

## GOVERNMENT REGULATION IN CANADIAN CIVIL AVIATION

BY HUGH W. SILVERMAN\*

### *Introduction*<sup>1</sup>

Transportation in Canada is under the jurisdiction of the federal and provincial governments, and this split-jurisdiction is of itself a problem when making policy and plans. The efforts of the national federal government in the field of air transportation, which, unlike other aspects of transportation is wholly within federal jurisdiction, to set policy, guide and administer air transportation must be viewed in the special setting of Canada: a large country, sparsely settled, with a national airline which is government controlled and sponsored, and a strong inheritance of British tradition represented by a parliamentary system of government which on the whole manages to avoid the pitfalls and vagaries of a manipulated government (absent the visible lobbyist, and to-the-victor-go-the spoils approach); and finally, add to that picture a heritage of approbation for a national transportation system as a unifying force for all of Canada to withstand the pressures and the pull to the south (it was said that when the C.P.R. was laid out as a national railroad it was two streaks of rust which made Canada into one nation); in the second half of the twentieth century it can be said that Trans-Canada Airlines (now called Air Canada) replaced the C.P.R. as a unifying national force.

The role of the Canadian government in its control and regulation of civil aviation in Canada is revealed in the statutory history surrounding Canadian civil aviation.

### *Background*

In 1931 the Judicial Committee of the Privy Council in the *Aeronautics* case held "that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion".<sup>2</sup>

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1. This study focuses in the main upon government regulation of commercial passenger air carriers up to 1966 which is the date when the reports known as Canadian Railway and Transport Cases (C.R.T.C.) ceased publication with volume number 85. Nevertheless reference is made to some of the recent activities of the Air Transport Committee. A further study of recent decisions and activities of the Air Transport Committee is planned for publication. Generally see, Martial, *Government Control of Aviation In Canada*, unpublished thesis, Institute of International Air Law, McGill University, Montreal, 1953.

2. *In Re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, 77, per Lord Sankey, L.C. (on appeal from the Supreme Court of Canada). Generally see, McNairn, *Aeronautics And The Constitution*, (1971) 49 Can. Bar Rev. 411.

When these words were uttered by Lord Sankey he could not possibly have foreseen their far-reaching effect; and what is puzzling is the strong emphasis of the Judicial Committee placed upon the treaty-making power of the federal government.

Lord Sankey delves into history and informs us that after the 1914-18 war the allied powers (including Canada) signed a convention for the regulation of aerial navigation, dated October 13, 1919, and this "was ratified by His Majesty on behalf of the British Empire on June 1, 1922".<sup>3</sup> The result is that,

"With a view to performing her obligations as part of the British Empire under this convention, which was then in course of preparation, the Parliament of Canada enacted the Air Board Act, c. 11 of the Statutes of Canada, 1919 (1st session), which with an amendment thereto, was consolidated in the Revised Statutes of Canada, 1927, as c. 43, under the title the Aeronautics Act. It is to be noted, however, that the Act does not by reason of its reproduction in the Revised Statutes take effect as a new law. The Governor General in Council, on December 31, 1919, pursuant to the Air Board Act, issued detailed "Air Regulations" which, with certain amendments, are now in force. By the National Defense Act, 1922, the Minister of National Defense thereafter exercised the duties and functions of the Air Board.

By these statutes and the Air Regulations, and the amendments thereto, provision is made for the regulation and control in a general and comprehensive way of aerial navigation in Canada, and over the territorial waters thereof. In particular, s. 4 of the Aeronautics Act purports to give the Minister of National Defense a general power to regulate and control, subject to approval by the Governor in Council (with statutory force and under the sanction of penalties on summary conviction), aerial navigation over Canada and her territorial waters; including power to regulate the licensing of pilots, aircraft, aerodromes and commercial services; the conditions under which aircraft may be used for goods, mails and passengers, or their carriage over any part of Canada; the prohibition (absolute or conditional) of flying over prescribed areas; aerial routes, and provision for safe and proper flying."<sup>4</sup>

Under the provisions of The British North American Act, 1867 (hereinafter called the B.N.A. act) sections 91 and 92, legislative powers are

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3. *Ibid.*, p. 63.

4. *Ibid.*

distributed between the federal and provincial governments, and as expected the provincial governments argued that aerial navigation was within their domain because it falls within property and civil rights and is a matter of merely local and private nature within the provinces.<sup>5</sup> The federal government relied upon the introductory words to Section 91, "peace, order and good government" and the provisions dealing with regulation of trade and commerce, postal services, beacons, and navigation and shipping.<sup>6</sup>

Lord Sankey outlines the obligations which Canada, as part of the British Empire, undertook in the aerial navigation convention; and some of these are — Canada agreed not to permit over-flights except by aircraft of contracting nations; registration of Canadian aircraft; notification to contracting states of prohibited areas; and many other provisions governing flying.<sup>7</sup>

He concludes that the federal government has exclusive jurisdiction over this area because under Section 132 of the B.N.A. Act, Canada "as part of the British Empire" has all the powers necessary to perform her obligations to foreign countries "arising under treaties between the Empire and such foreign countries", and the convention "covers almost every conceivable matter relating to aerial navigation,"<sup>8</sup> and also having regard to Section 91, items 2, 5 and 7 (military and naval services), and the peace, order and good government clause; and with almost prophetic words he says:

"Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion".<sup>9</sup>

As a concomitant of government licensing of commercial passenger air carriers, consideration should be given to airports and their control by government; hence, when a local municipality, relying upon a provincial statute empowering it to pass bylaws for licensing, regulation and prohibiting the erection of aerodromes, passed such a bylaw it was struck down in *Johannesson v. Rural Municipality of West St. Paul*<sup>10</sup> by the Supreme Court of Canada which reiterated the views of the Privy Council that the

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5. Items 13 and 16 of Section 92, *B.N.A. Act 1867*.

6. Items 2, 5, 9 and 10, Section 91, *B.N.A. Act 1867*.

7. *Ibid.*, pp. 74-76.

8. *Ibid.*, pp. 64, 77.

9. *Ibid.*, pp. 77.

