in Canada rests with the entity that is best able to make the determination of what is safe and what is not safe and who is also accountable to the public - the Minister of Transport.

In cases where the Minister decides to suspend or cancel a Canadian aviation document because of incompetence or, because the person or thing in respect of which the document was issued ceases to have the qualifications necessary for the issuance of the document, the CAT may either confirm the decision of the Minister or refer the matter back to the Minister for reconsideration. In such cases, the CAT cannot substitute its own decision for that of the Minister.[274] An appeal is available to a three-member panel of the CAT from a determination of any one of its members on an application for review. There again, the CAT sitting in appeal may only dismiss the appeal or refer it back to the Minister for reconsideration - and that is where the process ends.[275]

In cases where the Minister suspends, cancels or refuses to renew a Canadian aviation document on medical grounds the same process is available to the document holder as in the case of suspension or cancellation for incompetence. The only difference is that in the case of a refusal to renew on medical grounds, the burden of establishing that the Minister's decision is unjustified is on the person requesting the review.[276]

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273 This does not mean that there are no recourses available under the common law or under some other Federal statute such as the Federal Court Act, R.S.C. 1985 c. F-7.

274 Aeronautics Act, subs. 7.1(8).

275 Ibid., para. 7.2(5)(b).

276 Ibid., subs. 7.1(7). The burden is also on the applicant where the matter is appealed to the second level of the CAT (see subs. 7.2(4)).

Where the Minister decides to suspend or cancel a Canadian aviation document on the grounds that the document holder has contravened[277] any provision of the Aeronautics Act or any regulation or order, the CAT may either confirm the decision of the Minister or substitute its own decision for that of the Minister, both at the initial review or on appeal.[278]

Similarly, where the Minister decides to suspend a Canadian aviation document on the grounds that an immediate threat[279] to aviation safety exists or is likely to occur, the CAT, both at the initial review and on appeal, may either confirm the Minister's decision or substitute its own decision for that of the Minister.[280]

The Aeronautics Act sets out the whole process that must be followed by the Minister and the document holder respecting the administrative suspension, cancellation or non-renewal of a Canadian aviation document, including notices to be given, delays to be observed, matters to be proved and by whom to be proved.[281]

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277 Ibid., subs. 6.9(1).

278 Ibid., subs. 6.9(8) and para. 7.2(5)(a). The Tribunal functions as a true appellate body in such circumstances.

279 Ibid., subs. 7(1).

280 Ibid., subs. 7(7) and para. 7.2(5)(a).

281 Ibid., ss. 6.6 to 7.2 inclusive. This raises the question of whether the procedure established under the Aeronautics Act for such cases is sufficient to withstand any challenges based on a lack of procedural fairness or absence of natural justice. In a recent case before the Federal Court of Canada, Trial Division, Skylink Airlines v. Her Majesty the Queen in Right of Canada, No. T-3017-89, February 26, 1990 (not appealed) Addy, J., considered the issue of whether there had been a breach of natural justice resulting from lack of notice and denial of an opportunity to be heard in the situation where the operating certificate of Skylink Airlines had been initially suspended and ultimately cancelled by the Minister pursuant to paragraph 7.1(1)(b) of the Aeronautics Act in accordance with the procedure set out in section 7.1 of the Act. Addy, J., examined the procedure found therein and concluded at pages 6 and 7:

> Where a specific remedy is prescribed by law that remedy should normally be pursued rather than a remedy by means under section 18 of the Federal Court Act, or where the avenues of appeal have not been exhausted....
>
> Having regard to the fact that the plaintiff has a full opportunity to be heard and to present evidence before the decision regarding the suspension or cancellation can be considered final and that it has not availed itself of that opportunity, it would be improper to grant relief under section 18 of the Federal Court Act.

(ii) Imposition of a Monetary Penalty

The Aeronautics Act introduced for the first time into Canadian legislation a scheme of monetary penalties[282] that could be assessed through an administrative process for the violation of certain regulations or orders made under the Aeronautics Act. Such provisions are referred to as "designated provisions".[283] Administrative monetary penalties may only be assessed for a contravention of a designated provision.[284]

The assessment of an administrative monetary penalty by the Minister is based on the Minister believing on reasonable and probable grounds that a person has contravened a designated provision.[285] The mechanism that is then set in motion allows for a hearing before the CAT, where the Minister has the burden of proving the alleged

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Nevertheless, Addy, J., considered it important not to dispose of the matter before him solely on that basis and found that on the facts of that case, the plaintiff had had an opportunity to be heard.

282 Ibid., ss. 7.6 to 8.2 inclusive. The administrative monetary penalty scheme raises certain constitutional questions (which would be beyond the scope of this thesis to address) relating to the jurisdiction of the courts and the traditional functions of the three branches of government - the Legislature the Executive and the Judiciary. See s. 96 of the Constitution Act, 1867 and the decision of the Judicial Committee of the Privy Council in Hinds v. The Queen [1977] A.C. 195. A similar administrative penalty scheme has existed in the United States for quite some time (see Schwartz, B., Administrative Law, Boston, Little, Brown and Co., 1976.

283 Ibid., para. 7.6(1)(a). A "designated provision" is any regulation or order made under the Aeronautics Act, Part I, which has been designated by regulation of the Governor-in-Council, as a regulation or order the contravention of which may be dealt with under and in accordance with the procedure set out in ss. 7.7 to 8.2 of the Aeronautics Act.

284 Ibid., para. 7.6(1)(b). The amount that may become payable in respect of a contravention of a designated provision is prescribed by regulation of the Governor-in-Council. The maximum amount that could be so prescribed was originally $1,000.00. However, Bill C-76, supra note 271 raised the maximum to $5,000.00 in the case of an individual and $25,000.00 in the case of a corporation. See also the Designated Provisions Regulations, (Air Regulations Series I, No. 3, SOR/86-596 as amended) which set out the designated provisions and the maximum amount assessable in respect of each in the event of a contravention.

285 Ibid., subs. 7.6(2) and 7.7(1). The violation of a designated provision does not preclude the suspension or cancellation of a Canadian aviation document but prosecution by way of summary proceedings is precluded. Thus, the violation of a designated provision may be addressed by either an administrative penalty or, by a suspension or cancellation of the Canadian aviation document, but not cumulatively.

contravention.[286] The determination of a member of the CAT may be appealed on the merits (by the person alleged to have contravened the designated provision or by the Minister) to a three-member panel of the CAT. The CAT has the jurisdiction to decide, either to dismiss the appeal or allow it, and, in allowing it, substitute its own decision.[287] The monetary penalty amount assessed by the Minister may be varied by the CAT in the first instance as well as on appeal.

(c) Prosecution

The Aeronautics Act provides for the prosecution of anyone who contravenes a provision of Part I of the Aeronautics Act or, any regulation or order made thereunder, except a designated provision.[288] The Aeronautics Act sets out a number of so-called "hybrid offenses" that may be proceeded by way of indictment or by way of summary conviction procedure. These are prohibitions which address a certain number of wilful acts that are considered very serious or potentially so. They are set out in the Aeronautics Act section 7.3, and include wilfully doing "any act or thing in respect of which a Canadian aviation document is required except under and in accordance with the required document".[289]

The Aeronautics Act provides for the possibility of proceedings being instituted against the registered owner of an aircraft, the operator of an aircraft and the pilot in command of an aircraft, in addition to the person who actually committed the offence. Also, the same may be done with respect to the operator of an aerodrome or other aviation facility.[290]

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286 Ibid., subs. 7.9 (5). The alleged offender is not required, and cannot be compelled, to give any evidence or testimony in the matter.

287 Ibid., subs. 8.1(3) and (4).

288 Ibid., subs. 7.3(3).

289 Ibid., para. 7.3(1)(f).

290 Ibid., s. 8.3.

The Aeronautics Act makes available to an alleged offender a defence of due diligence. What this means is that a person shall not be found to have contravened a provision of the Act, or of any regulation or order made under the Act, if the person exercised all due diligence to prevent the contravention.[291]

As well, subsection 818(2) of the Air Regulations also makes available the defence of necessity (i.e. it is a good defence if the person charged establishes that the contravention took place due to stress of weather or other unavoidable cause). However, this would seem to be limited to those situations involving aircraft flight only.

The Aeronautics Act establishes a limitation period of 12 months for any proceedings with respect to monetary penalties and by way of summary conviction. The period is measured from the time when the subject matter of the proceedings arose.[292] There are no limitation periods set for indictable offences in Canadian law.

The Transport Canada Regulatory Compliance Manual recognizes that where an air carrier is accused of having contravened the Aeronautics Act, or any regulations or orders made thereunder, the suspension of the Operating Certificate would punish not only the carrier but also the employees and the public that may be relying on the carrier for their needs. In such a case, the Regulatory Compliance Manual provides that the punitive suspension of an Operating Certificate should only be considered when the carrier has a history of repeat offenses (two or more major offenses in the previous two years) and when, in the opinion of the suspending authority, other measures (such as monetary penalties or prosecution) would not promote future compliance.[293] However, where the suspending authority identifies an immediate threat to aviation safety, the

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291 Ibid., s. 8.4. The availability of the due diligence defence to a person charged with an offence under the Act or any regulation or order made thereunder, confirms that the nature of such offenses is one of strict liability as this was defined by the Supreme Court of Canada in R v. Corporation of the City of Sault Ste. Marie, [1978] S.C.R. 1299.

292 Ibid., s. 22.

293 Regulatory Compliance Manual.

emergency suspension of the Operating Certificate could take place and would remain in effect until such time as the threat to aviation safety is removed.[294]

(d) Preventive Actions

Finally, it should be indicated that the procedure for enforcement of the aeronautics legislation adopted by Transport Canada involves several steps prior to a decision to suspend or cancel a Canadian aviation document, to assess a monetary penalty or, to proceed through the Courts.

This procedure involves the taking of administrative actions such as "Counselling" and the "Training for Compliance Program" described below:

(i) Counselling

(A) Oral counselling is primarily used when a document holder commits a minor inadvertent violation, for which the imposition of a sanction is not considered appropriate;

(B) Letters of Counselling are used for minor violations, for which the imposition of a sanction is not considered appropriate, but the violations are of a serious enough nature to record in the document holder's compliance file;

(C) Letters of Compliance outline that a minor continuing breach has been found, and that a mandatory compliance due date has been reached between the alleged offender and Transport Canada. Should corrective action not be taken by the specified date indicated in the letter, a sanction will immediately be imposed on the alleged offender.

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294 Ibid., para. 9.5.2 at p. 9-5.

(ii) Training for Compliance Program (TCP)

> This is available to eligible document holders when minor violations committed by them indicate a lack of knowledge or skill or decision-making abilities that, when taken in isolation, did not amount to incompetency in the exercise of document privileges.

The use of Letters of Counselling was successfully challenged by a document holder in a case decided recently by the Trial Division of the Federal Court of Canada[295]. The Court held that, since the statutory scheme under the Aeronautics Act only enables the imposition of a sanction once the underlying infraction has been established in conformity with the procedure prescribed by the Act (i.e. after the interested party has been afforded on opportunity to present his or her case before the CAT), the issuance of a Letter of Counselling resulting in a notation of a violation on a document holder's record, amounted to the imposition of a sanction without the underlying infraction having been established in conformity with the statutory scheme.

As a result, the Letters of Counselling are no longer available to Transport Canada as a "soft" enforcement tool.

6. Conclusion

Aviation is one of the most sophisticated and technologically-advanced areas of human activity and requires an equally sophisticated and advanced regulatory scheme in order to achieve the objectives of safety, efficiency and accessibility of the air transportation system at the lowest cost for the users and for the benefit of all society.

Because of the sophistication of the components of air transportation - the vehicle, the way and the providers of air transportation - the regulatory scheme relies to a large

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295 On June 29, 1994. In the Matter of a Reference by the Civil Aviation Tribunal of a Question of Jurisdiction Pursuant to Section 18.3 of the Federal Court Act, R.S.C. 1985 c. F-7, as amended, (T-1869-93) (referred to as the "Dobbins case")

extent on the professionalism of the actors involved to achieve its objectives. This allows the regulatory authority to delegate some of its responsibilities to properly qualified individuals or organizations, with the regulatory authority always retaining a supervisory role and the right to inspect the quality of the exercise of the delegated functions.

The regulatory scheme establishes standards of airworthiness for the aeronautical products as well as standards of competence for the key personnel carrying on essential functions in the aviation safety chain - flight crews, aircraft maintenance engineers, and air traffic controllers. These standards are aimed at achieving the objective of an adequate level of aviation safety (that corresponds to the highest level of aviation safety under the prevailing circumstances) by reducing the risks inherent in civil aviation to an acceptable level (again that corresponds to the lowest level of risk under the prevailing circumstances) while retaining the advantages of air transportation over other modes for medium to long distance transport - speed, comfort, reliability and accessibility - at an affordable price.

Nevertheless, because no system is perfect, the regulatory scheme provides for the necessary tools for the regulatory authority to carry out inspections and audits[296] and to take enforcement action as the need arises. The flexibility of those enforcement tools (suspension or cancellation of a Canadian aviation document or, assessment of a monetary penalty or, prosecution) enables the regulatory authority to choose the most appropriate sanction in each case.

Furthermore, recognizing that there is a need to ensure that the rights of the regulated are not arbitrarily or improperly affected, the regulatory scheme provides for various recourses whereby the actions or decisions of the regulatory authority may be challenged. In this regard, the Civil Aviation Tribunal is unique since it is dedicated solely to aviation matters and staffed by persons knowledgeable in the field.

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296 See Transport Canada Manual of Regulatory Audits, Transport Canada Publication TP8606. Recently, the TSB in a Report made public on December 11, 1994 questioned the effectiveness of the Transport Canada audits of commercial air carrier operations. The Report noted that since 1984, the TSB and its predecessor, the CASB, had investigated nineteen aviation occurrences (as defined in section 2 of the TSB Act) in which deficiencies had been discovered in the audits of commercial air carriers that had been carried out by Transport Canada. In twelve of the nineteen accidents investigated, the TSB found that the Transport Canada audits had overlooked or failed to document a non-conformance with required standards or non-compliance with regulatory requirements. (See Communique of the Transportation Safety Board of Canada, TSB No. A39/94, dated December 12, 1994 and the attachment thereto).

Also, because aviation is constantly changing, the aviation safety regulatory scheme needs to be reviewed on a continuing basis to ensure its ongoing relevance to the reality of the aviation system both nationally and internationally. Hence, the creation in the summer of 1994 of the Canadian Aviation Regulation Advisory Council ("CARAC") by the Aviation Group of the Department of Transport with the mandate of assisting in the regulatory review and revision, is a very welcomed development for the stakeholders of the aviation system. Through the CARAC, the stakeholders will have a formal structure within which to make known their concerns and provide input on all regulatory initiatives at the earliest stages to ensure their need and relevance.

- PART V -

AIR SERVICES

APPLICABLE LAWS AND REGULATIONS:

National Transportation Act, 1987[297], Parts I, II and VII

Air Transportation Regulations[298]

Transportation of Dangerous Goods Act[299]

Excise Tax Act[300] and Air Transportation Tax Regulations

Aeronautics Act[301]

Chicago Convention, Articles 5, 6, 7 and 96 and Annex 9[302]

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297 S.C. 1987 c. 34; now R.S.C. 1985 c. 28 (3rd Supp.), as amended.

298 SOR/88-58, as amended.

299 R.S.C. 1985 c. T-19, as amended.

300 R.S.C. 1985 c. E-15, as amended and also the Air Transportation Tax Regulations, C.R.C. 1978 c. 583, as amended.

301 R.S.C. 1985 chapter 33 (1st Supp.), as amended.

302 Entitled "Facilitation", as amended.

1. Introduction

The regulation of air services[303] in Canada must be seen in the context of today's environment of deregulation or, to be more exact, in the spirit of "less regulation and more competition" as reflected in the National Transportation Policy[304] set out in s. 3 of the NTA, 1987 which provides as follows:

> 3. (1) It is hereby declared that a safe, economic efficient and adequate network of viable and effective transportation services making the best use of all available modes, of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all parties are able to compete, both within and among the various modes of transportation,

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303 The former Aeronautics Act, R.S.C. 1985 c. A-2, Part II, defined the jurisdiction of the Canadian Transport Commission (CTC) to be in respect of "commercial air services". That phrase was defined in that Act as meaning "any use of aircraft in or over Canada for hire or reward" and "hire or reward" was defined as "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft". These definitions were the subject of several Court decisions among which were: R. v. Race and Race (1973), 14 C.C.C.(2d) 165 (Ont. Dist. Ct.); R. v. Alexander (1988), 4 W.C.B.(2d) 173 (Nfld S.C.); R. v. Laserich and Altair Leasing Ltd. (1977), 36 C.C.C.(2d) 285; St. Andrews Airways Ltd. v. Anishenineo Piminagan Inc. (1977), 80 D.L.R.(3d) 645. All of these decisions are now of historical interest only as far as concerns the exercise of the powers by the Agency. The new test is based not on the exchange of financial benefits between operator and passenger but rather on the availability of the aircraft to the public. This new test is referred to as the "publicly available" test. It is not defined in the NTA, 1987. None of the cases in which it has been considered (e.g. Her Majesty the Queen in Right of the Province of Manitoba v. The National Transportation Agency of Canada, Federal Court of Appeal, No. A-184-92, dated November 22, 1994) provides any guidance. Rather, it is left to each trier of fact to arrive at a conclusion based on the particular facts of each case. Unfortunately, the current Aeronautics Act, R.S.C. 1985 c. A-2 as amended by R.S.C. 1985 c.33 (1st Supp.), S.C. 1987 c. 34, s. 276, and S.C. 1992 c.4 still retains the "commercial air service" test for the purposes of the regulation by the Minister of those aspects of aviation within the jurisdiction of the Minister. In this respect see subs. 3(1), 7.4(1), 7.5(2) of the Aeronautics Act where the phrase "commercial air service" is used.