10. [1952] 1 S.C.R. 292, (1953) 69 C.R.T.C. 105 (S.C.C.).

whole field of aerial navigation belongs to the federal government. The court says that the field has been occupied by the Dominion with the enactment of the Aeronautics Act; and although the international 1919 Aviation Convention was denounced by Canada in 1947, Canada became a party in 1944 to the Chicago Convention, hence the Dominion is still active in the aeronautics area. The court states that air navigation is a matter of national importance and concern and falls within the peace, order and good government language of section 91 of the B.N.A. Act.

Estey, J. analyses air navigation, and says that the aerodrome is the place for taking off and landing, hence it is an essential aspect of air navigation and aeronautics.

Since the federal government, Locke J. says, has the power to prescribe aerial routes, it can also prescribe the places for landing and takeoff. He makes it clear that by its nature and its development aeronautics is a matter for national concern when he says:

“There has been since the First World War an immense development in the use of aircraft flying between the various Provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the Provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity in the carrying of passengers and mails east and west is in the hands of a Government-controlled company, private companies carry on large operations, particularly between the settled parts of the country and the north and mails are carried by some of these lines. The maintenance and extension of this traffic, particularly to the north, is essential to the opening up of the country and the development of the resources of the nation. It requires merely a statement of these well-recognized facts to demonstrate that the field of aeronautics is one which concerns the country as a whole.”<sup>11</sup>

From *Johannesson* we can conclude that local authorities, be they provincial or municipal, cannot pass legislation or regulations in the aeronautics field; hence, even a zoning bylaw (ordinarily the subject of local legislation), cannot supersede federal legislation or invade the field—and in *Johannesson* that was one of the contentions for the local

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11. *Ibid.*, p. 131 (C.R.T.C.).

municipality i.e. that the bylaw was only a zoning bylaw.<sup>11.1</sup>

Parliament authorized the Governor in Council, giving it unlimited discretion, under the provisions of the Department of Transport Act<sup>12</sup> to pass regulations for the management, maintenance and use and protection of property under the control of the Minister of Transport; and accordingly at a civil airport which is the property of the Crown in the right of Canada, nobody can carry on a commercial business in contravention of regulations made by the Governor in Council.<sup>13</sup> Such regulations are valid and effective notwithstanding the provisions of the Aeronautics Act<sup>13.1</sup> which give the Minister the right to make regulations for the control of air navigation which includes licensing, inspection and regulation of aerodromes—it being the intent, as the Manitoba Court of Appeal has said, that the Aeronautics Act “rather than dealing specifically with airports themselves, their operations, and management . . . deals primarily with the mechanics of flying and the conditions under which aircraft may be operated”.<sup>14</sup>

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11.1 The federal government owns and operates the major Canadian public airports, and in 1968 it disclaimed the right to land use control in the vicinity of airports, except with respect to the height of structures: Rosevear, *Noise in the vicinity of Airports and Sonic Boom*, (1969) 17 Chitty's L. J. 3, 5. Land use control adjacent to airports is a function of the provincial and municipal governments (see, The Planning Act, R.S.O. 1970, c. 349, sections 29, 35, 38). The Airports Act of the Province of Ontario, R.S.O. 1970, c. 17, permits the province to acquire, lease, operate, maintain and establish airports in Ontario; and in fact the Province of Ontario, using the services of White River Air Services Limited, operates the norOntario airline serving Timmins, Sudbury and Sault Ste. Marie. In the United States all commercial air carriers, pursuant to section 401 of the Federal Aviation Act of 1958, *infra*, footnote 126, must have a certificate issued by the Civil Aeronautics Board, which is declared in section 201 of the Federal Aviation Act of 1958 to be an agency of the United States—all appointments to the Board are made by the President with the advice of the Senate; nevertheless, states have entered into the aeronautics field, albeit in a limited sense: see Caves, *Air Transport And Its Regulators—An Industry Study*, pp. 133-136, Harvard University Press, Cambridge, Massachusetts, 1962, who concludes, at p. 136: “In sum, given the nature of air transportation, the apparent mood of the states, and the comprehensive use of its regulatory powers by the Civil Aeronautics Board, it seems likely that except for occasional jurisdictional conflicts, all important economic regulatory power will continue to lie with the Civil Aeronautics Board.”

12. R.S.C. 1952, c. 79; now R.S.C. 1970, c. T-15.

13. *Desrosiers v. Thinel* [1962] S.C.R. 515, (1964) 83 C.R.T.C. 316 (S.C.C.).

13.1 R.S.C. 1952, c. 2, as amended by c. 302, section 4(1)(c).

14. *Regina v. Johnson* (1964) 49 D.L.R. (2d) 373, 377. But *cf. Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board*, [1967] 2 O.R. 25 (H.C.J.), 243 (C.A. Laskin, J.A., as he then was, dissenting); 62 D.L.R. (2d) 270 (H.C.J.), 63 D.L.R. (2d) 198 (C.A.) where it was held that when the Government of Canada contracts with a motor transportation service for the carriage of passengers to and from a federally-owned airport, that matters falls outside federal jurisdiction *i.e.* outside the Aeronautics Act.

While it is not intended to trace step-by-step all of the legislation pertaining to air law, a cursory examination indicates that it has been (and still is to some extent) a morass of complexity and overlapping.

Air legislation goes back to 1919 when the Canadian government passed The Air Board Act,<sup>15</sup> establishing an Air Board, and air regulations were promulgated and published in the Canada Gazette.<sup>16</sup> In 1922 the Air Board Act became known as the Aeronautics Act, and the Air Board came under the Minister of National Defence, and in 1936 the Department of Transport Act put the Minister of Transport in charge. The next step in 1938 when the Transport Act was passed was significant as it established the Board of Transport Commissioners (which was formerly the Board of Railway Commissioners) "with authority in respect of transport by railways, ships and aircraft".<sup>17</sup> The Board's duties included licensing of aircraft and granting of routes.

The Air Transport Board was created in 1944 pursuant to the provisions of the Aeronautics Act,<sup>18</sup> and "it had substantially the same powers over civil aviation as the Board of Transport Commissioners had had" except that it had to make special provision to allow Trans-Canada Air Lines to operate which meant that "the Trans-Canada Air Lines Act would take precedence over the licensing powers of the new [Air Transport] Board,"<sup>19</sup> hence it was required under the provisions of the Aeronautics Act<sup>20</sup> to grant to Trans-Canada Air Lines "a license to operate a commercial air service" and we should note that,

"In 1937, Trans-Canada Air Lines, a subsidiary of Canadian National Railways, began to fly the transcontinental route and Canada's share of trans-border services with the United States. In 1964 its name was changed to Air Canada".<sup>21</sup>

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15. S.C., 1919 (1st sess.), c. 11.

16. Richardson, *Canadian Law of Civil Aviation* (1942) 53 C.R.T.C. 321.

17. *Ibid.*, p. 323.

18. S.C., 1944-45, c. 28.

19. Currie, *Canadian Transportation Economics*, 393, University of Toronto Press, 1967. Trans-Canada Air Lines changed its name to Air Canada in 1964: see *infra*, footnote 21. Only in recent times has there been any serious threat to Air Canada for service to major cities, as, for example, the licence which was granted to Nordair Ltd. to service Windsor-Montreal-Ottawa with non-stop restrictions as proposed by Air Canada: Decision No. 3307 of the Air Transport Committee, February 2, 1972.

20. *Supra*, footnote 18, section 12(6). See the present Aeronautics Act, R.S.C. 1970, c. A-3, section 16(7).

21. *Supra*, footnote 19, p. 12. Canada's national air carrier, Trans-Canada Air Lines, T.C.A. became Air Canada by virtue of the Trans-Canada Air Lines Act, S.C. 1937, c. 2, and section 7 of that statute (see now Air Canada Act, R.S.C. 1970, c. A-11, sections 6,

Early aeronautics legislation gives the impression that it was prepared on a patchwork basis; and the effect of this nebulous approach can be seen, for example, in *Attorney-General for Canada v. MacDougall*<sup>22</sup> where the accused was charged with acting as an aircraft pilot without holding a certificate from the Air Board of Canada contrary to the provisions of the Aeronautics Act, 1919, and Prendergast, C.J.M., who gave the court's reasons notes the following:

1. In 1919 the Air Board Act,<sup>23</sup> was passed putting aeronautics under the control of the Air Board.
2. In 1922, the National Defence Act,<sup>24</sup> was enacted providing that the Minister of National Defence was to carry out the functions of the Air Board.
3. The Air Board Act was in substance incorporated into the 1927 Aeronautics Act,<sup>25</sup> and whenever Air Board had been mentioned Minister of National Defence replaces those words.
4. The Air Board regulations passed under The Air Board Act continued in force because of the provisions of two statutes to that effect,<sup>26</sup> but they still state that an Air Board certificate is required before one can act as a pilot.

Prendergast, C.J.M., therefore concludes that the "effect of the change made by *The National Defence Act, 1922*, in the personnel of the administration of the Act, the obligation is now to procure a certificate, not from the Air Board which no longer exists, but from the minister . . ."<sup>27</sup> In the result the acquittal was upheld.

Under the present Aeronautics Act<sup>28</sup> the Minister of Transport has a general supervisory power over all matters concerning aeronautics,<sup>29</sup> and this includes building and maintaining government aerodromes;<sup>30</sup> pre-

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11, formerly Trans-Canada Air Lines Act, R.S.C. 1952, c. 268) gave the Canadian National Railways (which is itself owned and controlled by the Canadian government: Currie, *supra*, footnote 19, pp. 7-12) control of its capital stock; hence the comment by Currie, *ibid.*, p. 554, that Canada's national air carrier is "a subsidiary of Canadian National Railways".

22. [1934] 1 W.W.R. 621 (Man., C.A.).

23. *Sura*, footnote 15.

24. S.C. 1922, c. 34.

25. R.S.C. 1927, c. 3.

26. *Ibid.*, p. 624; the two statutes being the Interpretation Act, R.S.C. 1927, c. 1, s. 20, and an Act respecting the Revised Statutes of Canada, 1924, c. 65 (plus an amendment to the 1919 regulations which specifies that the Interpretation Act is to apply to them).

27. *Ibid.*

28. R.S.C. 1970, c. A-3.

29. *Ibid.*, section 3(a).

30. *Ibid.*, section 3(c).

scribing of aerial routes;<sup>31</sup> investigation, examination and reporting upon the operation and development of commercial air services in Canada;<sup>32</sup> and preparing and drafting “for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada . . . and for the control or operation of aircraft registered in Canada wherever such aircraft may be . . .”<sup>33</sup> The Governor in Council can make regulations to charge owners or operators of aircraft for use of government facilities, and may authorize the Minister to make regulations for charges for facilities.<sup>34</sup>

Subject to the approval of the Governor in Council, the Minister of Transport can make “regulations to control and regulate air navigation over Canada . . . and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada” and such regulations can be for the licensing and regulation of pilots, aircraft, aerodromes, conditions of use of aircraft and for transportation of goods, mail, passengers; prohibition of navigation of aircraft; conditions for aircraft coming from outside Canada; aerial routes and their use and control; navigation safety rules; height, use and location of buildings and structures in or near airports; maximum working hours for pilots, co-pilots, navigators, engineers “employed by any person operating a commercial air service licensed by the Canadian Transport Commission;” to determine air-worthiness of aircraft, the right to enter on aircraft manufacturer’s premises for inspection; to preserve, protect, remove, and test aircraft involved in accidents; operation and use of rockets, moored balloons and kites; and investigation of aircraft accidents.<sup>35</sup> The Governor in Council may authorize the Minister “to enter into a contract with any air carrier for the grant of . . . assistance, financial or otherwise”<sup>36</sup>

The functions and the personnel of the Air Transport Board were transferred to the Canadian Transport Commission in 1967 under the National Transportation Act.<sup>37</sup>

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31. *Ibid.*, section 3(f).

32. *Ibid.*, section 3(k).

33. *Ibid.*, section 3(1).

34. *Ibid.*, sections 4, 5.

35. *Ibid.*, section 6(1). Section 6(4)(5) provide penalties for violations of regulations, or orders or directions of the Minister of Transport, and section 16(5) says that even though the Canadian Transport Commission may issue a commercial air service license, the air carrier cannot operate until the Minister of Transport issues a certificate that the carrier is “adequately equipped and able to conduct a safe operations as an air carrier”.

36. *Ibid.*, section 18.

37. S.C. 1966-67, c. 69, sections 14, 82. In addition, the Board of Transport Commissioners, and the Canadian Maritime Commission were incorporated into the C.T.C.