304 Some aspects of the National Transportation Policy have been criticized as being at cross purposes. For example, regional development as a goal of transportation policy may conflict with the goal of competition. See Report of the National Transportation Act Review Commission entitled "Competition in Transportation - Policy and Legislation in Review", Volume I, Minister of Supply and Services Canada, Ottawa, 1993, at pp. 169 to 173.

under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,

(a) the national transportation system meets the highest practicable safety standards,

(b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,

(c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,

(d) transportation is recognized as a key to regional economic development and commercial viability of transportation links is balanced with regional economic development objectives in order that the potential economic strengths of each region may be realized,

(e) each carrier or mode of transportation, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

(f) each carrier or mode of transportation, so far as practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty, and

(g) each carrier or mode of transportation, so far as practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute,

(i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved,

> (ii) an undue obstacle to the mobility of persons including those persons who are disabled,
>
> (iii) an undue obstacle to the interchange of commodities between points in Canada, or
>
> (iv) an unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports,
>
> and this Act is enacted in accordance with and for the attainment of so much of those objectives as fall within the purview of subject-matters under the legislative authority of the Parliament of Canada relating to transportation.
>
> (2) The Minister may, with the approval of the Governor-in-Council and on such terms and conditions as the Governor-in-Council may specify, enter into agreements in support of the national transportation policy set out in subsection (1) or in respect of such transportation matters as the Minister considers appropriate.
> (Emphasis added)

The responsibility for achieving the objectives of this policy falls on both the Minister of Transport and the National Transportation Agency ("Agency").

The NTA, 1987 is divided into eight parts, with Parts I, VII and VIII applying to all modes. All other parts are mode-specific.

Sections 2 to 5 are not included in any of the Parts. Section 2 sets out the scope of application of the Act; section 3 contains the National Transportation Policy, and section 4 provides for the interpretation of certain key terms including, the meaning to be

given to the term "public interest"[305] for the guidance of the Agency in its interpretation and application of the Act.

Part I of the NTA, 1987 establishes the Agency, its powers and duties and, as well, refers to the powers and duties of Cabinet and the Minister of Transport. It also contains the dispute-resolution mechanisms of mediation, final offer arbitration and public interest investigation.

Parts II to VI set out mode-specific rules, definitions and requirements.

Part VII establishes procedures for the review of proposed acquisitions of Canadian transportation undertakings, and Part VIII contains general and transitional provisions, including the mandate for annual surveys for the years 1988, 1989, 1990 and 1991 to be carried out by the Agency, as well as for a comprehensive review by independent persons appointed by the Governor Council in 1992.[306]

For present purposes our focus will be Part II (Sections 67 to 109) governing domestic and international air services.

The NTA, 1987 confers on the Agency both a power to make rules, orders and regulations generally[307] and specifically respecting each mode of transport. In the exercise of its powers to make regulations respecting air transportation, with the approval of the Governor-in-Council, the Agency made the Air Transportation Regulations[308] ("ATRs"). The ATRs address various aspects of air services, including, but not limited to, the following subject-areas:

(i) classification of air services;

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305 "Public interest" is defined in s. 4 of the NTA, 1987 as the public interest that is consistent with:
(a) the national transportation policy set out in subs. 3(1) of the NTA, 1987,
(b) policy directions, if any, issued under s. 23 by the Governor-in-Council, and
(c) in respect of air transportation, directions if any, issued by the Minister under s. 86 of the NTA, 1987.

306 See s. 266 and 267, NTA, 1987. It was pursuant to these provisions that the National Transportation Act Review Commission was appointed by Order in Council P.C. 1992-176 dated January 31, 1992.

307 Ibid., ss. 27 and 28.

308 S. 102 in Part II of the NTA, 1987 deals with air transportation.

(ii) establishing of weight groups of aircraft;

(iii) issuance, amendment and cancellation of licences or permits;

(iv) duration and renewal of licences[309];

(v) respecting traffic and tariffs, fares, rates, charges, terms and conditions of carriage for international service;

(vi) filing of documentation by licensees;

(vii) terms and conditions to be included in contracts and arrangements with tour operators, charterers and others;

(viii) respecting tariffs, fares, charges and conditions of carriage of disabled persons; and

(ix) excluding any person from any of the requirements of part II of the NTA, 1987.[310]

Air services in Canada, within the meaning of the NTA, 1987, fall into two broad categories:

(1) Domestic services; and

(2) International services.

These are defined in subsection 67(1) of the NTA, 1987 as follows:

> "Domestic service" means "an air service that is publicly available for the transportation of passengers or goods, or both, between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country". (emphasis added)

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309 In actual practice, however, licences are not normally limited as to duration and therefore there is no need for renewals to be made.

310 The NTA, 1987 also excludes certain air services from the application of Part II. Such services are principally "specialty air services" and they are set out in subs. 68(2) of NTA, 1987 and s. 3 ATRs as amended by SOR/89-306. Other services for exclusion may be prescribed by regulation.

> "International service" means "an air service that is publicly available for the transportation of passengers or goods, or both, between Canada and a point in the territory of another country". (emphasis added)

Therefore, on the basis of these two broad categories, we will discuss below the relevant laws and regulations.

2. Domestic Air Services

Except as discussed below, domestic air services are no longer subjected to regulation.[311]

The NTA, 1987 divides domestic air services into two sub-categories:

(i) those operating between points or to or from any point in the "designated area"[312]; and

(ii) those operating wholly outside the designated area.

This division of air services recognizes the special needs of northern and remote communities, which rely on regular air service as the primary method for passengers and cargo transportation. The air transport market in northern Canada is thin, highly dispersed, and relatively fragile. Thus, although designed to give northern and remote communities the benefits of increased competition and improved productivity due to a reduction in regulatory controls, the essential nature of air service in the north is given protection by allowing a greater degree of economic regulation where this will serve the public interest.

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311 At least in so far as concerns entry or exit from a market (i.e. licensing), levels of service, routes, operating equipment, schedules, tariffs, fares, rates and charges, and points to be served.

312 The "designated area" is defined in subs. 67(1) of the NTA, 1987. Basically, it covers northern and remote areas of Canada which are generally beyond the northern limit of regular road access. Included in the designated area would be the northern tip of Newfoundland; all of Labrador; most of the northern regions of Quebec, Ontario and Manitoba; the northern halves of Saskatchewan, Alberta and British Columbia; and, of course, all of the Northwest Territories and Yukon.

This will ensure that essential air services to small communities in northern and remote areas are not lost due to market fragmentation.[313]

We will be discussing both categories together but we will highlight the differences when and where appropriate. Also, so as to facilitate discussion, we will be using the term "northern air services" to mean domestic air services operated between points or to or from any point in the designated area. Domestic air services wholly outside the designated area will be referred to as "southern air services". Moreover, we will be referring to the designated area as being "northern Canada" and the areas outside the designated area as being "southern Canada".

(a) Market Entry

The NTA, 1987[314] prohibits the operation of a domestic air service by any person unless the person, in respect of that service:

(i) holds a domestic licence[315];

(ii) holds a Canadian aviation document[316]; and

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313 See Transport Canada Publication, TP7749 "Freedom to Move: The Legislation - Overview of National Transportation Legislation", 1986 at p. 6.

314 NTA, 1987, subs. 71(1).

315 NTA, 1987, subs. 67(1) defines "domestic licence" as a licence issued under the NTA, 1987, Part II that permits the licensee to operate a domestic service.

316 "Canadian aviation document" has the same meaning as in the Aeronautics Act where it is defined in subs. 3(1) as:

> Any licence, permit, accreditation, certificate or other document issued by the Minister under Part I to or with respect to any person or in respect of any aeronautical product, aerodrome, facility or service.

More specifically, the reference is to the Operating Certificate issued by the Minister pursuant to the Air Regulations s. 700 and Air Navigation Orders Series VII Nos. 2, 3 and 6, which certifies that an air carrier is adequately equipped and able to conduct a safe operation as an air carrier.

(iii) has prescribed liability insurance[317] coverage.

This is the basic prohibition against operating a domestic air service without the appropriate authorizations and qualifications. This does not mean necessarily that, an air carrier meeting these requirements, is thereby authorized to operate an air service between any two points located anywhere in Canada. An air carrier operating rotating-wing aircraft (i.e. helicopters) that holds a domestic licence is not bound by the northern Canada-southern Canada division.[318] An air carrier operating fixed-wing aircraft, on the other hand, who wants to operate anywhere in Canada must hold a domestic licence authorizing air services in southern Canada and a domestic licence authorizing air services in northern Canada.[319]

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317 "Prescribed liability insurance" means the liability insurance as prescribed in the ATRs ss. 6 to 8. The ATRs basically provide for two types of liability insurance: first, there is the liability insurance to cover risks of injury to or death of passengers; and, second, there is the public liability insurance to cover the legal liability of an air carrier arising from the air carrier's operation, ownership or possession of an aircraft for injury to or, death of, persons other than the air carrier's passengers, aircrew or employees, and for damage to property other than property in the air carrier's charge. The amount of coverage required is based on formulae that take into account the number of passenger seats (in the case of passenger liability insurance) or the Maximum Certificated Take-Off Weight of the aircraft (in the case of public liability insurance). A certificate of insurance in the form set out in Schedule I to the ATRs must be filed by the applicant or licensee. Also, the prescribed insurance coverage must be kept in force during the whole time that the licensee is in operation and the licensee must notify the Agency of any changes in the coverage that causes the licensee not to have the prescribed coverage. (ATRs s. 8 and NTA, 1987, subs. 98(a)).

318 This would seem to be the intent although the wording of the provision (i.e. subs. 71(2) of NTA, 1987) leaves a lot to be desired by way of clarity of intent. Nevertheless, whether fixed-wing or rotating-wing, the Canadian aviation document and liability insurance are required for all domestic air services whether northern or southern.

319 If an air carrier that is licensed to operate an air service in northern Canada applies to the Agency to operate also an air service in southern Canada, a domestic licence for the air service in southern Canada will, more than likely, be issued automatically by the Agency since the air carrier already meets all of the requirements. In this respect, s. 39 of the NTA, 1987 enables the Agency to grant a domestic licence for southern Canada to an air carrier who qualifies for or already holds a domestic licence for northern Canada even if the air carrier has not applied for it.

On the other hand, in the case of an air carrier holding a licence for an air service in southern Canada wishing to operate also in northern Canada, the process contemplated under subs. 72(2) of the NTA, 1987 removes any automaticity from the issuance of the licence for which application was made.

The important point to remember is that the difference, between the requirements to be met for a domestic licence for northern Canada and a domestic licence for southern Canada, goes to the needs of the community and not to the qualities or qualifications of the air carrier. Air carriers operating in northern Canada must meet the same citizenship, insurance and Canadian aviation document requirements as air carriers operating in southern Canada.

The NTA, 1987 has several requirements for ownership and control of an air carrier. Canada, like most other nations has determined that air transportation plays a vital role in our society. In light of this policy goal, Canada has decided that it should be, generally speaking, Canadians who own and control this industry. In pursuance of this policy objective, the NTA, 1987 requires that for an airline to be considered "Canadian" it must be at least 75% owned by Canadians, and further that, regardless of this large percentage of ownership, such airline must also be "controlled in fact" by Canadians.[320]

In reviewing the Canadian ownership status of an air carrier, the Agency considers various factors in making a control in fact determination. In this regard, we refer to the Decision of the Agency in the AMR/CAI Case[321] where the Agency stated:

> There is no one standard definition of control in fact but generally, it can be viewed as the ongoing power or ability, whether exercised or not,

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320 For a discussion of the concept of corporate control generally see the decision of the Exchequer Court of Canada in Buckerfield's Limited et.al. v. M.N.R., 64 DTC 5301, and the decision of the English House of Lords in De Beers Consolidated Mines Ltd. v. Howe, [1960] A.C. 455. For a better understanding of the application of the concept of "Canadian" by the CTC and later the National Transportation Agency see the Decisions and Orders relating to: Minerve Canada (Air Transport Committee Decision No. 10708, dated May 19, 1987; NTA Decision No. 148-A-1989, dated March 21, 1989; NTA Decision No. 618-A-1989, dated December 6, 1989; and, NTA Order No. 1989-A-394, dated December 6, 1989.) and, the Decision IN THE MATTER OF the review by the National Transportation Agency of the proposed acquisition of an interest in Canadian Airlines International Ltd. carrying on business under the firm name and style of Canadian Airlines International or Canadian by Aurora Investments, Inc., a wholly-owned subsidiary of AMR Corporation; and, IN THE MATTER OF the review by the National Transportation Agency of the proposed acquisition of an interest in Air Atlantic Ltd., Calm Air International Ltd. and Inter-Canadien (1991) Inc. by Canadian Airlines International Ltd. carrying on business under the firm name and style of Canadian Airlines International or Canadian, (Decision No. 297-A-1993 dated May 27, 1993)(hereinafter "AMR/CAI Decision").

321 Supra note 320.

> to determine or decide the strategic decision-making activities of an enterprise. It also can be viewed as the ability to manage and run the day-to-day operations of an enterprise. Minority shareholders and their designated directors normally have the ability to influence a company as do others such as bankers and employees. The influence, which can be exercised either positively or negatively by way of veto rights, needs to be dominant or determining, however, for it to translate into control in fact.
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> Every control in fact review is unique because circumstances invariably are unique. For this reason, the Agency, like many others who are charged with making control in fact rulings, does not have standard and specified criteria which are used when making such determinations. When determining where control in fact lies, the Agency carefully examines all actual and proposed business and other relationships between the various shareholders and between the shareholders and the company whose ownership is under review. All actual and prosed operational, managerial and financial relationships are considered. The intent and ability of individual shareholders to influence and control are considered. Agreements, such as shareholder agreements and commercial contracts between the shareholders and the company are of special importance. Substance as opposed to form is emphasized and nothing is excluded from review.[322] (Emphasis added).

Also, in considering the economic interest of the various shareholders and the potential influence of each such shareholder on the affairs of the air carrier, the Agency indicated that as economic interest of a shareholder, as reflected in ownership of voting and non-voting shares, increases above 25%, such shareholders become of increasing importance in determining where control in fact lies. The greater the economic interest, the greater that likelihood that the owner of that economic interest will be able to exercise control in fact. This matter becomes of major importance as the economic interest reaches and exceeds 50%.[323]

The requirement for the air carrier to be "controlled in fact" by Canadians gives rise to the question of whether this requirement is recursive. In other words, does the person who controls the person who controls the air carrier also have to be Canadian? In

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322 AMR/CAI Decision, at p. 17.

323 Ibid., at p. 18.

the AMR/CAI Decision, the Agency would seem to have responded in the affirmative to this question. However, no indication was given by the Agency of how far one must go - should one look behind each controller ad infinitum?[324]

The NTA, 1987 does not specify that the airline must be a corporation that was created under the laws of Canada or of a Canadian Province. In theory, at least, one could have an airline that was created under the laws of a foreign State but be considered "Canadian" for purposes of the NTA, 1987 if the requirements of subsection 67(1) of the NTA, 1987 are met regarding ownership and control in fact.

Again, at least in theory, one could have the situation where Canadian investors acquire seventy-five per cent or more of the voting shares and control in fact of an airline created under the laws of a foreign State, and such airline then qualifies as "Canadian" within the meaning of subsection 67(1) of the NTA, 1987. In practice, however, should this happen, the requirements under the Aeronautics Act and Air Regulations would come into play and prevent such airline from operating any of its aircraft in Canada or to register them in Canada since it would not meet the criteria required for it to be the registered owner of a Canadian aircraft (unless the Governor-in-Council will have provided for an exemption or, an exemption is obtained from the Minister of Transport, from those regulatory requirements).[325]

An applicant for a domestic licence must establish in his application[326], to the satisfaction of the Agency, that the applicant

(i) is a Canadian;[327]

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324 Ibid., at p. 25.

325 See subs. 4.9(b) and subs. 5.9(1) and (2) of the Aeronautics Act, R.S.C., 1985, c. A-2 and c. 33 (1st Supp.), as amended and s. 700 et seq. of the Air Regulations, C.R.C. 1978, c. 2, as amended, as well as the Registration Regulations referred in supra note 130.

326 This is done through the submission of documentary evidence with the application for the domestic licence (ATRs, subs. 10(1)).

327 "Canadian" is defined in subs. 67(1) of NTA, 1987. See discussion of the manner in which the Agency has applied this requirement, supra note 320.

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence; and

(iii) has prescribed liability insurance or evidence of insurability.[328]

The requirements for obtaining a domestic licence for an air service in southern Canada are set out in subsection 72(1) of the NTA, 1987. These requirements are referred to as the "fit, willing and able" test. This test replaces the former test which required a finding by the Canadian Transport Commission (the predecessor to the Agency), that the air service for which the application was made, was required by the "present and future public convenience and necessity".[329]

Thus, the process for obtaining a licence to operate an air service in southern Canada is relatively simple and if an applicant meets the basic requirements, the Agency is required to issue the licence.