Section three of the National Transportation Act<sup>38</sup> sets out Canada's national transportation policy, and is worth considering in full—it reads:

“It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada, and that these objectives are most likely to be achieved when all modes of transport are able to compete under conditions ensuring that having due regard to national policy and to legal and constitutional requirements

- (a) regulation of all modes of transport will not be such a nature as to restrict the ability of any mode of transport to compete freely with any other modes of transport;
- (b) each mode of transport, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided that mode of transport at public expense;
- (c) each mode of transport, so far as practicable, receives compensation for the resources, facilities and services that it is required to provide as an imposed public duty; and
- (d) each mode of transport, so far as practicable, carries traffic to or from any point in Canada under tolls 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, or
- (ii) an undue obstacle to the interchange of commodities between points in Canada or 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 these objectives as fall within the purview of subject matters under the jurisdiction of Parliament relating to transportation.”

The National Transportation Act applies to air transport to which the

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38. R.S.C. 1970, c. N-17.

Aeronautics Act applies;<sup>39</sup> and the National Transportation Act specifically provides that the Canadian Transport Commission (C.T.C.) is charged with the duty to perform the functions vested in it under the Aeronautics Act “with the object of coordinating and harmonizing the operations of all carriers engaged in transport by railways, water, aircraft”<sup>40</sup> and the Commission is to give to the National Transportation Act and the Aeronautics Act “such fair interpretation as will best attain that object.”<sup>41</sup>

In addition to its functions, duties and powers under the Aeronautics Act<sup>42</sup> the C.T.C. has *inter alia* the following duties: (1) inquire and report to the Minister of Transport on matters concerning sound economic development of transport;<sup>43</sup> and the relationship between different types of transportation and methods to coordinate their development, regulation and control;<sup>44</sup> and financial assistance for transport;<sup>45</sup> (2) make economic studies and research concerning transportation;<sup>46</sup> (3) create economic standards and criteria for federal investment in transport;<sup>47</sup> (4) inquire and advise the government concerning expenditures of governmental departments or agencies concerning transportation, and for the development of revenue;<sup>48</sup> (5) and take part in national, international and intergovernmental transport organizations.<sup>49</sup>

The Commission which is a court of record<sup>50</sup> is given power to consult with other persons and bodies,<sup>51</sup> and it is to consist of not more than seventeen members appointed by the Governor in Council<sup>52</sup> which ap-

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39. *Ibid.*, section 4(b).

40. *Ibid.*, section 21.

41. *Ibid.*

42. *Ibid.*, section 22(1).

43. *Ibid.*, section 22(1)(a).

44. *Ibid.*, section 22(1)(c).

45. *Ibid.*, section 22(1)(e).

46. *Ibid.*, section 22(1)(b).

47. *Ibid.*, section 22(1)(g).

48. *Ibid.*, section 22(1)(h).

49. *Ibid.*, section 22(1)(i).

50. *Ibid.*, section 6(2).

51. *Ibid.*, section 22(4).

52. *Ibid.*, section 6(1). The members are appointed for ten years, but can be removed for cause: section 6(3); and can hold office until age seventy: section 6(4); and are not to have any conflicts of interest e.g. concerning matters or applicants before the Commission, or by having an interest in an air transport company, or in any device, appliance, machine or patented process which can be used in aircraft, or engage in manufacturing or selling of aircraft: sections 8, 9. Governor in Council is defined in the Interpretation Act, R.S.C. 1970, c. I-23, section 28 as meaning the “Governor in Council” or “Governor General in Council” and means, as the section states “the Governor General of Canada, or person administering

points one of them as president and two as vice-presidents.<sup>53</sup> The Commission has a secretary who keeps records,<sup>54</sup> other officers and employees,<sup>55</sup> and has an office in Ottawa.<sup>56</sup>

The Commission may investigate into any carrier rates or conditions of carriage which anybody believes is contrary to the public interest, as defined in section three, and if it is so found the Commission can order the rate or condition removed or make such order as it considers proper or report to the Governor in Council for appropriate action.<sup>57</sup> The criteria and standards which the Commission are to take into account are set forth in section 23(3):

“23(3) In conducting an investigation under this section, the Commission shall have regard to all considerations that appear to it to be relevant, including, without limiting the generality of the foregoing,

(a) whether the tolls or conditions specified for the carriage of traffic under the rate so established are such as to create

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

(ii) an undue obstacle to the interchange of commodities between points in Canada or 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; or

(b) whether control by, or the interests of a carrier in, another form of transportation service, or control of a carrier by, or the interest in the carrier of, a company or person engaged in another form of transportation service may be involved.”

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the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada.” For all practical purposes the Governor in Council is the cabinet, usually acting upon the advice of the Minister involved.

53. *Ibid.*, section 7(1).

54. *Ibid.*, sections 10, 11.

55. *Ibid.*, section 12.

56. *Ibid.*, section 13(1).

57. *Ibid.*, section 23.

To carry out its functions the Commission appoints an Air Transport Committee consisting of at least three commissioners exclusive of the president who is an *ex officio* member,<sup>58</sup> and any order, rule or direction of the committee (except as to a specific rate, license or certificate) which is objected to by an operator of another mode of transport on the ground of discrimination or unfairness, may be reviewed by the Commission;<sup>59</sup> and government, shippers and consignees can be heard at Commission hearings.<sup>60</sup>

There is a right of appeal to the Minister of Transport from any final decision of the Commission concerning an application for a commercial air service license under the Aeronautics Act, or any suspension, cancellation or amendment of license, within thirty days from the Commission's order or decision.<sup>61</sup>

Where an air carrier plans to "acquire, directly or indirectly, an interest by purchase, lease, merger, consolidation or otherwise, in the business or undertaking of any person whose principal business is transportation" notice must be given to the Commission which publicizes same, and if objection is filed with the Commission "on the grounds that it will unduly restrict competition or otherwise be prejudicial to the public interest" then the Commission is to investigate and may hold a public hearing and may disallow such acquisition "if in the opinion of the Commission such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest" and any such disallowed acquisition to which objection has been made is void.<sup>62</sup>

Under the provision of section 90 of the National Transportation Act passed in 1967 the regulations, rules, orders and directions of the old Air Transport Board were to continue in force until repealed, replaced, rescinded, amended or varied by the Commission, the Aeronautics Act, or any other federal legislation; and in section 94 the Act repealed segments of the Aeronautics Act, and provided that the word "Commission" was to be substituted for the word "Board" wherever it appeared in the Aeronautics Act.