In the case of an application for the operation of a domestic air service using fixed-wing aircraft on a northern air service, the NTA, 1987[330] allows for objections to be made to the issuance of the licence. Such objections may be made by an interested community, person or entity (e.g. another air carrier). If an objection is made, the burden is on the objector (or intervenor) to the application, to satisfy the Agency of the validity of the grounds for the objection. If, notwithstanding the objection, the Agency is satisfied that the issuance of the licence would not lead to a significant decrease or instability in

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328 Although "evidence of insurability" is sufficient to satisfy the prescribed liability insurance requirements for the issuance of a licence, the licensee cannot commence operating the air service for which the applicant has been licensed until the applicant provides to the Agency a certificate of insurance in the form set out in Schedule I to the ATRs. See NTA, 1987, subs. 98(a) and ATRs s. 8 which require that the certificate of insurance be filed with the Agency.

329 The "public convenience and necessity" test had been introduced for the first time with the enactment of the Transport Act, 1938 and carried forward subsequently into the Aeronautics Act until the coming into force of the NTA, 1987 which repealed Part II of the Aeronautics Act containing that provision. (see R.S.C. 1985 chapter A-2, subs. 21(6) and S.C. 1987 c. 34, s. 276.)

330 Para. 72(2)(b) of the NTA, 1987.

the level of domestic service provided, the Agency must issue the licence.[331] Of course, the applicant must meet all of the other requirements as to citizenship, insurance and Canadian aviation documentation.

In current practice, an application for a domestic licence for an air service in northern Canada is subjected to a two-step process by the Agency. First, an applicant must submit a proposal to the Agency, setting out the nature of the service that is contemplated, and request the issuance of a licence. The Agency then gives public notice of the proposed air service. If no objections are received by the Agency, the Agency issues a favourable decision to the applicant in which the applicant is informed that a licence will be issued by the Agency, subject to the applicant meeting all of the other requirements regarding citizenship, insurance and Canadian aviation documentation.[332] Usually the applicant is given one year from the date of the favourable decision to satisfy the Agency that it meets all of such other requirements. Failure by the applicant to do so will result in the decision being rescinded without further notice to the applicant, effective upon the expiry of the said period.

This two-step process serves to benefit the applicants for a northern licence in a significant way because the applicants avoid many costly investments until assured of being issued a licence. The initial proposal for an air service is examined in the context of the needs of the community to be served and not as to the qualities or qualifications of the applicant. At the second step, the applicant must then satisfy the Agency that he is qualified and meets the conditions set out in the legislation.

All licences for a northern air service are subject to the terms and conditions set out in the ATRs,[333] unless the Agency specifically exempts the air carrier. Moreover,

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331 Subs. 72(3), NTA, 1987, gives the Agency 120 days from the date of the application within which to decide on the objection, unless the applicant for the licence agrees to an extension.

332 A favourable decision does not permit the commencement of an air service but merely informs the applicant to proceed to obtain all of the other requirements.

333 The licence conditions prescribed are to be found in ss. 18 to 21 inclusive of the ATRs. Licence conditions are prescribed in respect of all licences for an air service other than a domestic service operated wholly outside the designated area. However, not all of the terms and conditions apply to all licences. For example, s. 21 of the ATRs only applies to class 4 domestic licences.

upon the issuance of a licence for a northern air service, or at any time thereafter, the Agency may make the licence subject to such other terms and conditions that the Agency deems appropriate in the public interest. This could include terms and conditions respecting routes to be followed, points or areas to be served, size and type of aircraft to be operated, schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and goods.[334]

The legislation also contemplates situations where it may be considered necessary or advisable in the public interest to issue a domestic licence to a person who is not a Canadian[335] (as defined). In such cases the Minister, and not the Agency, is empowered to make an order exempting such person from that requirement.[336]

The northern air services (but not the southern air services) that are permitted to be operated under a domestic licence, are classed into several different classes as follows:

(i) Class 1: Scheduled domestic service, being a service that is required to provide transportation and that serves points in accordance with a service schedule at a toll per unit of traffic;

(ii) Class 2: Regular Specific Point domestic service, being a service that is required to provide transportation to the extent to which facilities are available and that services points in accordance with a service schedule at a toll per unit of traffic;

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334 NTA, 1987, subs. 72(4). Because "goods" is defined in s. 4 of the NTA, 1987 as including mail, any terms and conditions imposed that would affect mail are subject to the Canada Post Corporation Act.

335 Such a person would not be qualified under para. 72(1)(a) or subpara. 72(2)(a)(i) of NTA, 1987 to obtain a licence.

336 NTA, 1987, s. 73. This section also allows the Minister to include in the exemption order such terms and conditions as the Minister may specify. It should be noted that this power of the Minister to exempt an air carrier from the requirement to be Canadian may only be exercised in respect of a domestic licence. By virtue of subs. 70(1), the Agency may also grant certain exemptions but not with respect to any provision that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage. The Agency's power to grant exemptions is not limited to domestic licences only. (NTA, 1987, subs. 70(2)).

(iii) Class 3: Specific Point domestic service, being a service that, consistent with traffic requirements and operating conditions, offers transportation and serves points at a toll per unit of traffic;

(iv) Class 4: Charter domestic service, being a service that offers transportation on reasonable demand at a toll for the charter of an entire aircraft with aircrew; and

(v) Class 4G: General domestic service, being a service that does not belong to any of the classes described in paragraphs (i) to (iv).[337]

Both the air carrier and the domestic licence that the air carrier holds are given the same Class as the air service which the air carrier operates. Thus, a Class 1 air carrier holds a Class 1 domestic licence and operates a Class 1 domestic service. The air service classification system is a remnant from the pre-deregulation legislation and this is why it is limited in application to areas or services that are still subject to some regulation.[338]

In recognition of the fact that the ATRs impose, and that the Agency may impose, terms and conditions on a domestic licence for a northern air service, (but not for a southern air service) the aircraft that are authorized to be operated under a licence are grouped on the basis of the Maximum Certificated Take-Off Weight (or "MCTOW"). These Groups vary from Group A (grouping aircraft having a MCTOW not greater than 4,300 pounds) to Group H (grouping aircraft having a MCTOW greater than 350,000 pounds).[339]

Both the air carrier and the domestic licence held by that air carrier are allocated the same Group as the air service. Thus, an air carrier operating an air service with an aircraft in Group A is a Group A air carrier holding a Group A licence.

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337 Ibid., subs. 102(1) and ATRs subs. 4(1). No distinction is made as to whether air services are charter or unit toll in southern Canada.

338 See Aeronautics Act, R.S.C. 1985 c. A-2, para. 18(1)(a) and Air Carrier Regulations, C.R.C. 1978 c. 3, s. 3.

339 See ATRs, subs. 5(1). One should note that the ATRs do not establish groups for rotating-wing aircraft. This is because rotating-wing aircraft operating between points or to or from any point in the designated area are treated in the same way as rotating-wing aircraft operating outside the designated area. The former Air Carrier Regulations, C.R.C. 1978, c. 3, para. 4(1)(b) established groups for rotating-wing aircraft.

The NTA, 1987 states unequivocally that a domestic licence is not transferable.[340] What this means is that only the person, to whom a domestic licence is issued, is permitted to operate a domestic air service under authority of that licence. Thus, for example, where a person purchases shares of a Canadian air carrier holding a domestic licence and thereby acquires substantial ownership and control[341] of that air carrier, the air carrier can continue to operate under the same licence, since a change in control through a share acquisition, does not affect the continued existence of the original licensee as a separate legal entity.[342] Where, however, the change in substantial ownership or control results in the air carrier no longer meeting the citizenship requirements (i.e. the air carrier is no longer a "Canadian") because substantial ownership or control is acquired by a person that does not qualify to be a "Canadian", that air carrier's licence ceases to be valid. In the case of a domestic licence only, if the Minister considers it necessary or advisable in the public interest, the Minister may grant an exemption from that requirement.[343]

Where a person acquires the assets of an air carrier (but not the shares) as a going concern such that, after the acquisition, all or subsequently all of the assets are held or controlled, directly or indirectly by the purchaser, it is submitted that the purchaser would have to obtain a licence from the Agency in order to continue to operate the air service. Although in such a case the air carrier whose assets were purchased would continue to exist as a legal entity, its licence would become invalid because, inter alia, it would no

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340 S. 74.

341 "Control" in the context of the NTA, 1987 refers to control in fact.

342 This is a different consideration than the question of acquisition of a Canadian transportation undertaking to which Part VII of the NTA, 1987 applies where the consideration is its effect on the public interest as defined in s. 4 of the NTA, 1987. Moreover, this is also different from any considerations under the Competition Act, R.S.C. 1985c.C-34, as amended.

343 See subs. 67(1) of the NTA, 1987, which defines "Canadian"; subs. 70(2) which prohibits the Agency from granting an exemption to the citizenship requirements; and s. 73 which empowers the Minister to grant such exemption where he considers it necessary or advisable in the public interest, but only in respect of domestic licences. Section 73 is couched in terms of the issuance of a licence but I believe that it could also apply in the case of the retention of the validity of an already existing licence.

longer meet the requirements for its issuance, especially the requirement that it hold a Canadian aviation document issued by the Minister. In such a case, the Operating Certificate, certifying that the air carrier is adequately equipped and able to conduct a safe operation as an air carrier, would lapse, since the air carrier would no longer be "adequately equipped", once all or substantially all its assets have been purchased by another person[344]. Thus, the Agency would be in a position to suspend or cancel the licence of the air carrier that was purchased, on the basis that the air carrier ceased to have the qualifications necessary for the issuance of the licence.[345]

If the purchaser of the assets of a Canadian air carrier operating a domestic service, does not meet the citizenship requirements established under the NTA, 1987, the Agency would not be in a position to issue a licence to such purchaser, unless the Minister, by order, exempts the purchaser from such requirement pursuant to section 73 of the NTA, 1987.

In the event of an amalgamation of two or more air carriers, the rights and duties of each of the amalgamating air carriers continue to subsist after the amalgamation.[346] That being the case, it is submitted that the validity of each of the licences held by each of the amalgamating air carriers would be maintained and could be relied upon by the amalgamated corporation to carry on the air services authorized under each of such

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344 This would be so unless the purchaser enters into contractual arrangements with the air carrier whereby the latter would continue to have the legal custody and control of the aircraft and meet all of the other organizational requirements imposed by the Airlines Regulations, Air Navigation Orders, and Operating Certificate and operations specifications.

345 In the case of a domestic licence see para. 75(1)(a) of the NTA, 1987.

346 See Dickson, J., The Queen v. Black and Decker Manu. Co. [1975] 1 S.C.R. 411, where he stated at p. 417:

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act [i.e. the Canada Corporations Act, R.S.C. 1970 c. C-32], in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon amalgamation under the Canada Corporations Act, no "new" company is created and no "old" company is extinguished.

See also Witco Chemical Company, Canada, Limited v. The Corporation of the Town of Oakville, [1975] 1 S.C.R. 273.

licences. In other words, the issue of non-transferability of a licence would not, in our view, arise under an amalgamation - at least insofar as concerns the amalgamation of corporations under the Canada Corporations Act and, we believe, also under the Canada Business Corporations Act[347].

In the case of a simple change of name by an air carrier named on a domestic licence for northern air services[348], it is submitted that all that would be required to meet the letter and spirit of the legislation, would be an application to the Agency requesting that either the existing licence be re-issued in the new name, or that the Agency grant an exemption under subsection 70(1) of the NTA, 1987[349]. This is seen as a purely administrative process, and the normal practice is for an application to be made to the Agency requesting a change of name on the licence. The Agency then verifies to satisfy itself that it was indeed only a change of name and then issues a new licence with the new name.

On a purely practical level, given that an applicant for a domestic licence to operate an air service in southern Canada is assured of being issued a licence if he meets the requirements pertaining to citizenship, insurability and Canadian aviation documents, the non-transferability of a licence would more than likely only become problematical in the case of northern air services and international air services.

Where a receiver or manager has been appointed by any court in Canada for the property of an air carrier or, has been appointed to manage or operate an air carrier, the Agency still retains its jurisdiction over that air carrier and the receiver or manager. The receiver or manager is bound to manage or operate the air carrier in accordance with the

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347 R.S.C. 1985 c. C-44, ss. 181-186.

348 The NTA, 1987 does not impose any restriction on an air carrier operating under a domestic licence for southern air services in respect of the name and style that it may use or advertise its services. However, restrictions may exist under other Federal statutes intended to protect corporate entities, and the Competition Act.

349 The exemption would be required because subs. 18(c) of the ATRs prohibits a licensee from operating an air service under a name and style different from that appearing on its licence.

NTA, 1987 and with the orders, regulations and directions of the Agency, notwithstanding the fact that he has been appointed by, or acts under, the authority of any court.[350]

Where by reason of insolvency, sale under mortgage or other cause, an air carrier or portion thereof is operated, managed or held, otherwise than by the air carrier, the Agency may make any order it deems proper for adapting and applying the provisions of the NTA, 1987 to the case.[351]

(b) Market Exit

Although market entry requirements providing for public notices and objections have been retained only for northern air services applications, some market exit requirements have been retained for both northern and southern air services.

If an air carrier that is operating a domestic service to or from a point not less frequently than once a week, during any period of six months or more, proposes to discontinue this service or, reduce the frequency to less than one flight per week, it must give a notice [352] of its intention. Such air carrier is prohibited from implementing the proposal until the expiration of 120 days after the notice is given.[353] Upon the expiration of the waiting period, if no complaint against the proposal has been received by the Agency, the proposal can go into effect.

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350 Ibid., subs. 38(1).

351 Ibid., subs. 38(2).

352 S. 14 of the ATRs requires that the notice be given to: the Agency; the Minister of Transport; the Minister responsible for transportation in the Province where the area to be affected by the proposal is located or, Yukon or Northwest Territories, if the area is located there; the holders of domestic licences operating in the area to be affected by the proposal; and to residents in that same area. The form and manner of giving notice is also specified in s. 14 of the ATRs.

353 S. 76 of the NTA, 1987. The 120-day waiting period for implementation of the proposal to reduce or discontinue services may be shortened by order of the Agency, on application being made by the licensee. In its consideration whether to shorten the period, the Agency must have regard to the requirements of NTA, 1987, s. 78 such as, adequacy of alternative modes of public transportation available at or in the vicinity of the point concerned, etc.

If, however, the Agency has received a complaint in writing from any person and the Agency finds that a licensee has not complied with the requirements set out above, the Agency, if it considers it practicable, may order or direct the licensee to re-instate the service for a period of up to 120 days, at a frequency of at least one flight per week, or at such lesser frequency as the Agency may specify.[354]

The Agency may exempt[355] a person from the requirements of giving notice, but in considering whether to do so, the Agency must have regard to several factors, namely, the adequacy of alternative modes of public transportation available at or in the vicinity of the point in question, other means by which the point is or is likely to be served, and the particular circumstances of the licensee that proposes to reduce or discontinue the service.[356]

(c) Domestic Service Tariffs

Prior to the entry into force of the NTA, 1987, all tariffs[357] had to be filed with the Agency before they could go into effect. Under the NTA, 1987 the filing requirement has been abolished. However, the tariffs are now required to be published or displayed and made available for public inspection. Moreover, the tariffs must identify specifically the basic fare[358] between all points for which the domestic service is offered.[359] A

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354 Ibid., s. 77.

355 Ibid., s. 70 provides for the power for the Agency to grant exemptions.

356 Ibid., ss. 70 and 78.

357 Ibid., s. 83. Also, "tariff" is defined in subs. 67(1) as a "schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and services incidental thereto".

358 "basic fare" is defined in subs. 67(1) of the NTA, 1987 as:

> (a) subject to paragraph (b), the fare in the tariff of the holder of a domestic licence that is not a premium fare, has no restrictions in respect thereof and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or

record of the tariffs must be retained for a period of not less than three years after they have ceased to have effect.[360] The tariffs are required to contain the information prescribed in the ATRs relating to, inter alia: prepayment requirements; terms and conditions generally governing the tariff; special terms and conditions applicable to a particular toll; terms and conditions of carriage of persons and goods (including any limits or exclusions of liability); tolls and points between which they apply; and types of passenger fares.[361]

(b) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week, or both, of travel, the highest of those fares;" (Emphasis added)

a "premium fare" is defined in the same subsection as:

> any fare in the tariff of the holder of a domestic licence that is higher than the basic fare for air transportation between the same points and that provides for a superior level of passenger comfort or service;

359 S. 83 of the NTA, 1987. The same section also requires the holder of a domestic licence to provide copies of tariffs upon request and the fee to be charged therefor.

360 Ibid.

361 Ibid. s. 84, and ATRs ss. 105 to 107 inclusive. According to the Agency, today's complex fare structures can be simplified into three major fare types:

> Business fares, the highest of the three, have largely replaced the first-class fare in domestic markets, offering passengers additional convenience and on-board amenities. Business fares are generally available on inter-city and commuter routes, and are priced about 12-15 per cent above the regular economy fare.
>
> The economy or basic fare is the standard unrestricted fare offered on each route. This fare is commonly used by the "must-go" traveller who is unable or unwilling to meet the requirements attached to various discount fares.
>
> Discount fares are priced at various levels below the economy fare (reductions range up to 70 per cent) and are available on almost all routes; however, these fares are restricted both in number and by other "fences" such as requirements for advance purchase, minimum or maximum stay, no-refundability, or off-peak travel. The extent of restriction generally varies directly with the size of the discount. In 1989, almost two out of every three passengers continued to fly on discount fares.
>
> The supply of discount fares is increasingly controlled by sophisticated yield management systems which are linked to carriers' computer reservation systems and designed to improve airline revenues. Ticket sales are continuously monitored and adjustments made to the availability and size of discounts in order to fill each flight with the optimum number of passengers. Yield management systems operate year-round whereas other sources of discounts such as seat sales tend to be seasonal in nature.

Although the ATRs prescribe the nature of the information that must be included in the tariffs, the substantive aspects of that information is left up to each licence holder. For example, the tariffs must contain the air carrier's limits of liability respecting passengers and goods, but the amount of those limits is left up to the air carrier to establish, bearing in mind their enforceability under Canadian domestic law. For example, no limits are to be found in any of the domestic tariffs for bodily injury to or death of a passenger.

Furthermore, an air carrier is prohibited from imposing any fare, rate or charge other than that which has been set out in the tariff that was published or displayed and is in effect.[362]

Increases in the basic fare charged by an air carrier are not subjected to Agency scrutiny, unless a written complaint is made by any person to the Agency.[363] If such a complaint is made with respect to a basic fare increase imposed by an air carrier operating a northern air service, and the Agency finds[364] that the increase was unreasonable, the Agency may disallow the increase or direct the air carrier to reduce the increase by such amounts and for such periods as the Agency considers reasonable in the circumstances.[365]

In the case of a complaint made against a basic fare increase imposed by an air carrier operating under a licence for a southern air service, however, the Agency must not only find that the increase was unreasonable but also that there is no other alternative,

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(See Annual Review of the National Transportation Agency of Canada, 1989, Minister of Supply and Services Canada 1990, at p. 41.)

362 See subs. 83(2), NTA, 1987. This prohibition ensures transparency in the tariffs and acts to protect the consumer from the day to day whims of an air carrier.

363 Ibid., s. 80(1) and (2).

364 Ibid., s. 81 provides that unless otherwise agreed between the complainant and the licensee, the Agency must give a decision within 120 days of reception of complaint.

365 Ibid., subs. 80(2).

effective, adequate and competitive transportation service available.[366] If the Agency does so find, it can order or direct the same remedy as described above in the case of a northern air service.

In addition, in the case of a northern air service only, a complaint may also be made with respect to the basic fare level (as opposed to an increase).[367] In such a case, if the Agency finds the basic fare level to be unreasonable, it may direct that it be reduced by such amounts as the Agency considers reasonable in the circumstances.[368]

In both situations, if the Agency finds it practicable, it may direct the air carrier to make a refund, with interest, to those persons whom the Agency determines to have been overcharged. The Agency specifies the amount of the refund.[369]

In essence, the power of the Agency to intervene in basic fares exists on all northern routes but only on monopoly routes in southern Canada.

Where a holder of a domestic licence and another person (read: passenger or shipper) enter into a contract for transportation services, and they agree that the terms and conditions of the contract are to be kept confidential, those provisions of the NTA, 1987 and ATRs dealing with fares, rates, charges or terms and conditions of carriage do not apply to that relationship.[370] The concept of a confidential contract was introduced into the NTA, 1987 as another means of encouraging competition. According to the Agency, confidential contracting was the principal competitive mechanism used by shippers and railways in 1988.[371] This mechanism is available for both cargo or passenger carriage

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366 Ibid., subs. 80(1). The reference to "other alternative, effective, adequate and competitive transportation service" would include other modes of transport and not just air transport.

367 Ibid., subs. 80(2).

368 Ibid.

369 Ibid., subs. 80(1) and (2).

370 Ibid., s. 79. The licensee must retain a copy of each such confidential contract for a period of at least three years after it has ceased to have effect.

371 Since their introduction in 1988, rail confidential contracts have been used to enhance the competitive position of railways. There were 6,183 confidential contracts filed with the Agency in 1993. see National Transportation Agency, Annual Review, 1993 entitled "Transportation Trends and Developments: An

at the domestic level only. Since tariffs for international scheduled services are still subjected to a form of regulatory control pursuant to the applicable bilateral air services agreements, it would be difficult to defend or justify a similar arrangement of confidential contracting under those circumstances.

3. International Air Services

(a) Scheduled International Air Services

In addition to the laws and regulations found in Canadian domestic legislation relating to aeronautics generally and air services in particular, Bilateral Air Services Agreements (or "BASAs") are a means of regulating the air service relationships between the two States that are parties to the BASA.[372]

In concluding a BASA, each State undertakes to identify the "Aeronautical Authorities" designated by it for the implementation of the rights and obligations established under the BASA.[373]

In the Canadian context, the "Aeronautical Authorities" named have been the Minister and, in order of their appearance and disappearance from the scene, the Air

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Economic Perspective", at p. 227. Confidential contracts have not been used as extensively in the air mode and are thus not a significant competition tool yet.

372 The effect of a BASA is to regulate competition between or among the air carriers operating the air services covered by it.

373 For example, in the Air Transport Agreement between the Government of Canada and the Government of the French Republic (Paris, June 15, 1976), Article 1(b) defines "Aeronautical Authorities" as meaning:

> ... in the case of France, the Director General of Civil Aviation and all persons or agencies empowered to perform the functions now exercised by the said Director or analogous functions and, in the case of Canada, the Minister of Transport, the Canadian Transport Commission and all persons or agencies empowered to perform the functions now exercised by the said Minister and the said Commission or analogous functions.
>
> (See CTS 1977 No. 15. Amended December 21, 1982, CTS 1982 No. 7).

Transport Board,[374] the Canadian Transport Commission[375] and the National Transportation Agency ("Agency")[376] - depending on which entity was existing at the time that a particular BASA was entered into.

This duality has arisen from the division of responsibilities over aeronautics under the Federal legislative scheme. Since a typical BASA contains some elements which fall under the jurisdiction of the Minister and others which fall under the jurisdiction of the Agency, full and efficient implementation could only be effected with both entities participating to the extent of their respective jurisdictions.

The NTA, 1987 specifically addresses the role of the Agency when it is named as the Aeronautical Authority for Canada and requires the Agency to act as such and to perform the duty or function in accordance with the designation.[377] The Agency is also required to perform any duty or function of the Minister pursuant to any such agreement, convention or arrangement if the Minister directs the Agency to do so.[378]

Moreover, except as the Minister may otherwise direct, the Agency must exercise its powers in relation to international air services in accordance with any international

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374 The Air Transport Board was created in 1944 through an amendment to the Aeronautics Act and was abolished by the National Transportation Act, 1967.

375 The Canadian Transport Commission was created by the National Transportation Act, 1967 and abolished by the NTA, 1987.

376 The National Transportation Agency was created by the NTA, 1987 and continues to exist.

377 NTA, 1987, subs. 86(4). As Gertler notes:

> Since the implementation of the agreements is a matter to be taken care of by respective governments in conformity with their constitutions and other laws, it would appear to be the responsibility of each of the two contracting parties to ensure that the body named as the aeronautical authority in a bilateral air agreement will also possess all necessary legal powers to discharge the functions arising from the bilateral agreements.

(See Gertler, Z. Joseph, Bilateral Air Transport Agreements: Non-Bermuda Reflections, [1976] 42 JALC 779, at p. 794.

378 Ibid., subs. 86(4). It should be noted however, that the Minister cannot direct the Agency to do anything that is not within the Agency's jurisdiction pursuant to the NTA, 1987. For example, the Agency cannot be directed to do anything governed by the Aeronautics Act (see para. 86(2)(b)).

agreement, convention or arrangement relating to civil aviation to which Canada is a party.[379]

The NTA, 1987 introduced for the first time a power for the Minister of Transport to issue directions to the Agency in the specific circumstances outlined in subsection 86(1) of the NTA, 1987. The background to some of the specific circumstances for which a direction may be issued by the Minister relates to acts of other States that in the past had a negative and discriminatory impact on Canadian air carriers. For this reason, a power to issue directions to the Agency was included for the purpose of enforcing Canada's rights under international agreements, or responding to acts, policies or practices of a Contracting Party that adversely affect or, lead to adverse effects on Canadian international civil aviation services.[380] In such a case, however, the directions can only be issued with the approval of the Governor-in-Council on the recommendation of the Minister of Transport and the Minister of Foreign Affairs.[381]

The other circumstances in respect of which the Minister may issue a direction to the Agency are: in the interest of international aviation safety or security; in connection with the implementation or administration of an international agreement; in the interest of international comity or reciprocity; and in connection with any other matter concerning civil aviation as it affects the public interest.[382]

The Minister may issue directions in the interest of international civil aviation safety and security, and in connection with the implementation or administration of an international agreement to which Canada is a party, without the need to have Governor-in-Council approval or a recommendation from the Minister of Foreign Affairs.[383]

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379 Ibid., s. 69. The substance of this provision was formerly found in s. 24 of the Aeronautics Act, R.S.C. 1985, c. A-2.

380 Ibid., para. 86(1)(d).

381 Ibid., subs. 86(3).

382 Ibid., paras. 86(1)(a), (b), (c) and (e).

383 Ibid., subs. 86(3).

The directions may relate to: the persons to whom licences are or are not to be issued; the terms and conditions of such licences; variation of such terms and conditions; the suspension or termination of such licences; and any other matter concerning international service not governed by the Aeronautics Act.[384]

Once a BASA is in force, it is the Minister who selects and designates a Canadian air carrier to operate the routes provided for Canada under the agreement.[385] Previously, there was no clear legislative provision to be found that conferred specifically on the Minister the authority to designate an air carrier under a BASA. The relevant provision of the NTA, 1987 is subsection 89(1), which provides as follows:

> The Minister may, in writing, designate any Canadian as being eligible to hold a scheduled international licence and while the designation remains in force, the Canadian shall so remain eligible.

Once the Minister has designated the Canadian air carrier and the Agency has been informed of the designation, the Agency is required to issue a scheduled international licence,[386] if the air carrier:

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384 Ibid., subs. 86(2). This ensures a distinction between the Minister's powers under the NTA, 1987 and the Aeronautics Act.

385 This particular point was clarified by the NTA, 1987, subs. 89(1). Technically speaking the actual act of "designation" is done by the Minister of Foreign Affairs. The Minister of Transport selects the air carrier and requests the Minister of Foreign Affairs to designate it. Since the Minister of Foreign Affairs does not overturn the Minister's selection and does not refuse to designate the air carrier selected, the selection of the air carrier by the Minister may be seen as being tantamount to a "designation".

386 Subs. 67(1) of the NTA, 1987 defines a "scheduled international licence" and a "scheduled international service" respectively, as follows:

> "scheduled international licence" means a licence issued under this Part that permits the licensee to operate a scheduled international service;
> "scheduled international service" means an international service that is a scheduled service pursuant to
>
> (a) an agreement or arrangement for the provision of that service to which Canada is a party, or
> (b) a designation under subsection (2).

(i) holds a Canadian aviation document (i.e. an Operating Certificate issued by the Minister); and

(ii) has the prescribed liability insurance or evidence of insurability, in respect of the service to be provided under the licence.[387]

The Department of Foreign Affairs notifies the other State party to the BASA of the Canadian air carrier designation (usually by means of a diplomatic note) and the Canadian air carrier can commence operating the agreed route(s) after it receives the required authorization from the other State.

In the same way, a foreign air carrier, which has been designated by the foreign State party to a BASA with Canada, requires a scheduled international licence issued by the Agency.[388] In order for a foreign air carrier (or as the legislation provides, a "non-Canadian carrier") to be eligible for a scheduled international licence issued by the Agency, it must, in addition to having been designated by the foreign State, hold a document issued by the aeronautical authorities of that State that is equivalent to a scheduled international licence.[389] Moreover, the foreign air carrier also requires a Canadian aviation document (i.e. a Foreign Air Carrier Operating Certificate issued by the Minister), and prescribed insurance coverage or evidence of insurability in respect of the service to be provided under the licence.[390]

In issuing a scheduled international licence (and at any time thereafter), the Agency may make the licence subject to such terms and conditions the Agency deems appropriate in the public interest.[391] The terms and conditions could address: routes to be followed, points or areas to be served, size and type of aircraft to be operated,

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387 Ibid., s. 88.

388 Ibid., subs. 89(2).

389 Ibid.

390 Ibid., s. 88.

391 Ibid., subs. 91(1) and ATRs ss. 18 to 20, inclusive.

schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the Canada Post Corporation Act, carriage of goods. In addition, all scheduled international licences are automatically governed by the relevant terms and conditions prescribed in the ATRs, unless an exemption is given by the Agency pursuant to section 70 of the NTA, 1987.

A scheduled international licence is not transferable.[392] This being the case, neither a Canadian nor a foreign air carrier may sell, assign or otherwise transfer the scheduled international licence obtained from the Agency to another air carrier, unless an exemption from that provision is obtained from the Agency pursuant to section 70 of the NTA, 1987. However, any exemption granted by the Agency for the transfer of a scheduled international licence that had been issued by it to a Canadian air carrier may only allow the transfer to another Canadian air carrier. This is so because otherwise, the effect of the transfer would be tantamount to exempting an air carrier from the requirement to be "Canadian" - something which neither the Agency nor the Minister can do in respect of a scheduled international licence.[393]

The situation would be different where the exemption is sought regarding a transfer between two foreign designated air carriers or, from a foreign designated air carrier to a Canadian designated air carrier. In such cases, no issue would arise concerning the "Canadian" citizenship requirement but an issue would arise regarding the identity and nationality of the designated air carrier from the perspective of the designating Party and the Party requested to accept the designation.

Scheduled international services are not divided into Classes but are grouped according to the weight of the aircraft operated by the air carriers involved. These Groups are established in the same way as, and are similar to, the Groups established for domestic

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392 NTA, 1987, s. 90.

393 S. 70, NTA, 1987 prohibits the Agency from granting any exemption from the "Canadian" requirement in all cases while, s. 73 of that Act, confers on the Minister the power to grant exemptions from the "Canadian" requirement in the case of domestic licences only.

northern air services.[394] Thus, an air carrier operating Group G aircraft is a Group G air carrier and holds a Group G licence.

(b) Non-Scheduled International Air Services

Essentially, commercial non-scheduled air services are controlled and regulated on a unilateral basis and are, to a greater extent, primarily governed by the rules of the country of origin of the traffic. A partial exception to this generalization has been the operation of transatlantic charter services. In this market, national regulations have been expected to adhere to principles arrived at through multilateral discussions.

The only country with which Canada has a BASA dealing with non-scheduled air services is the United States. That BASA was entered into in 1974[395] concurrently with re-negotiations for amending the 1966 BASA[396] and the negotiations of a bilateral agreement on pre-clearance.[397]

The ostensible objectives of the Non-Scheduled Agreement ("Agreement") were to: (i) promote non-scheduled air services; (ii) complement the BASA on scheduled air services; and (iii) ensure the orderly development of such services, consistent with the interests of the parties in maintaining "a sound system of scheduled air services between their respective territories".[398] In other words, it was clear that the non-scheduled services were to be purely complementary to the scheduled services. Each party is

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394 See ATRs, subs. 5(1).

395 Non-scheduled Air Service Agreement Between Canada and the United States of America, Ottawa, May 8, 1974, (CTS 1974 No. 16). In addition to the non-scheduled air services agreement between Canada and the United States, Canada also has established special charter arrangements with: China, Cuba, France, Netherlands, Portugal, Scandinavian countries and the United Kingdom. Most of these special charter arrangements were done by way of an exchange of notes or a confidential Memorandum of Understanding.

396 Air Transport Agreement Between the Government of Canada and the Government of the United States of America, signed at Ottawa, January 17, 1966, (CTS 1966 No. 2).

397 Agreement Between Canada and the Government of the United States of America on Air Transportation Preclearance, Ottawa, May 8, 1974, (CTS 1974 No. 17).

398 Preamble of the Agreement.

required to ensure that its non-scheduled services do not cause substantial impairment of the scheduled services of the scheduled airlines of the other party (or of the non-scheduled air services of the other party).[399]

The Agreement also provides for the designation, by diplomatic note, of air carriers to operate any of the non-scheduled services contemplated in the Annex thereto.[400] Furthermore, the Agreement provides that where both parties have adopted regulations governing the same specific type of service covered by the Agreement, the regulations of the party where the traffic is boarded are to govern unless otherwise agreed.[401]

Once the Minister has designated a Canadian air carrier under the Agreement or, has accepted the designation of an air carrier by the other party to the Agreement, the Agency is required to issue a non-scheduled international licence to the designated air carrier, without the necessity of determining whether it would be in the public interest to do so.[402] We arrive at this conclusion because when Canada enters into a BASA with another country, there is a presumption that the agreement is in the public interest. Thus, the fact that an air carrier has been designated pursuant to such agreement is deemed to be in the public interest. Moreover, the Agreement itself imposes the obligation to issue the necessary licences.[403] Since the Agency is required, by virtue of Section 69 of the NTA, 1987, to exercise its powers in accordance with any international agreement, convention or arrangement related to civil aviation to which Canada is a party, it is bound to issue the necessary non-scheduled international licences.

In the absence of any BASA for non-scheduled international air services, the Agency is required to issue a non-scheduled international licence only if it determines that

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399 Article IX of the Agreement.

400 Ibid., Article III.

401 Ibid., Article VII(2).

402 Of course, the air carrier in question will need to have met the nationality and all the administrative and technical requirements referred to in Article III(2) and (3) and Articles IV and VI of the Agreement.

403 Article III(2) of the Agreement.

it is in the public interest to do so.[404] Nevertheless, the NTA, 1987 does not prohibit the Agency from issuing such a licence without making a determination of public interest. In this respect, the Agency also has the power to exempt an applicant from that requirement.[405]

In issuing a non-scheduled international licence (and at any time thereafter) the Agency may make the licence subject to such terms and conditions as the Agency deems appropriate in the public interest.[406] Also, even where an air carrier has met all the requirements of the NTA, 1987 and ATRs, if the Agency determines that the operation of a charter carrying traffic originating in Canada would be contrary to the public interest, the Agency must prohibit the performance of that charter by denying the application for a permit, or cancelling a permit if one had already been issued.[407]

As we have already indicated, the issuance of a non-scheduled international licence is subject to a public interest test by the Agency.[408] Thus, an applicant for such a licence must not only establish to the satisfaction of the Agency that he is qualified,[409] but must

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404 NTA, 1987, subs. 94(1).