Under the Aeronautics Act the C.T.C. has the power to inquire into all matters concerning deviations from the provisions of the Act, or regulations, license, permit, order or direction of the Commission, and also

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58. *Ibid.*, section 24(1).

59. *Ibid.*, section 24(4).

60. *Ibid.*, section 24(5).

61. *Ibid.*, section 25.

62. *Ibid.*, section 27: the intending acquiring air carrier must be one "to which the legislative jurisdiction of the Parliament of Canada extends".

regarding matters of public interest, with the power to make mandatory enforcing orders, and has jurisdiction to determine all matters of law and fact in this connection.<sup>63</sup> The C.T.C. is to advise the Minister of Transport concerning all civil aviation matters and make recommendations to him concerning any investigation or survey made by it;<sup>64</sup> and it can make regulations *inter alia* for the classification and form of licenses which are issued, their terms and conditions including renewals and restrictions;<sup>65</sup> dealing with records and accounts to be kept by carriers;<sup>66</sup> requiring carriers to file returns showing assets, equipment and similar information;<sup>67</sup> furnishing of information regarding ownership, control, transfer, consolidation, merger or lease of commercial air services;<sup>68</sup> establishing fees for licenses,<sup>69</sup> minimum insurance requirements,<sup>70</sup> classification or groups of air carriers,<sup>71</sup> traffic, tolls, tariffs, penalties;<sup>72</sup> exclusion of any carrier or commercial air service from all or part of this legislation or any regulation, order or direction made thereunder;<sup>73</sup> and designating examiners to make investigations.<sup>74</sup>

One must read together with the aforesaid provisos, the provisions of section 16(2) (3) of the Aeronautics Act<sup>75</sup> which permit the C.T.C. to issue licenses for the operation of commercial air services, provided it is in "the public interest" and the C.T.C. "is satisfied that the proposed commercial air service is and will be required by the present and future public convenience and necessity". With certain exceptions (such as a scheduled commercial air service operating wholly within Canada) the Commission can exempt a carrier or commercial air service in whole or in part from the public convenience and necessity provision.<sup>76</sup> The C.T.C. can prescribe the routes and areas to be served, and can impose conditions concerning schedules, places of call, carriage of passengers and freight, insurance, and the carriage of mail (subject to the Post Office Act);<sup>77</sup> and "may

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63. *Supra*, footnote 28, section 10.

64. *Ibid.*, section 13.

65. *Ibid.*, section 14(1)(a)(b).

66. *Ibid.*, section 14(1) (c).

67. *Ibid.*, section 14(1)(d).

68. *Ibid.*, section 14(1)(e).

69. *Ibid.*, section 14(1)(h).

70. *Ibid.*, section 14(1)(j).

71. *Ibid.*, section 14(1)(k).

72. *Ibid.*, section 14(1)(m).

73. *Ibid.*, section 14(1) (g).

74. *Ibid.*, section 14(1)(p).

75. *Supra*, footnote 28.

76. *Ibid.*, section 16(4).

77. *Ibid.*, section 16(6).

suspend, cancel or amend any license or any part thereof where, in the opinion of the Commission, the public convenience and necessity so requires";<sup>78</sup> and likewise when "in the opinion" of the Commission any conditions attached to a license have been violated by an air carrier the Commission may cancel, or suspend the license.<sup>79</sup> A valid and subsisting license is required to operate a commercial air service, and violation can lead to severe penalties.<sup>80</sup>

In the result the C.T.C. licences commercial air carriers, and the Minister of Transport makes regulations concerning the operations of air carriers, and licensing and regulation of all appurtenant matters (e.g. pilots, aerodromes, etc.).

### *Licensing*

Professor Currie tells us that prior to 1938 "there was practically no official regulation of commercial aviation except the licensing of aircraft and pilots"; and as the functions of the Board of Railway Commissioners passed to the Board of Transport, in the result "the Board was not a success in its administration of civil aviation. It was too bound by precedent, too railway-minded, and too inclined to deal only with the controversies brought to its attention. In other words, it was incapable of planning the future development of a rapidly growing industry".<sup>81</sup>

Before we pass to an examination of the Board's decisions so that we can assess these critical comments made by Professor Currie, we should remember that distilled out of all the legislation mentioned, the hierarchy in civil aviation in Canada today reads like this: to be strictly accurate we should begin with the Parliament of Canada, followed by the Governor in Council; next come the Minister of Transport, C.T.C. and the Air Transport Committee.<sup>82</sup> The A.T.C. has two branches, the Operations

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78. *Ibid.*, section 16(8).

79. *Ibid.*, section 16(9).

80. *Ibid.*, section 17: Up to \$5,000.00 or imprisonment for a term not exceeding one year or both upon summary conviction. There is a twelve month limitation period from the time an offence is committed for instituting a prosecution: section 22. This appears to conflict with section 721(2) of the Canadian Criminal Code R.S.C. 1970, c. C-34, which provides for a six month limitation period for summary conviction proceedings, as to which see *Jorgenson v. North Vancouver Magistrates* (1959) 28 W.W.R. 265, and *The Queen v. Machasek* [1961] S.C.R. 163.

81. *Supra*, footnote 19, p. 392.

82. A Canadian government handout given to the author states: "The functions of the Air Transport Committee extend to the licensing of persons to operate commercial air services; the regulation of air carriers; making investigations and surveys as required on the operation and development of commercial air services in Canada; advising the Minister in

Branch which in turn has Fares, Rates and Services, Operations Analysis, and the Licensing and Inspection Division; and the Economics and Accounting Branch (research, analysis, audit, finance); and finally there is a Secretary and Assistant Secretary called the Secretariat. The C.T.C. provides the A.T.C. with legal services from its Legal Services Branch.

Canadian air carriers are granted licenses to operate, which amount to the same thing as the certificates issued to American air carriers by the Civil Aeronautics Board (C.A.B.).

The year 1938 marks so-to-speak the official genesis of the period of regulated national air transportation in Canada; and this was governed by the Transport Act<sup>83</sup> which provided for the creation of The Board of Transport Commissioners for Canada, to replace The Board of Railway Commissioners of Canada. In section 3(2) it was stated that the Board, pursuant to the provisions of the Transport and Railway Acts, is to carry out its duties "with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways, ships and aircraft and the Board shall give to this Act and to the *Railway Act* such fair interpretation as will best attain the object aforesaid". In section 4 provision was made for incorporation of the practices and procedures set forth in the Railway Act.