405 Ibid., s. 70.

406 Ibid., subs. 96(1) and ATRs 18 to 20 inclusive. The terms and conditions that may be imposed by the Agency on non-scheduled international licences are in relation to the same subject areas as in the case of a scheduled international licence. The nature and scope of those terms and conditions, however, could differ.

407 ATRs, s. 22.

408 NTA, 1987, subs. 94(1). A non-scheduled international licence is defined in subs. 67(1) of the NTA, 1987 as:

> a licence issued under this Part that permits the licensee to operate a non-scheduled international service;

409 Where the applicant for a non-scheduled international licence is a Canadian he must submit to the Agency documentary evidence establishing to the satisfaction of the Agency that he:

(a) is a Canadian,
(b) holds a Canadian aviation document, and
(c) has the prescribed liability insurance or evidence of insurability.

also have a determination by the Agency that issuance of the licence is in the public interest.[410]

In actual practice, when processing an application, the Agency applies a two-stage procedure.[411] First, the Agency determines whether it would be in the public interest (as defined) to grant the licence for which the application was made. If the Agency finds that it is in the public interest, it informs the applicant of the favourable finding. The applicant is given a fixed period (usually, one year) within which the applicant is required to prove, to the satisfaction of the Agency, that he meets the other statutory requirements, namely, that he is "Canadian", holds an Operating Certificate from the Minister of Transport, and has the prescribed liability insurance coverage.

A key aspect of the second stage for the applicant is to show that he is "Canadian" within the meaning of subsection 67(1) of the NTA, 1987. Under certain circumstances, an applicant will not be in a position to show that he is "Canadian", unless he submits as evidence copies of agreements for the acquisition (by purchase or lease) of aircraft and final information concerning the actual shareholders, and other investors and creditors of the applicant. In such cases, this two-step process is reasonable and enables the applicant to advance his application without making any costly financial commitments until after there is a finding of public interest in his favour.

Non-scheduled international licences are not transferable[412] and the holder thereof must comply with every term and condition to which the licence is subject.[413] In the same way that the Agency could grant an exemption under section 70 of the NTA, 1987

Where the applicant is a non-Canadian, he must hold a document issued by his government or an agency thereof that, in respect of the service to be provided under the document, is equivalent to a non-scheduled international licence for which he has applied. Of course, he must also satisfy the other requirements in the same way as a Canadian applicant. (See NTA, 1987, subs. 94(1) and ATRs, subs. 15(2)).

410 "Public interest" is defined in s. 4, NTA, 1987. See supra note 305.

411 See, for example, the recent Decision of the Agency (Decision No. 692-A-1994, dated October 26, 1994) in the Application by Sky Service F.B.O. for a Class 9-4 Charter Non-Scheduled International Licence.

412 NTA, 1987, s. 95.

413 Ibid., subs. 96(2).

from the non-transferability rule for scheduled international licences (discussed above), it could do so also for non-scheduled international licences.

Prior to the coming into force of the NTA, 1987 one spoke of a "scheduled international air carrier" and "non-scheduled international air carrier". Since the coming into force of the NTA, 1987, this terminology has been dropped (at least in the Canadian legislation) and one now speaks of a "scheduled international service" and a "non-scheduled international service". The impact of this difference is that currently, most, if not all, Canadian air carriers that obtain a licence to operate a scheduled international service also apply for, and usually obtain, a licence to operate a non-scheduled international service. However, the opposite is not true. A carrier that obtains a non-scheduled international licence cannot obtain a scheduled international licence until that air carrier has been designated by the Minister as being eligible to hold such a licence.[414]

The operation of a non-scheduled international air service is subject to a whole series of regulations, the object of which is to try to maintain a distinction between those services and the scheduled international air services operated pursuant to a BASA or other arrangement.[415] The basic reason for the need for this distinction lies in the desire of States to protect the traffic that they consider should be carried by their air carriers operating scheduled international services so as to maintain their year-round viability. Under current Canadian aviation policy,[416] operators of non-scheduled services are entitled to compete on an equal footing with the operators of scheduled services for the "discretionary" or leisure traveller. The "non-discretionary" traveller (e.g. the businessman) is meant to be the exclusive reserve of the air carrier operating a scheduled service. This traveller needs more flexibility (e.g. to change bookings, to travel one-way, to interline

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414 Ibid., subs. 89(1).

415 The distinction has become more and more difficult to maintain due to the many different types of non-scheduled international air services that have emerged.

416 See the Canadian International Air Charter Policy of September 5, 1978 announced by the then Minister of Transport, the Honourable Otto Lang.

with other air carriers, to receive a refund if he does not use his flight coupon, to travel at any time of the year). Hence, "fences" are designed to keep the business traveller out of non-scheduled air services by making the condition of travel unattractive for his purposes.

Some of the "fences" imposed on the operation of non-scheduled air services are the requirement that there be advance booking for a flight, advance payment (at least of a minimum amount) of the fare, minimum stay required at destination and round trip requirements. There are also operational restrictions imposed on the air carrier, as for example, the prohibition that no air carrier may operate an Advance Booking Charter between more than one point in Canada and more than one point outside Canada for the purpose of embarking or disembarking Advance Booking Charter passengers, unless arrangements are in existence between the Agency and the foreign aeronautical authorities that would permit it.[417]

The trade-off that a traveller must make, normally, in choosing between a scheduled flight and a non-scheduled flight is between paying less with less flexibility or paying more with more flexibility as to time of departure, return, place of destination, etc.

Although the distinction between scheduled and non-scheduled air services is becoming blurred, as long as there are different worldwide domestic and international regulatory regimes for scheduled and non-scheduled air services, it is necessary to protect the difference between them.

It would be beyond the purpose and scope of this thesis to define and discuss in detail all of the regulatory aspects of each type of non-scheduled (or "charter") air services. Suffice it to say that currently Canadian laws and regulations recognize the following types of charters:

(i) Common Purpose Charter;[418]

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417 See ATRs, s. 64.

418 Ibid., s. 24 to 32.

(ii) Entity Charter;[419]

(iii) Inclusive Tour Charter;[420] and

(iv) Advance Booking Charter.[421]

The Common Purpose Charter (or "CPC") is defined in section 2 of the ATRs as:

> a round-trip passenger flight originating in Canada that is operated according to the conditions of a contract entered into between one or two air carriers and one or more charterers that requires the charterer or charterers to charter the entire passenger seating capacity of an aircraft to provide transportation at a price per seat to passengers
>
> (a) travelling to and from a CPC event[422], or
>
> (b) participating in a CPC educational program;"

An example of this type of charter would be a Scout troupe going to a jamboree.

No air carrier may operate a CPC with Group E, F, G, or H aircraft without first obtaining a permit[423] from the Agency. In order to obtain such a permit, the applicant must hold a Class 9-4 or a Class 9-4R licence valid for the proposed charter and must have a financial guarantee from a Canadian financial institution providing full protection for any advance payment, otherwise his application cannot even be considered by the

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419 Ibid., s. 33 to 36.

420 Ibid., s. 43 to 46.

421 Ibid., s. 47 to 72.

422 The ATRs is s. 2 define a "CPC event" as "a presentation, performance, exhibition, competition, gathering or activity that (a) is of apparent significance unrelated to the general interest inherent in travel, and (b) is not being created or organized for the primary purpose of generating charter air traffic".

423 Subs. 24.1(1) of ATRs. The ATRs in s. 2 define a "permit" as:

> a document issued by the Agency authorizing an air carrier holding a Class 4, Class 9-4 or Class 9-4R licence within the meaning of section 4, valid for the proposed flight or series of flights, to operate, subject to compliance with these Regulations, the charter flight or series of charter flights specified in the permit.

Agency.[424] Moreover, there are numerous terms and conditions to meet and documents to provide in order for the application to be valid.[425]

The second type of charter is the Entity Charter and is defined in section 2 of the ATRs as:

> a flight operated according to the conditions of a charter contract in which
>
> (a) the cost of transportation of passengers or goods is paid by one person, company or organization without any contribution, direct or indirect, from any other person, and
> (b) no charge or other financial obligation is imposed on a passenger as a condition of carriage or otherwise in connection with the transportation.

An example of such a charter would be one chartered by a professional sports team to travel from one city to another during their season's schedule.

Where an Entity Charter originating in Canada, is to be operated by an air carrier using Group E, F, G or H aircraft a permit[426] must be obtained from the Agency in respect of the proposed charter.[427] Thus, in the case of an Entity Charter to be operated using aircraft in Group A, B, C or D, no permit is required from the Agency. The issuance of a permit for such a charter originating in Canada is subject to certain terms and conditions, requiring, inter alia, the applicant to hold a Class 9-4 or 9-4R licence, the provision of certain documentation to the Agency, as well as the timing and content of the application, which must be filed with the Agency.[428]

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424 ATRs, subs. 24.1(2).

425 Ibid., s. 24 to 32 inclusive. This includes terms and conditions aimed at protecting the passenger in the event of the insolvency of the charterer or air carrier (see for example ATRs, paras. 25(2)(e),(e.1) (f) and (g)).

426 See supra note 423.

427 ATRs, s. 33.1.

428 Ibid., ss. 33 to 36 inclusive.

The third type of charter is the Inclusive Tour Charter (or "ITC") and is defined in section 2 of the ATRs as:

> a passenger flight operated according to the conditions of a contract entered into between an air carrier and one or more tour operators that requires the tour operator or tour operators to charter the entire passenger seating capacity of an aircraft for resale by them to the public at an inclusive tour price per seat;

An air carrier may not operate an ITC originating in Canada with Group E, F, G, or H aircraft without first obtaining a permit from the Agency.[429] The ATRs set out numerous conditions to which the issuance of a permit for an ITC originating in Canada is subject.[430] Such conditions include, inter alia, a requirement that the air carrier hold a Class 9-4 licence for the proposed charter and that certain information and documentation be provided to the Agency, such as, the charter contract between the tour operator and the air carrier, and the "fences" that must be applied.[431]

The fourth type of charter is the Advance Booking Charter (or "ABC") and is defined in section 2 of the ATRs as:

> a round-trip passenger flight originating in Canada that is operated according to the conditions of a contract entered into between one or two air carriers and one or more charterers that requires the charterer or charterers to charter the entire passenger seating capacity of an aircraft for resale by them to the public, at a price per seat, not later than a specified number of days prior to the date of departure of the flight from its origin in Canada.

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429 Ibid., subs. 43(1).

430 Ibid., subs. 43(2).

431 Ibid., subs. 43(2), and ss. 44 to 46 inclusive.

An air carrier may not operate an ABC with Group E, F, G or H aircraft without first obtaining a permit from the Agency.[432] The air carrier performing the outgoing portion of an ABC must apply to the Agency for a permit and the application cannot be considered by the Agency unless the applicant holds a Class 9-4 licence valid for the proposed charter, and has a financial guarantee with a Canadian institution (in the form supplied by the Agency) that protects any advance payment.[433] The ATRs set out numerous terms and conditions to which the operation of an ABC is subject including, inter alia, conditions respecting the contracting of aircraft capacity, operation of an ABC by two air carriers, reservations, terms and conditions to be included in the charter contract, information and documentation to be provided to the Agency by the air carrier, public solicitations, advance booking requirements, minimum stay for ABC passengers, persons who may be transported on an ABC, tariffs and tolls, operational restrictions, and protection of advance payments.[434]

The ATRs contemplate the situation where an air carrier would be transporting, on the same flight, both ABC passengers and ITC participants. In such a case, certain terms and conditions are imposed respecting, inter alia, the minimum number of seats for which each charterer must contract, the filing of the charter contracts by the air carrier with the Agency, and the requirement for the entire passenger seat capacity of the aircraft to be chartered.[435]

The ATRs also address the possibility of goods being carried for remuneration on an aircraft used for an ABC, an ABC/ITC, a CPC or, an ITC passenger charter and sets out terms and conditions as to when, how and by whom this can be done.[436]

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432 Ibid., subs. 47.2.

433 Ibid., subs. 48(1), 48(2) and 65(1).

434 Ibid., ss. 49 to 72 inclusive.

435 Ibid., ss. 37 to 42 inclusive.

436 Ibid., s. 23.

There is also the situation where an air carrier, licensed to operate a scheduled international air service, sells seats on one of its aircraft involved in a scheduled service, through a tour operator. This is known as "Contract Bulk Inclusive Tour". An example of this is the sale of seats by Air Canada on its scheduled services to the Caribbean through its tour operator, Air Canada Vacations.

The foregoing discusses the rules and regulations that apply to charter flights originating in Canada. There is, of course, also the situation where charter flights originate in the territory of a foreign country and are destined for Canada. In such a case, it is the rules and regulations of the originating foreign country that would apply. However, since the charter flight is destined for Canada, Canadian rules and regulations also play an important role.[437] These rules are commonly referred to as the "country of origin" charter-worthiness rules. This means that the traffic to be carried by a charter operator and the tariffs that apply to that operation are governed by the rules and regulations respecting charter operations of the country where the traffic originates. Other regimes that exist are, for example, the "national" charter rules, whereby the charter rules of the country of which an air carrier is a national apply, even to traffic uplifted at a foreign originating point. Generally speaking, the requirements imposed by the ATRs in such a case have to do with the licence that the air carrier must hold from the Agency, the authorization from the aeronautical authorities of the country of origin of the flight, the filing of a notice of the planned flight with the Agency, the type of aircraft to be used, the restrictions on the persons that may be transported from Canada, as well as information and documentation required by the appropriate Canadian authorities. Fares and rates, however, are not subject to the Canadian rules and regulations, and neither are any requirements concerning the charter-worthiness of the flight.

Non-scheduled international services are divided into Classes and Groups according to the weight of the aircraft operated by the air carriers involved. The Classes[438] of services are as follows:

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437 Ibid., subs. 110(1) and (3).

438 For a description of each Class, see subs. 4(2) of the ATRs.

(i) Class 9-3: Unit toll non-scheduled international service;

(ii) Class 9-4: Charter non-scheduled international service; and,

(iii) Class 9-4R: Restricted Charter non-scheduled international service.

Non-scheduled international air services are grouped in the same way as scheduled international air services.[439] Unlike the scheduled international air services, however, the non-scheduled international air services are divided as to the type of flight that is operated or offered to the public.[440]

Charter air services are operated by an air carrier pursuant to a charter contract made with a charterer or tour operator. It is the charterer (or tour operator) who purchases passenger seats on (or cargo capacity of) an aircraft, and then offers for resale those seats or that capacity, directly to the public. The ATRs address the air carrier and impose obligations on the air carrier as to what requirements must be met for a charter air service to take place. The reason is that the charterer or tour operator is governed by provincial law and not by the federal laws and regulations. However, the obligations and requirements imposed on the air carrier regulate the air carrier portion of the contractual relationship with a charterer or tour operator; so, indirectly, a certain amount of control is in fact exercised by the Agency over that whole relationship.

(c) Scheduled International Air Services Tariffs[441]

Fares and rates to be charged for a scheduled international air service are subject to regulatory control. An air carrier is prohibited from advertising, offering or charging

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439 See subs. 5(1) of the ATRs.

440 NTA, 1987, subs. 89(1).

441 This discussion is limited to tariffs for scheduled international air services. Tariffs for non-scheduled international services are discussed supra, under the heading "Non-Scheduled International Air Services".

any toll where the applicable tariff has not been filed with the Agency or the toll has been disallowed or suspended by the Agency.[442]

Under a BASA, tariffs for scheduled international air services are for the most part determined by the designated air carriers. Most agreements provide that tariffs be determined by the air carriers, either by mutual agreement or through the tariff-coordinating machinery of the International Air Transport Association (IATA),[443] where possible. The agreed tariffs that are so determined remain subject to the approval, expressly or tacitly, of the aeronautical authorities. These authorities have the responsibility of determining the tariffs, should the air carriers be unsuccessful in reaching

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442 ATRs, subs. 110(1) and (3).

443 See Gertler, op. cit., supra, note 373 at p. 800, where the author also notes that:

> According to the study prepared for ICAO in 1975 by the Institut du Transport Aérien (ITA) a reference to the IATA machinery appears in almost three quarters of the agreements examined for the purpose of the study.

For an analysis of the making of fares and rates in international air transport the reader is referred to: Haanappel, Peter P.C., Ratemaking in International Air Transport: A Legal Analysis of International Air Fares and Rates, Kluwer, The Netherlands, 1978.

an agreement. A review of eight[444] BASAs entered into by Canada since 1985 indicates the following types of tariff clauses:

(a) Those that require the tariffs to be agreed between the designated carriers, to be arrived at, whenever possible, through an appropriate international tariff coordination mechanism (Canada-Ivory Coast, September 1987; Canada-Spain, September 1988);

(b) Those that require the tariffs to be agreed between the designated carriers, to be arrived at, whenever possible, through the international tariff coordination mechanism of the International Air Transport Association (Canada-Jamaica, October 1985; Canada-Israel, March 1987; Canada-Belgium, May 1986; Canada-Brazil, May 1986); and

(c) Those that enable the designated carriers to agree to tariffs between themselves and that also provide the option of the designated carriers of

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444 The full titles of those BASAs are as follows:

(i) Agreement Between the Government of Canada and the Government of Jamaica on Air Transport, signed on and in force since October 18, 1985 (CTS 1985 No. 38);

(ii) Agreement Between the Government of Canada and the Government of Belgium on Air Transport (With Memorandum of Understanding) signed on and in force since May 13, 1986 (CTS 1986 No. 5);

(iii) Agreement Between the Government of Canada and the Government of the Federative Republic of Brazil on Air Transport, signed on and in force provisionally since May 15, 1986 (CTS 1990 No. 5);

(iv) Agreement Between the Government of Canada and the Government of the State of Israel on Air Transport, signed on April 13, 1986 and in force since March 24, 1987 (CTS 1987 No. 17);

(v) Agreement Between the Government of Canada and the Government of the Republic of the Ivory Coast on Air Transport (With Memorandum of Agreement), signed on and in force provisionally since September 3, 1987 (CTS 1990 No. 7);

(vi) Agreement Between the Government of Canada and the Government of the Kingdom of Great Britain and Northern Ireland Concerning Air Services (With Annex), signed on and in force since June 22, 1988 (CTS 1988 No. 28);

(vii) Agreement Between the Government of Canada and the Government of Australia Relating to Air Services (With Annex), signed on and in force since July 5, 1988 (CTS 1988 No. 2); and

(viii) Agreement Between the Government of Canada and the Government of Spain on Air Transport (With Annex), signed on and provisionally in force since September 15, 1988 (not yet published).

coordinating their tariffs with other airlines (Canada-Australia, July 1988; Canada-U.K., June 1988).

All the above BASAs, except the one with Australia, require that the tariffs be filed with the aeronautical authorities by, or on behalf of, the designated airlines. The BASA with Australia leaves it to the respective aeronautical authorities to require filing. Canada requires each carrier to file tariffs, unless an air carrier is specifically exempted by regulation or, if a BASA specifically provides for an exemption or, still further, if an exemption is granted by the Agency pursuant to section 70 of the NTA, 1987.[445]

It is clear from the BASAs examined, that the IATA tariff coordinating activities are not only recognized but also specifically required or authorized for use by the designated carriers in reaching agreement on tariffs.[446]

The foregoing discusses examples of various formulae used in BASAs for tariff filing with the aeronautical authorities. The other important aspect is, of course, the matter of tariff approval. Several different formulae exist for tariff approval by aeronautical authorities, ranging from the liberal to the restrictive. Below are the three principal approaches normally found in tariff clauses included in BASAs:[447]

(a) Double Approval - Both parties to the BASA must agree on a tariff before it can go into effect.

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445 ARTs, subs. 110(1).

446 This is a very important consideration which assists in protecting the tariff-coordinating activities of IATA and its membership from the offence provisions of the Competition Act, (R.S.C. 1985 c. C-34, as amended) by making available the regulated conduct defence (so-called) as it has been developed and applied by the courts. For a thorough analysis and discussion of that defence, the reader is referred to: Kaiser, Gordon, Competition Law of Canada, Matthew Bender, New York, 1988; Bourque, Serge, La Nouvelle Loi Sur la Concurrence, Cowansville, Les Editions Yvon Blais, Inc., 1989, at p. 153 et seq.; and Affleck, Donald, S. and McCracken, Wayne K. Canadian Competition Law, Volume I, Carswell, Toronto, 1992, at p. 2-8 et seq.

447 Further information and documentation on international tariffs, may be found in the following publications: ICAO Doc. 9440 - Policy and Guidance Material on International Air Transport Regulations and Tariffs; ICAO Doc. 9538 - C/1105 - Models of Bilateral Tariff Clauses; and ICAO Doc. 9364 - Manual on the Establishment of International Air Carrier Tariffs.

(b) Country of Origin - Each party approves the tariff for traffic originating in its territory. Each party may request consultations on a tariff for traffic from the territory of the other party, but without agreement, the decision of the party from whose territory the traffic originates will prevail.

(c) Double Disapproval - Tariffs come into effect as filed unless both parties to the BASA agree to disapprove them.

Canadian BASAs have used certain aspects of the different approaches to conclude more liberal agreements.

With the introduction of less regulation and more competition in the domestic air industry in Canada, the Government indicated its desire to negotiate new BASAs with fewer restrictions. The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada concerning Air Services, signed on, and in force since June 22, 1988, (or "Canada/U.K. BASA") provides an example of a more liberal formula for tariff approval.

In effect, the formula adopted provides for a regime of double approval of a tariff except if the conditions of Article 13(11)[448] are met where no disapproval is possible. However, the tariff article is supplemented by Annex II to the Canada/U.K. BASA, which reflects the desire of Canada and the U.K. to make the tariff regime as "liberal, flexible and market responsive" as possible.[449] As a result, they have provided for a double disapproval tariff regime, which applies as long as certain basic conditions are met. In other words, a tariff that is filed will come into effect unless both Parties have disapproved it within 15 days of filing. However, this regime will only apply if the filed tariff is:

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448 Article 13(11) provides for tariff matching. In essence it provides that neither Contracting Party shall exercise the right to serve notice of dissatisfaction of a tariff...where the proposed tariff would enable that airline to match a tariff already approved by the first Contracting Party for application by one of its own designated airlines, provided that the proposed tariff corresponds to the tariff being matched (e.g. in price level, conditions and date of expiry, but not necessarily the routing used), or is more restrictive or higher than that tariff.

449 See Annex II of the Canada/U.K. BASA, para. 1(a).

(a) at least 60% of the reference level[450] in effect on the date the tariff is filed; or

(b) less than 60% of the reference level in effect on the date the tariff is filed and subject to each of the following requirements:

(i) a round trip;

(ii) a minimum stay of at least seven (7) days; and

(iii) an advance booking of at least seven (7) days, with the exception of tariffs where the travel is subject to the terms and conditions listed in Appendix "B".[451]

The BASA also provides for ways of dealing with short term promotional tariffs.[452]

Annex III of the Canada/U.K. BASA deals with non-scheduled air services. The two parties, recognizing the need to preserve opportunities for competition between scheduled and non-scheduled air services, have provided for consultations between them if a tariff filing is approved that might adversely affect the ability of non-scheduled air services to compete with the scheduled air services or, where adjustments to existing charter-worthiness rules or requirements or new rules or requirements, are imposed that might adversely affect the ability of the scheduled air services to compete with the non-scheduled air services. Annex III also makes most of the Articles of the BASA apply to non-scheduled air services between the two Parties.[453]

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450 Ibid., Appendix A. For example, the reference level for London-Vancouver (westbound) is established at £660 and eastbound at $1,290 (Cdn.). In order to establish return fares, the applicable local currency reference level is to be doubled.

451 Ibid., Appendix B sets out the conditions subject to which a tariff falling below 60% of the reference level does not require an advance booking provision.

452 Ibid., s. 4.

453 Articles 8, 9, 10, 11, 12, 15, 16, 17, 18 and 19 of the Canada/U.K. BASA.

In several relatively recent BASAs concluded by Canada, the double approval tariff regime has been adopted, but there is also provision for the matching of any publicly available lawful tariff.[454]

4. Enforcement and Recourses

(a) Enforcement

In respect of enforcement, the NTA, 1987 permits the Agency to impose terms on orders that it issues and to make interim, conditional and time limited orders. The Agency is empowered to enforce its own orders, or apply to have them made an order of a Court, so that judicial remedies such as contempt proceedings become available.[455]

The NTA, 1987 includes provisions creating offences in Parts II through VI covering the various modes of transportation under the Agency's jurisdiction. Generally, failure to comply with the Act, or with an order made under each Part, is a summary conviction offense, with maximum fines of $5,000 for individuals and $25,000 for corporations.

In addition to those provisions of NTA, 1987 that create summary conviction offenses in relation to the operation of air services, the Agency may also suspend or cancel the licence of an air carrier where it has reasonable grounds to believe that, in respect of the service for which the licence is issued, the person ceases to have the qualifications necessary for the issuance of a licence or has contravened any provision of Part II of that Act or any regulation or order made under that Part.[456]

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454 Agreement between the Government of Canada and the Government of Australia Relating to Air Services (with Annex), signed on and in force since July 5, 1988 (Article XIV(3) and (7)); and, the Agreement between the Government of Canada and the Government of Spain on Air Transport (with Annex), signed on and in force provisionally since September 15, 1988 (Article XIII(3) and (8)).

455 The Supreme Court of Canada confirmed in a decision rendered on June 25, 1992, that Parliament validly can give an administrative tribunal enforcement powers. See the case of Chrysler Canada Ltd. v. Canada (Competition Tribunal) [1992] 2 S.C.R. 394.

456 NTA, 1987, ss. 75, 92 and 97.

Also, the NTA, 1987 empowers the Agency, with the approval of the Governor-in-Council, to adopt regulations designating any regulation or order, or any term or condition of a licence, issued by the Agency in respect of an air service (referred to as a "Designated Provision") that will be dealt with under and in accordance with the procedure set out in sections 6.7 and 7.2 of the Aeronautics Act[457]. The said procedure is discussed in more detail supra in the context of the regulation of aviation safety and the jurisdiction of the Civil Aviation Tribunal. In essence, it means that, for Designated Provisions, the Agency would be in a position to assess monetary penalties against alleged violators, which would then be subject to review by the Civil Aviation Tribunal.

Although the Agency has it within its authority, by virtue of section 107 of the NTA, 1987, to make use of the Civil Aviation Tribunal, it has not done so, mainly because of the position adopted by its former President. He refused to have the decisions of the Agency second-guessed by another administrative tribunal, which he considered to have less expertise in the subject.

(b) Recourses

The NTA, 1987 provides for statutory recourses that a person may take in respect of any order or decision rendered by the Agency which affects that person's interests, including any decision or order that purports to suspend or cancel a person's licence. The first route is by way of an application to the Agency itself for a review under section 41 of the NTA, 1987. No statutory time limits are imposed on the Agency for dealing with applications for review of its orders or decisions. The procedure that is to be followed in making such a request is to be found in the National Transportation Agency General Rules.[458]

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457 Ibid., s. 107.

458 The full title is "General Rules Respecting the National Transportation Agency and the Practice and Procedure to be Followed in Respect of Proceedings Before the Agency", made pursuant to subs. 22(1) and s. 260 of the NTA, 1987 (SOR/88-23, as amended).

The second recourse available to an interested person with respect to any decision, order, rule or regulation made by the Agency is by way of an appeal to the Federal Court of Appeal, on a question of law or jurisdiction. However, this recourse is available only upon leave being obtained from that court. The application for leave must be made within one month after the date of the decision, order, rule or regulation with respect to which the appeal is sought.[459]

A third recourse could be by way of petition to the Governor-in-Council.[460] A petition made to the Governor-in-Council would request that a particular decision, order, rule or regulation of the Agency be varied or rescinded. The modalities of such a petition are not governed by any rules, orders or regulations made by the Agency. In this respect, if the Governor-in-Council receives such a petition, section 64 of the NTA, 1987 empowers the Governor-in-Council to vary or rescind[461] the decision, order, rule or regulation addressed in the petition. Any order that the Governor-in-Council may make as a result is binding on the Agency and on all parties.[462] The same section also

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459 Subs. 65(1), NTA, 1987. A judge of the Federal Court may allow for more than one month for the application to be made under special circumstances and on notice to the parties and the Agency and on hearing such of them as appear and desire to be heard.

460 A petition to the Governor-in-Council exists as of right and is not made pursuant to any particular section of the NTA, 1987. However, the relief that could be requested and the response or action that the Governor-in-Council can give to such a petition is governed by s. 64 of the NTA, 1987. If the petition requests that the Governor-in-Council vary or rescind a decision, order, rule or regulation of the Agency then, on the basis of the statutory authority conferred on the Governor-in-Council by virtue of s. 64 of the NTA, 1987, the Governor-in-Council, in its discretion, is in a position to give effect to that petition.

461 The power of the Governor-in-Council to vary a decision enables the Governor-in-Council to substitute its own decision for that of the Agency or to come to the opposite decision. See in this respect Consumers' Association of Canada v. A.-G. of Canada (1978) D.L.R. (3d) 33.

462 S. 64 of the NTA, 1987 reads as follows:

> 64. The Governor-in-Council may, at any time, in the discretion of the Governor-in-Council, either on petition of any party or person interested or of the Governor-in-Council's own motion, and without any petition or application, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made inter partes or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor-in-Council may make with respect thereto is binding on the Agency and on all parties.

empowers the Governor-in-Council to act of its own motion at any time and vary or rescind any decision, order, rule or regulation of the Agency.

The nature and scope of the power of the Governor-in-Council under section 64 were discussed in the case of A.-G. of Canada v. Inuit Tapirisat of Canada et al[463] where Estey, J., in delivering the judgment of the Court stated:

> ...Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied. (p. 753)

and further:

> In short the discretion of the Governor-in-Council is complete provided he observes the jurisdictional boundaries of s. 64(1). (p. 756)

and still further:

> Given the interpretation of s. 64(1) which I adopt, there is no need for the Governor-in-Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition. (p. 757)

However, Estey, J., also makes clear that in the exercise of the power under section 64(1), the Governor-in-Council must not only observe the jurisdictional boundaries but must also observe any condition precedent to the exercise of that power. In his words:

> Let it be said at the outset that the mere fact that a statutory power is vested in the Governor-in-Council does not mean that it is beyond review.

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463 [1980] 2 S.C.R. 735; [1980] 115 D.L.R. (3d) 1. Although the case dealt with subs. 64(1) of the NTA, 1967, the wording of that provision is substantially the same as the current s. 64 of the NTA, 1987. The issue there was whether the Governor-in-Council was bound by any rules of procedural fairness or natural justice in considering a petition made to it under subs. 64(1) of the NTA, 1967. See also, Jasper Park Chamber of Commerce et al. v. A.-G. of Canada et al. [1982], 141 D.L.R. (3d) 54; CCH DRS 1982 P26-427 F.C.C. (C.A.).

> If that body has failed to observe a condition precedent to the exercise of that power, the Court can declare that such purported exercise is a nullity. (p. 748)

Also, the Supreme Court of Canada found that the role conferred on the Governor-in-Council by section 64 was not an appellate role but a supervisory one: it enabled the Governor-in-Council to respond to the political, economic and social concerns of the moment.[464] Furthermore, it was pointed out in another case[465] that the Governor-in-Council does not concern himself with questions of law or jurisdiction which are more in the realm of judicial responsibility and that, the Governor-in-Council can do what the Courts cannot do, which is, to substitute his views as to the public interest for that of the CTC.

Under the old National Transportation Act[466], an applicant or an intervener on an application to the CTC for a licence under the Aeronautics Act to operate a commercial air service was able to appeal[467] to the Minister of Transport from a final decision of the CTC with respect to the application. The Commission was then bound to comply with the opinion of the Minister on the matter. Moreover, where the Commission had suspended, cancelled or amended any licence to operate a commercial air service, the carrier whose licence had been suspended, cancelled or amended, was also able to appeal to the Minister.

Under the current NTA, 1987 there are no statutory appeals to the Minister available to a person in respect of any decision, order, rule or regulation of the Agency.

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464 A.-G. of Canada v. Inuit Tapirisat et al, supra note 463 at p. 755.

465 RE: CSP Foods Ltd. v. Canadian Transport Commission, (1978) 84 D.L.R. (3d) (F.C.A.) cited with approval in Islands Protection Society v. British Columbia (Environmental Appeal Board), (1988) B.C.J. No. 654.

466 National Transportation Act, R.S.C. 1985 c. N-20. subs. 25(1).

467 Ibid., subs. 25(2).

5. Conclusion

The most significant events that occurred since the 1970s that have had an impact on the economic regulation of air transportation in Canada were:

(i) The U.S. Deregulation Act of 1978 which removed restrictions on market entry, routes and pricing for U.S. domestic air carrier services;

(ii) The New Canadian Air Policy of 1984 which introduced a policy of "liberalization" for domestic air services in Canada;

(iii) The consolidation of the Canadian airline industry into two large families that followed the New Canadian Air Policy of 1984;

(iv) The adoption by the Canadian Parliament of the new National Transportation Act, 1987 giving legislative effect to the policy of "less regulation and more competition" between and among all modes of transport;

(v) The Report of the Royal Commission on National Passenger Transportation of November 1992, which called for phased withdrawal of transportation subsidies, application of a "user-pay" concept, and the limitation of the Government's role to that of setting policy only; and

(vi) The Report of the National Transportation Act Review Commission of March 1993 which in essence called for maintaining competition and consumer choice in airline services, inter alia, by allowing higher levels of foreign investment in Canadian airlines.[468]

Prior to these events, economic regulation of Canadian air transportation services imposed comprehensive controls over market entry and exit, levels of service, routes, operating equipment, passenger fares and cargo rates. These controls were reduced or

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[468] However, this particular recommendation was rejected by the Standing Committee on Transport of the House of Commons in its report of June, 1993.

eliminated substantially by the New Canadian Air Policy of 1984. That Policy resulted in the elimination of defined roles for air carriers, the relaxation of market entry requirements, the elimination from air carrier licences of restrictions on aircraft - type and frequency of services, and in the freedom to discount fares. In giving legislative effect to that New Air Policy, the NTA, 1987 removed most economic regulation for domestic air services in southern Canada while reducing it in northern Canada. However, international air services were untouched except for the indication that, in recognition of the desirability of less regulation for international air services, Canada would be interested in pursuing such policies with other States - particularly the United States of America.