Section 5 of the Transport Act outlined the requirements for licenses, and it is worth reading in full:

"5. (1) Before any application for a license is granted for the transport of goods and/or passengers under the provisions of this Act, the Board shall determine whether public convenience and necessity require such transport, and in so determining the Board may take into consideration, *inter alia*,—

(a) any objection to the application which may be made by any person or persons who are already providing transport facilities, whether by rail, water or air, on the routes or between the places which the applicant intends to serve on the ground that suitable facilities are or, if the license were issued, would be in excess of requirements, or on the ground that any of the conditions of any other transport license held by the applicant have not been complied with;

(b) whether or not the issue of such license would tend to develop the complementary rather than the competitive functions of the different forms of transport, if any, involved in such objections;

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the exercise of his duties and powers under the Aeronautics Act in all matters relating to civil aviation."

83. S.C. 1938, c. 53.

- (c) the general effect on other transport services and any public interest which may be affected by the issue of such license;
- (d) the quality and permanence of the service to be offered by the applicant and his financial responsibility, including adequate provisions for the protection of passengers, shippers and the general public by means of insurance.

(2) Notwithstanding anything contained in subsection one of this section, if evidence is offered to prove,—

- (a) that at any time during the period of twelve months next preceding the coming into force of the relevant Part of this Act on, in or in respect of the sea or inland waters of Canada, or the route between specified points or places in Canada or between specified points or places in Canada and specified points or places outside of Canada, or the part of Canada to which the application for the license relates, the applicant was *bona fide* engaged in the business of transport, whether in bulk or otherwise, and
- (b) that such ship for which such license is sought was at any time during the period of ten years next preceding the coming into force of this Act used for the transport of goods other than goods in bulk, and
- (c) that the applicant was during such period using ships or aircraft, as the case may be, for the purpose of such business,

the Board shall, if satisfied with such proof, accept the same as evidence of public convenience and necessity and issue a licence accordingly: Provided, however, that a ship temporarily out of service during the period of twelve months aforesaid shall nevertheless be deemed to have been in use during such period.”

Section 5(2), commonly called the “grandfather clause”, is similar to section 401(a) of the American Civil Aeronautics Act of 1938<sup>84</sup> which, as Professor Andreas Lowenfeld has noted, created and fostered an “irrational network” consisting of the “Big Four”, American, United, T.W.A. and Eastern which have “dominated commercial aviation within the United States” since 1938.<sup>85</sup>

One must keep in mind that there are basically two major airlines in Canada, Air Canada and Canadian Pacific Airlines (C.P.A.). C.P.A. in 1942 bought up most of the bush flyers who were operating in northern

84. 52 Stat. 977.

85. Lowenfeld, *Aviation Law*, 1-18, 1-25, Matthew Bender, New York, 1972. Certificates are now granted by the C.A.B. under section 401 of the Federal Aviation Act of 1958, 72 Stat. 731, as amended: *supra*, footnote 11.1.



Canada.<sup>86</sup> Also, it should be remembered that Canada, unlike the United States, does not have a government whereby the executive, legislative and judicial branches are split and operate on a checks-and-balances basis; judicial review of legislative acts, in the American sense, is not present; and although it is a federal confederation, the national government at Ottawa operates upon the British parliamentary system i.e. the elected government chooses its Prime Minister (usually the party leader) and cabinet (Governor in Council) who are the "executive" branch, but wholly responsible to Parliament; legislative acts of the federal and provincial governments may come under the scrutiny of the courts to ascertain whether they are *intra* or *ultra vires* the particular government, as encompassed within sections 91 and 92 of the B.N.A. Act.<sup>87</sup> Two other differences between Canada and the United States are worth noting: there is nothing in Canada comparable to the American Administrative Procedure statute;<sup>88</sup> and the American position that there a presumptive right to a judicial determination of administrative action<sup>89</sup> is not necessarily the Canadian position where judicial review by way of certiorari, prohibition and mandamus (even in the face of privative clauses which are "shown little respect"<sup>90</sup>) may be used provided the administrative agency exercised a judicial and not an administrative function.<sup>91</sup>

What was the record of the Board of Transport from 1938 to 1944 in its governance of civil aviation in Canada? Again we turn to Professor Currie, whose seminal works<sup>92</sup> in the Canadian transportation field de-

86. Currie, *supra*, footnote 19, pp. 556-560.

87. It is of interest to note that the Supreme Court of Canada is itself a creature of federal statute, Supreme Court Act, R.S.C. 1970, c. S-19.

88. 80 Stat. 378 (Public Law 89-554, September 6, 1966; Title 5, United States Code).

89. Jaffe, *Judicial Control of Administrative Action*, 336, Little, Brown and Company, Boston, 1965; although there is a doctrine of non-reviewability with respect to internal processes of administrative agencies where matters of personnel and discipline arise: see Comment re *United States v. Moore*, 427 F.2d 1020 (10th Cir. 1970), (1971) 46 N.Y.U.L. Rev. 353. In England, Professor S. A. deSmith in his *Judicial Review of Administrative Action*, 30, Stevens & Sons Limited, 2nd ed., 1968, says: "An outstanding characteristic of judicial review in English administrative law is that it is so seldom invoked".

90. Reid, *Administrative Law; Rights and Remedies*, 1953 Special Lectures of the Law Society of Upper Canada, 1, 41, Richard De Boo Limited, Toronto; and see generally Reid, *Administrative Law and Practice*, chapter 5, pp. 177-208, Butterworths, Toronto, 1971.

91. See, for example, *Canada Safeway Ltd. v. The Labour Relations Bd.* [1953] 1 D.L.R. 48, reversed [1953] 2 S.C.R. 46. For review by certiorari the administrative board must be exercising a judicial function: *Bruton v. Regina City Policemen's Assn.* [1945] 3 D.L.R. 437; and not an administrative function: *Rex v. Noxzema Chemical Company of Canada Ltd.* [1942] S.C.R. 178, 180, 186.