For domestic services, the market entry criteria of present and future public convenience and necessity gave way in southern Canada to the "fit, willing and able" standard. All that the new standard requires is an Operating Certificate and Operating Specifications from the Minister of Transport, adequate liability insurance coverage and proof of Canadian nationality. No restrictions of any kind can be imposed on licences for southern air services.

In the case of northern Canada, those who object to a proposed air service have the onus of proving why the licence should not be granted - this is a complete reversal of the onus under the old test. However, licences may be restricted by the Agency as to the type of service to be provided, aircraft size, and the points to be served.

In summary, the current Canadian regulatory and administrative framework for air transportation may be described as being flexible and responsive to market changes both domestically, and to a more limited extent, internationally.

- PART VI -

CONCLUSIONS AND FUTURE REGULATORY PROSPECTS

We have given a brief overview of the events which resulted in the constitutional jurisdiction over aeronautics resting with the Federal Government as well as a discussion of the historical development of the legislative and regulatory framework of aviation in Canada beginning with the Air Board Act of 1919 and culminating with the adoption of the National Transportation Act, 1987. In the discussion of the historical development, we focused principally on the various approaches that were used in regulating aviation safety and the commercial use of aircraft that led ultimately to the introduction of more comprehensive safety legislation and a more liberal economic regulatory framework through Federal Government policy in the Spring of 1984 followed by the introduction and adoption of legislation in 1987 giving effect to and broadening the scope of that policy.

We discussed the philosophy of aviation safety as well as the relevant legislation and regulations that have as their purpose the advancement and maintenance of aviation safety through the establishment of standards that must be met by the aircraft, the personnel involved in the operation of the aircraft, and the airlines that use the aircraft in their commercial air services. Since our focus was on the regulation of air transportation, we only spoke of aircraft used in the carriage of passengers or goods for hire or reward and thus excluded from our discussion aircraft used in specialty air services (such as aerial inspection services, aerial spraying services, etc.) Moreover, we addressed only fixed-wing aircraft thereby excluding commercial air services operated using rotating-wing aircraft (i.e. helicopters).

In discussing the aircraft, we provided a description and analysis of the relevant regulations that establish the Canadian nationality and registration marks as well as those that qualify persons to be the registered owners of Canadian registered aircraft. Similarly, we provided a description and analysis of the relevant regulations that establish standards

of airworthiness that aircraft must meet in order to be considered airworthy and qualified to obtain a certificate of airworthiness from the Minister of Transport.

We also touched upon the second element of the aviation system, namely the licenced personnel whose role is essential to the safe operation of aircraft, (i.e. flight crew members, air traffic controllers and aircraft maintenance engineers).

We examined the regulation of the air carrier itself in the context of the requirements of aviation safety as integral players in the Canadian air transportation system. This covered an examination of those regulatory requirements dealing with the organizational and operational aspects of an air carrier. Moreover, we also included a brief note on the legislative and regulatory regime for the protection of aviation from criminal acts, and more particularly, terrorist activities. This is generally referred to as aviation security and we consider it to be an important aspect of aviation safety.

We analyzed the legislative and regulatory requirements in respect of the operation of the air services themselves distinguishing between domestic and international air services, including the different tariff regimes applicable to each of them.

Since aviation is an activity at the higher end of the technology spectrum, it is little wonder that it is in a state of constant change. In Canada, two very important elements of the aviation infrastructure are currently under scrutiny. In a recent address[469], the current Minister of Transport, the Honourable Douglas Young, indicated that Transport Canada would be reviewing the potential for commercialization[470] of a number of its major activities, including, the Air Navigation System and Services and

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469 "New Directions for Transportation: A Reality Check" delivered in Thunder Bay, Ontario, on Friday, June 3, 1994, to the National Transportation Day Dinner.

470 "Commercialization" in this context covers a spectrum of options: from government agencies, to not-for-profit organizations, to private and public sector partnerships, to employee-run companies, to Crown corporations, to privatization. As of January 13, 1995 a decision on the management structure had not yet been made but because of industry-wide support for a "not-for-profit" organization, indications are that the Government will choose that route.

airport operations[471]. However, the Government will retain regulatory responsibility for ensuring safety and security.

The impact of these transfers on the regulatory program will be quite significant. The reason is that as long as the Air Navigation System and Services and the airports in question were being operated by Transport Canada, there was no real need for any regulatorily imposed standards or, enforcement. Standards were established and applied but they were essentially internal to Transport Canada. With the transfer of the areas in question into the hands of other entities, there will be a clear need for standards and procedures to be imposed by regulations.

Furthermore, the move from ground-based to satellite-based communication, navigation and surveillance, and air traffic management systems, will inevitably lead to a re-examination of the relevance and effectiveness of the current domestic and international aviation regulatory frameworks. This re-evaluation would need to address not only questions relating to the extent and sanctity of a State's sovereign airspace and territory but also issues of liability (both State and private), and the protection from criminal acts of satellites, and associated earth stations located in remote areas.

On December 20, 1994 the Canadian Minister of Transport and Minister of Foreign Affairs announced a new Canadian policy for international air transportation[472]. In essence, the New Air Policy is intended to:

(i) ensure that hard-won route rights awarded by the Canadian Government to Canadian air carriers are utilized to the best possible extent, through a "use it or lose it" approach;

(ii) facilitate access to Canada by foreign air carriers; and

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471 This would mean removing from the Transport Canada operations 26 additional airports. Between 1989-1991, five Transport Canada airports were transferred under lease to Local Airport Authorities in Vancouver, Calgary, Edmonton and Montreal.

472 See Government of Canada New Release, No. 172/94, dated December 20, 1994 and attachments thereto, entitled "Canada's International Air Transportation Policy" (hereinafter "New Air Policy").

(iii) provide consumers with a wider range of travel options and improve protection in their travel arrangements.[473]

The New Air Policy places the national interest ahead of the interests of the air carriers. Thus, the New Air Policy has as its objective to meet the air transportation needs of the Canadian business, trade and tourism markets and:

> ... offer new opportunities for airlines, respond to airport community needs, protect the interests of travellers, shippers, and taxpayers, and is part of our government's efforts to stimulate the economy by exploiting business opportunities globally.[474]

Except as indicated below, the New Air Policy has no impact on the existing legislative and regulatory framework of air transportation in Canada. Its principal impact is on the manner in which the existing laws and regulations will be applied by the Minister of Transport and the Agency. For example, the New Air Policy addresses the problems encountered by consumers with new Canadian international charter entrants who were unable to provide the service on the announced date or on an ongoing basis. In order to prevent such problems from recurring, the New Air Policy provides that the Minister of Transport will ask the Agency to ensure that new applicants for international charter licences

(i) meet minimum financial requirements before being given a licence; and

(ii) do not sell transportation services before they have obtained the necessary licence.

Both of these requirements can be accommodated under the existing NTA, 1987 and ATRs.[475]

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473 See New Air Policy, ibid.

474 Ibid., p. 6.

475 In effect, the New Air Policy indicates that the Minister of Transport will be issuing a direction to the Agency under para. 86(1)(e) of the NTA, 1987 which, by virtue of subs. 86(3) of the NTA, 1987, requires the approval of the Governor in Council on the Recommendation of the Ministers of Transport and Foreign Affairs. Since the New Air Policy was issued jointly by the two Ministers in question, the approval of the

Similarly, the application of the new "use it or lose it" policy intended to avoid the non-use and the under-utilization of operative rights over an international route, may be given effect by the Agency simply by adding the necessary terms and conditions to the scheduled international licences that it has already issued or that it will issue.[476]

The New Air Policy points out that, in order to provide for the protection of the interests of consumers from abusive and anti-competitive practices in the use of Computer Reservations Systems ("CRSs"), new regulations will be required and indicates that such new regulations will be promulgated early next year pursuant to the Aeronautics Act. In this regard, the question arises as to who in Canada may regulate CRSs and for what purpose? The difficulty is in trying to identify whether a CRS is "animal, vegetable or mineral" and whether it is a Federal or Provincial "animal, vegetable or mineral" or, whether is has aspects of both.

The subject of CRSs raises not only consumer protection issues but also aspects of competition:

(i) competition between air carriers; and

(ii) competition between (or among) CRSs vendors (who may or may not be air carriers).

Certainly, the Agency has some input in maintaining competition between air carriers, but this is limited to the air carriers qua air carriers, and since the entry into force of the NTA, 1987, only in respect of international air services (setting aside for present purposes the air services within or, to and from, the designated area). For example, it does not extend to regulate travel agents who are and have been accepted as being subject to provincial jurisdiction.

We do not believe that the Agency could use its powers to impose terms and conditions in the public interest on licences issued under Subsections 91(1) and 96(1) of the NTA, 1987 that would be directed to the air carrier in the latter's capacity as a CRS

Governor in Council should be forthcoming.

476 See s. 91 of the NTA, 1987 which empowers the Agency to impose on scheduled international licences, on their issuance or from time to time thereafter, in addition to those terms and conditions prescribed in the ATRs, any terms and conditions as the Agency deems appropriate in the public interest.

vendor. It is submitted that any terms and conditions so imposed by the Agency may only be directed to the air carrier qua air carrier.

The next question then is whether the Minister of Transport, within the context of the Aeronautics Act, has the power and authority to regulate CRSs. Our review of the Aeronautics Act does not convince us that there is any provision in that act which in any way would authorize the adoption of regulations to regulate CRSs in any respect (i.e. whether in regard to competition or consumer protection).

More specifically, we do not believe that section 4.2 of the Aeronautics Act, which sets out the various responsibilities of the Minister in respect of aeronautics, can be used by the Minister to regulate CRSs any more than the Minister could use that same section to regulate travel agents or other elements of the air transport services distribution system.

We also do not believe that section 4.9 of the Aeronautics Act which authorizes regulations respecting aeronautics, and more specifically, subsection 4.9(u) thereof which enables regulations respecting the "provision of facilities, services and equipment relating to aeronautics", can be a basis upon which regulations dealing with CRSs may be founded. That provision relates and was intended[477] to relate simply to those facilities, services and equipment that are used and required in effecting the actual transportation and operation of aircraft and not in the distribution or sale of the transportation service to the consumer.

The problem is that the existing legislation (both the Aeronautics Act and the NTA, 1987) is structured to regulate the activities of the providers of air transportation and not the distributors of air transportation.

Therefore, if regulations dealing directly with CRSs are to be adopted we believe the statutory amendments would be required. But, once again, one is faced with the question of whether a CRS is or is not a creature that is fully a subject of federal jurisdiction. Although we do not purport to respond to this question as it would be beyond the scope of this thesis, we believe that one way to ensure that both the competition

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[477] The "intention" is derived from this writer's involvement as legislative instructing officer during the drafting of the legislation that eventually became An Act to amend the Aeronautics Act, R.S.C. 1985 c. 33 (1st Supp.).

aspects and the consumer protection aspects would be addressed would be by way of Federal and Provincial dovetailing legislation - one complementing the other - in order to cover the whole area.

While we are not fully convinced that paragraphs 102(1)(i) and 102(1)(n) of the NTA, 1987 could be a valid basis, we suggest that pending the adoption of the necessary legislation, these two provisions could serve as legal authority to promulgate regulations that would address CRSs "indirectly". By this we mean properly structured regulations that would address the competition aspects of CRS by regulating the conduct of the air carrier. We have in mind regulations that would, for example, prohibit an air carrier from acting as a system vendor or, as a participating air carrier, where the CRS involved contains any of those elements which are considered to be anti-competitive.

In light of the new National Airports Policy[478], which will result in the transfer to community-based authorities, of 26 additional airports, the New Air Policy recognizes the need to be responsive to the legitimate aspirations of those communities in respect of air transportation benefits. This, in our view, will result in increased pressure from the airport community to play a more significant role not only in the obtaining of additional international routes to and from Canada, but also in how those routes will be distributed among the various airports.[479]

As a general comment, we would wish to state that with the onset of more liberal aviation regimes around the world and the privatization of air carriers leading to the "globalization" of aviation, the interest of States may possibly shift from one of focusing on the national airlines to one of focusing on their national airports. By this we mean that,

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478 See Transport Canada Publication TP12163E dated July 1994 entitled "National Airports Policy".

479 In a recent article that appeared in Airline Business, December 1994, the point was made that because governments consult airlines far more than other interested parties (e.g. communities, the business sector, travel and tourism entities, and consumers) before and during air services negotiations, there is a risk that the other interests are not given their due consideration and have less influence on the outcome of the negotiations (at p. 29). The article refers to the recent study (submitted to the UK Department of Transport at the beginning of September 1994) carried out by the UK CAA entitled "The Economic Impact of New Air Services - a study of new long haul services at UK regional airports", (CAA Publications, Cheltenham, UK), which, according to the article, helps to tilt the negotiating balance away from the airlines to the broader interests of users and the economy (at p. 29).

as the importance of the "nationality" of airlines is eroded through cross-border investments between and among airlines giving way to the emergence of regional airlines (such as the concept of "community air carrier"[480] being advanced in the EU), States will not place as much emphasis on the nationality of their airlines but rather will try to develop their aviation infrastructure such that it will play a more important role in their national air transportation policy.

This could lead to more emphasis being given to maximum utilization of the aviation infrastructure such as airports and airways and less emphasis on the nationality of the users (i.e. the air carriers).

Moreover, as the nationality of the users of the aviation infrastructure becomes less and less important, it may be that airport authorities will be in a position to negotiate directly with air carriers for air services to and from their airports rather than rely on complicated and perhaps outdated BASAs negotiated between States. Should such a scenario develop, the need for having in place appropriate and enforceable formulae for the allocation of slots[481] and other facilities necessary for the carrying out of a commercial air service with the least obstacles, and in the most efficient and beneficial way for air carriers, shippers and travellers, will become significant. At such time, governments may have to adopt regulations which would provide a formula for allocating the scarce infrastructure resources.

Since aviation, by its very nature, is in defiance of one of the four basic forces of nature - gravity - it is fraught with inherent dangers. Because of this, rules, regulations and procedures have been developed by States which have as their goal the reduction of those inherent risks to an acceptable level. In the absence of such rules, regulations and procedures each person intending to participate in an aviation activity would have to carry

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480 See Council Regulation (EEC) No. 2343/90, July 24, 1990; replaced by Council Regulation (EEC) No. 2408/92 and Council Regulation (EEC) No. 2407/92, of July 23, 1992.

481 A "slot" is a specific time period and airspace allocated to an air carrier that allows for its aircraft to land or take off from a particular airport. It is also sometimes seen as the right to use a particular runway at a particular time at a particular airport. However, we believe that the more appropriate characterization is one related to time and airspace.

out an evaluation of the risks involved before embarking on that activity. Individual and non-expert risk evaluations would no doubt lead to chaos and result in an already dangerous activity becoming even more dangerous - because each participant would not only create a risk for himself but also for others. Therefore, appropriate rules, regulations and procedures are a necessity in aviation.

However, the best rules, regulations and procedures will not result in an adequate level of safety if they are not followed. Hence, the need for a State to have in place a regulatory compliance program that, in our view, should be preventive in objective and deter, rather than punish after the fact. In this regard, we believe that the focus of such program should be education coupled with frequent inspections or audits of the licenced personnel, and certificated facilities, equipment and organizations.

The future in Canadian aviation, and perhaps, in aviation generally, would appear to be boundless. However, in order to maintain an adequate level of aviation safety, rules, regulations and procedures will have to keep pace with the technological progress otherwise the only enforceable lav will be the one that is self-enforcing - gravity.

Our final conclusion is that although aviation is no longer in its infancy, it has not yet left its teenage years. Much more change and restructuring will be required from the economic and safety perspectives, before it can be considered an adult.

BIBLIOGRAPHY

CASES:

A.-G. Canada v. Inuit Tapirisat of Canada et al. [1980] 2 S.C.R. 735; [1980] 115 D.L.R. (3d) 1.

A.-G. Ont. v. Can. Temperance Federation [1946] A.C. 193.

Agence de Securité Fortin Inc. c. Union des agents de securité du Québec, Local 924 (1981) T.T. 153.

Buckerfield's Limited et al. v. M.N.R., 64 DTC 5301.

Capital Cities Comm. Inc. v. C.R.T.C. [1978] 2 S.C.R. 141.

Chrysler Canada Ltd. v. Canada (Competition Tribunal) [1992] 2 S.C.R. 394.

Colonial Coach Lines v. Ontario Highway Transport Board [1967] 2 O.R. 25 (Ont. H.C.) confirmed on appeal [1967] 2 O.R. 243 (C.A.) for other reasons.

Construction Montcalm Inc. v. Quebec Minimum Wage Commission [1979] 1 S.C.R. 754.

Consumers' Association of Canada v. A.-G. of Canada (1978) D.L.R. (3d) 33.

Re CSP Foods Ltd. v. Canadian Transport Commission, (1978) 84 D.L.R. (3d) (F.C.A.).

De Beers Consolidated Mines Ltd. v. Howe, [1960] A.C. 455.

In Re The Regulation and Control of Aeronautics in Canada, [1932] A.C. 54.

Field Aviation Co. Ltd. v. Alberta Board of Industrial Relations and International Association of Machinists and Aerospace Workers, [1974] 6 W.W.R. (N.S.) 596.

Re Forest Industries Flying Tankers Ltd. v. Kellough [1980] 108 D.L.R. (3d) 686 (B.C.C.A.).

Hinds v. The Queen [1977] A.C. 195.

IN THE MATTER OF a Reference by the Civil Aviation Tribunal of a Question of Jurisdiction Pursuant to Section 18.3 of the Federal Court Act, R.S.C. 1985 c. F-7 as amended, Federal Court of Canada, Trial Decision, (T-1869-93).

Islands Protection Society v. British Columbia (Environmental Appeal Board), (1988) B.C.J. No. 654.

Jasper Park Chamber of Commerce et al. v. A.-G. of Canada et al. [1982] 141 D.L.R. (3d) 54; CCH DRS 1982 P26-427 F.C.C. (C.A.).

Johanneson v. Rural Municipality of West St. Paul, [1952] 1 S.C.R. 292.

Murray Hill Limousine Service Limited v. Batson 1965 B.R. 778.

Re Orangeville Airport and Town of Caledon et al. [1976] 11 O.R. (2d) 546 (Ont. C.A.).

The Queen v. Black and Decker Manu. Co. [1975] 1 S.C.R. 411.

R. v. Alexander (1988), 4 W.C.B. (2d) 173 (Nfld. S.C.).

R. v. Corporation of the City of Sault Ste. Marie, [1978] S.C.R. 1299.

R. v. Laserich and Altair Leasing Ltd. (1977), 36 C.C.C. (2d) 285.

R. v. Race and Race (1973), 14 C.C.C. (2d) 165 (Ont. Dist. Ct.).

Service d'entretien avant-garde c. Conseil Canadien des relations du travail (1986) R.J.Q. 164; 26 D.L.R. (4th) 331.

Skylink Airlines v. Her Majesty the Queen in Right of Canada, No. T3017-89, February 26, 1990 (not appealed).

St. Andrews Airways Ltd. v. Anishenineo Piminagan Inc. (1977) 80 D.L.R. (3d) 645.

Swanson and Peever v. Her Majesty the Queen [1990] 2 F.C. 619, confirmed on appeal [1992] 1 F.C. 408.

Re Walker et al. and Minister of Housing for Ontario Re Walker and City of Chatham, 144 D.L.R. (3d) 86.

Witco Chemical Company, Canada, Limited v. The Corporation of the Town of Oakville, [1975] 1 S.C.R. 273.

STATUTES:

An Act to amend the Aeronautics Act, R.S.C. 1985 c. 33 (1st Supp.).

Aeronautics Act, R.S.C. 1952 c. 2.

Aeronautics Act, R.S.C. 1970 c. A-3.

Aeronautics Act, R.S.C. 1985 c. A-2.

Aeronautics Act, 1919, R.S.C. 1927 c. 3.

The Air Board Act, S.C. 1919, 9-10 George V, c. 11 (1st session).

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 82 Stat. 1707 (1978).

British North America Act, 1867, 30 & 31 Vict., c. 3, renamed the Constitution Act, 1867 by the Constitution Act, 1982 that was enacted as Schedule B to the Canada Act 1982 (U.K.), c. 11.

Canada Business Corporations Act, R.S.C. 1985 c. C-44, as amended.

Canada Post Corporation Act, R.S.C. 1985 c. C-10, as amended.

Canada Shipping Act, R.S.C. 1985 c. S-9, as amended.

Canadian Aviation Safety Board Act, S.C. 1980-81-82-83, c. 165.

The Carriage by Air Act, R.S.C. 1985 c. C-26, as amended.

Competition Act, R.S.C. 1985 c. C-34, as amended.

The Department of Transport Act, 1936, S.C. 1936 c. 34.

Department of Transport Act, R.S.C. 1952 c. 79; R.S.C. 1970 c. T-15; R.S.C. 1985 c. T-18.

Excise Tax Act, R.S.C. 1985 c. E-15, as amended.

Federal Aviation Act of 1958 (Act of August 23, 1958, 72 Stat. 731).

Federal Court Act, R.S.C. 1985 c. F-7, as amended.

Inquiries Act, R.S.C. 1985 c. I-11, as amended.

National Defence Act, 1922, S.C., 1922, 12-13 George V, c. 34.

National Transportation Act, S.C. 1966-67 c. 69, s. 2; R.S.C. 1985 c. N-17.

National Transportation Act, 1987, S.C. 1987 c. 34; R.S.C. 1985 c. 28 (3rd Supp.), as amended.

Statutory Instruments Act, R.S.C. 1985 c. S-22, as amended.

Territorial Seas and Fishing Zones Act, S.C. 1964-65 c. 22 s. 7.; R.S.C. 1985 c. T-18, as amended.

The Transport Act, 1938, S.C. 1938 c. 53.

Bill C-76, entitled "An Act to amend the Aeronautics Act and to amend an Act to amend the Aeronautics Act" (S.C. 1992 c. 4).

Transportation of Dangerous Goods Act, R.S.C. 1985 c. T-19, as amended.

REGULATIONS:

Air Carrier Regulations, C.R.C. 1978 c. 3, as amended.

Air Carrier Security Regulations, SOR/87-707, as amended.

Air Cushion Vehicle Regulations, C.R.C. 1978, Vol. I, c. 4, as amended.

Air Regulations, C.R.C. 1978 Vol. 1, c. 2, as amended.

Air Transportation Regulations, SOR/88-58, as amended.

Air Transportation Tax Regulations, C.R.C. 1978 c. 583, as amended.

The Aircraft Marking and Registration Regulations, (Air Regulations, Series II No. 2), SOR/90-591, as amended.

Designated Provisions Regulations, (Air Regulations, Series I No. 3), SOR/89-117, as amended.

Identification of Aircraft and Other Aeronautical Products Regulations, (Air Regulations, Series II No. 1), SOR/90-590, as amended.

Leased Aircraft Registration Regulations, SOR/90-592, as amended.

AIR NAVIGATION ORDERS:

Air Navigation Order, Series II. No. 3, C.R.C. 1978, c. 57, as amended.

Air Navigation Order, Series II No. 4, C.R.C. 1978, c. 31, as amended.

Air Navigation Order, Series IV No. 6, SOR/89-542, as amended.

Air Navigation Order, Series IV, No. 1, SOR/90-232, as amended.

Air Navigation Order, Series VII No. 2, C.R.C. 1978 c. 21, as amended.

Air Navigation Order, Series VII No. 3, C.R.C. 1978 c. 22, as amended.

Air Navigation Order, Series VII No. 6, C.R.C. 1978 c. 62, as amended.

INTERNATIONAL CONVENTIONS AND ASSOCIATED DOCUMENTS:

Annex 1 to the Chicago Convention entitled "Personnel Licensing. Licensing of flight crews, air traffic controllers and aircraft maintenance personnel".

Annex 6 to the Chicago Convention entitled "Operation of Aircraft" has three Parts: Part I - International Commercial Air Transport - Aeroplanes; Part II - International General Aviation - Aeroplanes; Part III - International Operations - Helicopters.

Annex 7 to the Chicago Convention entitled "Aircraft Nationality and Registration Marks".

Annex 8 to the Chicago Convention entitled "Airworthiness of Aircraft. Certification and inspection of aircraft according to uniform procedures".

Annex 16 to the Chicago Convention entitled "Environmental Protection: Volume I - Aircraft Noise; Volume II - Aircraft Engine Emissions."

Convention on International Civil Aviation, signed at Chicago on December 7, 1944 and entered into force for Canada on April 4, 1947 (CTS 1944/36, 15 U.N.T.S. 296, ICAO Doc. 7300/6) as amended up to October 31, 1994.

Convention on the International Recognition of Rights in Aircraft, signed at Geneva, on June 19, 1948, 310 U.N.T.S. 152; ICAO Doc 7620.

Convention Relating to the Regulation of Aerial Navigation, signed at Paris on October 13, 1919.

Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo, September 14, 1963 (ICAO Doc. 8364).

Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, on December 16, 1970 (ICAO Doc. 8920).

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971 (ICAO Doc. 8966).

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, signed at Montreal on 24 February 1988 (ICAO Doc. 9518).

BILATERAL AIR SERVICES AGREEMENTS:

Agreement Between Canada and the Government of the United States of America on Air Transportation Preclearance, Ottawa, May 8, 1974, (CTS 1974 No. 17).

Agreement Between the Government of Canada and the Government of Australia Relating to Air Services (With Annex), signed on and in force since July 5, 1988 (CTS 1988 No. 2).

Agreement Between the Government of Canada and the Government of Belgium on Air Transport (With Memorandum of Understanding) signed on and in force since May 13, 1986 (CTS 1986 No. 5).

Agreement Between the Government of Canada and the Government of Jamaica on Air Transport, signed on and in force since October 18, 1985 (CTS 1985 No. 38).

Agreement Between the Government of Canada and the Government of Spain on Air Transport (With Annex), signed on and provisionally in force since September 15, 1988 (not yet published).

Agreement Between the Government of Canada and the Government of the Federative Republic of Brazil on Air Transport, signed on May 15, 1986, as amended by the Exchange of Notes of December 20, 1990 (entered into force December 20, 1990) (CTS 1990 No. 5).

Agreement Between the Government of Canada and the Government of the Kingdom of Great Britain and Northern Ireland Concerning Air Services (With Annex), signed on and in force since June 22, 1988 (CTS 1988 No. 28).

Agreement Between the Government of Canada and the Government of the Republic of the Ivory Coast on Air Transport (With Memorandum of Agreement and Annex), signed on and in force provisionally since September 3, 1987 (entered into force April 23, 1990) (CTS 1990 No. 7).

Agreement Between the Government of Canada and the Government of the State of Israel on Air Transport, signed on April 13, 1986 and in force since March 24, 1987 (CTS 1987 No. 17).

Air Transport Agreement between the Government of Canada and the Government of the French Republic (Paris, June 15, 1976) (CTS 1977 No. 15).

Air Transport Agreement Between the Government of Canada and the Government of the United States of America, signed at Ottawa, January 17, 1966, (CTS 1966 No. 2).

Non-scheduled Air Service Agreement Between Canada and the United States of America, Ottawa, May 8, 1974, (CTS 1974 No. 16).

BOOKS:

Affleck, Donald, S. and McCracken, Wayne K., Canadian Competition Law, Volume I, Carswell, Toronto, 1992.

Bourque, Serge, La Nouvelle Loi Sur la Concurrence, Cowansville, Les Editions Yvon Blais, Inc., 1989.

Bunker, Donald H., The Law of Aerospace Finance in Canada, Institute of Air and Space Law, McGill University, 1988.

Haanappel, Peter P.C., Ratemaking in International Air Transport: A Legal Analysis of International Air Fares and Rates, Kluwer, The Netherlands, 1978.

Hogg, Peter W., Constitutional Law of Canada, Third Edition (Supplemented) Volume 1, Toronto, Carswell, 1992.

Kaiser, Gordon, Competition Law of Canada, Matthew Bender, New York, 1988.

Main, J.R.K., Les Voyageurs de l'air - Historique de l'aviation civile au Canada 1859 - 1967, Queen's Printer, Ottawa, Canada, 1967.

MacLaren, Richard H., Secured Transactions in Personal Property in Canada, Second Edition, Carswell, Toronto, 1992.

Paquette, Richard, La responsabilité en droit aérien canadien, Montréal, Les Editions Yvon Blais, 1979.

Schwartz, B., Administrative Law, Boston, Little, Brown and Co., 1976.

Aviation in Canada - Historical and Statistical Perspectives on Civil Aviation, Transportation Division, Statistics Canada, Minister of Supply and Services, Canada, 1986.

ARTICLES:

Cuperfain, Joel, "A Canadian Central Registry for Security Interests in Aircraft: A Good Idea But Will It Fly?" (1991) 17 Can. Bus. L. J. 380.

Dempsey, Paul Stephen, "The Empirical Results of Deregulation: A Decade Later, and the Band Played On", Transportation Law Journal, University of Denver, Volume XVII No. 1, 1988.

Fiorita, D.M., "The Registration of Aircraft and the Recordation of Security Interests in Aircraft (Canadian Practice)", Okla City U.L. Rev., vol. 18, No. 1, Spring 1993.

Gertler, A. Joseph, "Bilateral Air Transport Agreements: Non-Bermuda Reflections", [1976] 42 JALC 779.

McNairn, Colin H., "Aeronautics and the Constitution" (1971) 49 Can. Bar Rev. 411.

McNairn, Colin H., "Transportation, Communication and the Constitution - The Scope of Federal Jurisdiction" (1969) 47 Can. Bar. Rev. 355.

Ziegel, Jacob S., "The New Provincial Chattel Security Law Regimes", 70 Can. Bar. Rev. 681.

ICAO DOCUMENTS:

ICAO Document A27-WP/111 dated 18 September 1989 entitled "Developments in Aviation Safety Regulation Within Europe - The Joint Aviation Authorities (JAA)".

ICAO Doc. 8973/4 - Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference.

ICAO Document 9364 - Manual on the Establishment of International Air Carrier Tariffs.

ICAO Document 9440 - Policy and Guidance Material on International Air Transport Regulations and Tariffs.

ICAO Document 9538 - C/1105 - Models of Bilateral Tariff Clauses.

GOVERNMENT OF CANADA PUBLICATIONS:

Annual Report of the Canadian Aviation Safety Board, Minister of Supply and Services Canada, dated 31 March 1989.

Annual Review of the National Transportation Agency of Canada, 1989, Minister of Supply and Services Canada, 1990.

Internal Transport Canada paper entitled "Bilateral Airworthiness Agreements - A Business and a Philosophy" by Mr. Maher Khouzam, Chief, Airworthiness Standards (dated 1991.09.26).

N-AME-AO 45/68 - Notice to Aircraft Maintenance Engineers and Aircraft Owners.

Annual Review of the National Transportation Agency of Canada, 1993 entitled "Transportation Trends and Developments: An Economic Perspective", Minister of Supply and Services Canada, 1994.

Personnel Licensing Handbook, published, as amended from time to time, under authority of the Minister of Transport by the Minister of Supply and Services (Canada).

Transport Canada Press Release, No. 46/85, March 28, 1985.

Transport Canada Publication TP3352E, Regulatory Compliance Manual, Fifth Edition, April 1992.

Transport Canada Publication TP8606, Manual of Regulatory Audits.

Transport Canada Publication, Regulatory Review Initiative, Volumes 1 and 2, September 1993.

Transport Canada Publication, TP11733E, CARAC Management Charter & Procedures, August 1994.

Transport Canada Publication, TP3473E, Transport Canada Approved Organizations, January 1993.

TSB Publication, TSB Statistical Summary: Air Occurrences 1992, Minister of Supply and Services Canada, 1993.

GOVERNMENT OF CANADA POLICY PAPERS:

Address by the Minister of Transport to the House of Commons, May 10, 1984.

Freedom to Move - A Framework for Transportation Reform, Ottawa, Transport Canada, July 15, 1985.

International Air Charter Policy of September 5, 1978.

Government of Canada News Release, No. 172/94, Canada's International Air Transportation Policy, December 20, 1994.

New Canadian Air Policy, May, 1984.

Transport Canada Publication, TP12163E, National Airports Policy, July 1994.

Transport Canada Publication, TP7749, Freedom to Move: The Legislation - Overview of National Transportation Legislation, 1986.

COMMISSION REPORTS:

Final Report of the Commission of Inquiry into the Air Ontario Crash at Dryden, Ontario, Minister of Supply and Services Canada, 1992.

Report of the Commission of Inquiry on Aviation Safety, Minister of Supply and Services Canada, 1981.

Report of the National Transportation Act Review Commission entitled "Competition in Transportation - Policy and Legislation in Review", Minister of Supply and Services Canada, Ottawa, 1993.

The Report of the Royal Commission on National Passenger Transportation, November 1992.

Report of the Royal Commission on Transportation (MacPherson Report) 1961.

DECISIONS AND ORDERS OF GOVERNMENT AGENCIES:

Air Transport Committee Decision No. 10708, dated May 19, 1987; NTA Decision No. 148-A-1989, dated March 21, 1989; NTA Decision No. 618-A-1989, dated December 6, 1989; and, NTA Order No. 1989-A-394, dated December 1989.

Aviation Technical Standard Orders referenced in Advisory Circular 20-110B, Appendix 1, Index of Aviation Technical Standard Orders dated April 12, 1984, published by the Federal Aviation Administration of the Government of the United States.

General Rules Respecting the National Transportation Agency and the Practice and Procedure to be Followed in Respect of Proceedings Before the Agency, SOR/88-23, as amended.

IN THE MATTER OF the application by Canavia Transit Inc. for review of Air Transport Committee (ATC) Decision No. 6529, dated August 28, 1981, Decision 1982-02 dated March 5, 1982 of the Review Committee.

IN THE MATTER OF the review by the National Transportation Agency of the proposed acquisition of an interest in Canadian Airlines International Ltd. carrying on business under the firm mane and style of Canadian Airlines International or Canadian by Aurora Investments, Inc., a wholly-owned subsidiary of AMR Corporation; and, IN THE MATTER OF the review by National Transportation Agency of the proposed acquisition of an interest in Air Atlantic Ltd., Calm Air International Ltd. and Inter-Canadien (1991) Inc. by Canadian Airlines International Ltd. carrying on business under the firm mane and style of Canadian Airlines International or Canadian, (NTA Decision No. 297-A-1993 dated May 27, 1993).

National Transportation Agency, Decision No. 692-A-1994, dated October 26, 1994.

Order in Council P.C. 1992-176, dated January 31, 1992.

Order Varying and Rescinding CTC Decision Respecting Bradley Air Services Limited, SOR/84-482, dated 21 June 1984.

Order Varying CTC Orders and Decisions Respecting Air Atonobee Limited, SOR/84-483, dated 21 June 1984.

EUROPEAN UNION COUNCIL REGULATIONS

Council Regulation (EEC) No. 2343/90, July 24, 1990; replaced by Council Regulation (EEC) No. 2408/92 and Council Regulation (EEC) No. 2407/92, of July 23, 1992.