92. See also Currie, *Economics of Canadian Transportation*, 550, U. of Toronto Press, 2nd ed., 1959. There are of course other Canadian publications worth noting, such as, for

serve the highest praise, and in his view the Board of Transport Commissioners was not a success in the administration of civil aviation.<sup>93</sup>

Some of Currie's criticisms are: (1) Until C.P.A. came in the Board permitted too many carriers in the north, but it may be that "the Board's hands were tied by the legal requirements of the grandfather clause which prevented it from eliminating services not required by public convenience and necessity."<sup>94</sup> (2) It granted licenses with restrictions which were not in line with government policy, and had to revoke these licenses. This development, Currie explains, happened like this:<sup>95</sup>

"Licensing services to the United States raised a number of issues, chiefly associated with the right of an airline to carry passengers by circuitous routes in competition with airlines which had licenses to fly by direct routes. For instance, the Board granted a license to American Airlines to fly between Toronto and Buffalo<sup>96</sup> on condition that it not carry passengers between Toronto and New York via Buffalo.

Similarly on approving the Toronto-Detroit license, the Board prohibited the American company from carrying traffic from Windsor to Buffalo via Toronto. Simultaneously it forbade Trans-Canada to carry passengers between Windsor and New York via Toronto."<sup>97</sup>

The Board revoked these licenses because they offended government policy because, he continues,<sup>98</sup>

". . . it was not justified in assuming that it had the exclusive right, subject only to the *Transport Act* and to any agreements with other countries, to determine the conditions under which a license was to be granted. It also ran into unexpected criticism in connection with

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example Glazebrook, *A History of Transportation in Canada*, The Ryerson Press, 1938; Royal Commission on Canada's Economic Prospects, *Transportation in Canada*, by J.-C. Lessard, 1956.

93. *Supra*, footnote 19.

94. *Supra*, footnote 92, p. 548.

95. *Ibid.*, pp. 549, 550.

96. *Ibid.*, footnote at p. 717, citing *T.C.A.-Toronto, Ont. to Buffalo, N.Y.*, (1941) 2 C.A.B. 616.

97. *Ibid.*, footnote at p. 717 which reads: "*American Airlines*, (1941) 53 C.R.T.C. 169, 31 J.O.R.R. 224, 227. In *Northeast Airlines*, (1941) 52 C.R.T.C. 280; 30 J.O.R.R. 459, the Board gave the license for the route between Moncton, N.B., and Bangor, Me., subject to the provision that the applicant might not engage in the transportation of passengers and goods between Moncton and Montreal via Bangor." The *Northeast* case is discussed *infra*, footnote 111.

98. *Ibid.*

the Vancouver-Victoria<sup>99</sup> and the Edmonton-Yukon-Alaska route.”<sup>100</sup>

In defence of the Board it must be said that the Transport Act was not “sufficiently detailed” nor did the Canadian government make its policies clear although it did favor Trans-Canada Airlines thereby raising charges of monopoly.<sup>101</sup> With the emergence of C.P.A. as a major line, T.C.A. was threatened as Canada’s national airline, hence the government set up the Air Transport Board in 1944, and made a divestment order requiring surface carriers to divest themselves of air affiliates one year after the end of the European war (Canadian Pacific Railways as owner of C.P.A., and Canadian National Railways as controller of T.C.A. would be directly affected); however, this order was cancelled in 1946 *qua* C.P.R. and C.N.R.<sup>102</sup>

With the foregoing as background let us examine some of the reported decisions of the Board of Transport Commissioners.

### *The Board of Transport Commissioners*

In the United States the C.A.B. operates by having a civil servant, an examiner, hear the presentations of interested parties by way of briefs and oral presentations, and he then makes a report to the C.A.B. which renders a decision written by its opinion writers (if objection is filed then the C.A.B. will hear the presentation of “objection” briefs). From a reading of the reports it appears that the Board of Transport Commissioners held hearings at different places in Canada, in the presence of the applicants and objectors with their counsel; counsel made statements on behalf of their clients; *viva voce* evidence could have been heard, with the right of cross-examination; and the Board then rendered a written decision.

Hence when M & C Aviation Co. Ltd. applied in 1939 under section 5(1) of the 1938 Transport Act for a license to transport passengers and goods from Prince Albert, Saskatchewan to Flin Flon, Manitoba, the hearing took place in Saskatoon and Regina, and Mr. Garceau rendered the written opinion of the Board.<sup>103</sup> He says that there was much public

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99. *Ibid.*, footnote at p. 717 citing *T.C.A. (Victoria, B.C.)*, (1943) 56 C.R.T.C. 120; 33 J.O.R.R. 84.

100. *Ibid.*, citing *Canadian Aviation*, March 1942, p. 90; June 1942, p. 50; Canada, House of Commons, *Debates*, 1944, p. 4035.

101. *Ibid.*, pp. 550, 551.

102. *Ibid.*, pp. 551, 552.

103. *Re M & C Aviation Co., Ltd. & Canadian Airways Ltd.* (1940) 50 C.R.T.C. 338.

agitation for the granting of the license; the position of Canadian Airways Ltd. which opposed the application was anomalous; the applicant, although it did not put in evidence a statement of revenue and expenses, had been operating unprofitably since 1932 on this run, and further it was asking to hold its application in abeyance until after the war. The application was dismissed, and the only basis for doing so, on a reading of the report, appears to be on the ground that these particular places had not been specified for air services by the Governor in Council under section 15 (1) of the Transport Act.

Applications by three opposing air carriers, under section 5 (1) of the Transport Act, for a license between Winnipeg and Flin Flon were dismissed after a hearing in Winnipeg in 1939.<sup>104</sup> The Board's reasons were rendered by Mr. Garceau who, after setting out the provisions of section 5(1), catalogs the arguments and positions of the applicants, and one objector (the C.N.R. which claimed adequate service was being provided by it) and concludes, with no analysis or exposition that the public convenience and necessity does not indicate this transportation is needed.<sup>105</sup>

In another application heard in 1939<sup>106</sup> two competing air carriers applied for a license under section 5 (1) of the Transport Act to provide service between Peace River and Yellowknife, N.W.T., opposed by a third air carrier. In the reasons rendered by Chairman Stoneman he points out that the two applicants have been operating at a loss, but one of them is in a sounder financial position, has the required aircraft and insurance coverage (which the other applicant does not have), and as the intervenor's objection was without merit (there was sufficient volume of traffic transported between the points mentioned in the application), hence the license was granted to the more solvent carrier and the application of the other applicant dismissed.

As we can see from the foregoing the Board of Transport Commissioners was busy with applications for air transport licenses in 1939, albeit by small carriers. Two other such applications are worth mentioning: where an applicant for license to serve different points in Manitoba was unable to show that it had any traffic to some of these points, and such a service would duplicate existing air service and would be for the benefit of a sparsely settled area, the application was dismissed, without preju-

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104. *Re Arrow Airways Ltd., Wings Ltd., & Canadian Airways Ltd.* (1940) 50 C.R.T.C. 341.

105. This is one of those instances when the headnote is better than the reasons in its pointed clarity and statement of the situation.

106. *Peace River Airways Ltd. & Mackenzie Air Service Ltd. v. Canadian Airways Ltd.* (1940) 50 C.R.T.C. 349. The written reasons reproduce a portion of the viva voce evidence tendered by one of the applicants.

dice to the applicant's right to apply in a separate application for a license under the grandfather provision;<sup>107</sup> accordingly, the same air carrier applied for a license under the grandfather provision which was granted, and then made application for extended service to other points, which was denied because the carrier had little evidence to prove necessity, never operated between these points at anytime, could not show how traffic would be developed, and nobody asked for such a service.<sup>108</sup>

To bring oneself within the grandfather provision, the applicant had to show, in accordance with the Transport Act provisions "that at some time" as Mr. Cross of the Board stated in *Re Peace River Airways Ltd.*<sup>109</sup> that "during the period of twelve months next preceding the first day of July, 1938, in respect of the route between the specified points or places to which its application relates, [that] the applicant was *bona fide* engaged in the business of transport whether in bulk or otherwise, and was using aircraft for the purpose of such business."<sup>110</sup>

The reasoning of the Board of Transport Commissioners in 1941 in *Re Northeast Airlines, Inc.*<sup>111</sup> is illuminating. Northeast applied for a license for service between Moncton, New Brunswick and Bangor, Maine. The application was sent through diplomatic channels, and was accompanied by an order of the C.A.B. including said points in the carrier's certificate. The Board refers to the 1940 Convention made between Canada and the United States whereby any new service between these particular points was allocated to an authorized American carrier, for a stipulated period of time; that "its consideration of the application is confined solely to the statutory provisions of the *Transport Act*, 1938. The Board is not a Department of the Government and derives its powers only from the legislation entrusted to its administration."<sup>112</sup>

The Governor in Council must name points and places as this was an international air service, and as it had done so it was "compulsory that any transport by air between said points be conducted only under a license from this Board."<sup>113</sup> No objections were filed, and in "considering whether public convenience and necessity require an air service between points where no such service is presently given, [the Board is] admittedly faced with a difficult task." The Board says that as the applicant received

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107. *Wings Ltd. v. Arrow Airways Ltd.* (1940) 50 C.R.T.C. 359.

108. *Re Arrow Airways Ltd.* (1940) 50 C.R.T.C. 364.

109. (1940) 51 C.R.T.C. 358, 365, 366.

110. As the applicant could not prove that its application was dismissed.

111. *Supra*, footnote 97.

112. *Ibid.*, p. 282 (C.R.T.C.).

113. *Ibid.*, p. 283, pursuant to the provisions of Part III of the Transport Act, 1938, sections 14(1), 15(1) (a).

a certificate from the C.A.B. it is unnecessary to restate the facts upon which the applicant relies. The license will be for international traffic, and the Board says it must consider matters of public interest, hence—

“It is a matter of common knowledge that public interest in national defence is keenly aroused. We believe that the development of regular air transport service between these points would tend to further that interest at this time to the mutual advantage of both countries. While this one factor does not essentially override all other considerations, it is, we believe, an appropriate one to take into consideration at this time.”<sup>114</sup>

The Board is impressed with the fact that Northeast already has a license to serve between Boston and Montreal and “its performance thereunder has been satisfactory, as is also its financial position and insurance protection.”<sup>115</sup> Public convenience and necessity have been proven and the license was granted for a one year period.

The year 1941 was a busy one for the Board in its work considering a variety of applications for air transport licenses; but we will see that it really did not have to work too hard in preparing its reasons. In *Re Western Air Lines, Inc.*<sup>116</sup> an American carrier, Western Airlines, applied for a license between Great Falls, Montana and Lethbridge, Alberta with an intermediate point of call at Cut Bank-Shelby, Montana. The Board uses the same language as it used in the *Northeast* case, adapting it to suit this application; it is almost as if the Board had a form type of judgment which a clerk would be asked to fill in making appropriate changes, except for one minor change, namely, that instead of stressing the national defence issue the Board says that this route will be “to the mutual advantage of both countries” and also it “will complete a protected inland air route along the east side of the Rocky Mountains to Yukon and Alaska.”<sup>117</sup> A one year license was granted.

If we stop at this point to consider the reasons rendered by the Board so far in these air transport license cases, we can conclude the following:

1. The Board contented itself with the use of cliches, platitudes and talesmanic sounding phrases in defining public interest, convenience and necessity.

2. It showed little or no imagination in its reasons which left much to be desired in delineating all of the considerations applicable to the case

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114. *Ibid.*, p. 284.

115. *Ibid.*

116. (1941) 52 C.R.T.C. 380.

117. *Ibid.*, p. 384.

before it; and in fact it adopted a pat formula type of judgment, using exactly the same language in similar type cases.

3. Anybody appearing before it with an application, and aware of the foregoing would certainly not be impressed with its performance.

American Airlines is the subject of two Board reports. In the first one, made on June 13, 1941,<sup>118</sup> in many ways the Board's reasons read like those in the *Northeast* and *Western Air Lines* cases—the pat formula judgment was hauled out of the desk and tailored to the immediate situation confronting the Board. The differences here are that the Board said that with respect to this application for a license between Buffalo and Toronto the Board could not consider mail transportation as that was not within its jurisdiction; Trans-Canada was granted licenses for Toronto-Buffalo and Toronto-New York services, but the C.A.B. approved of only the latter; the U.S. and Canada agreed that Toronto-New York would be granted to a Canadian carrier, and Toronto-Buffalo to an American; the T.C.A. license for Toronto-Buffalo expired and was not renewed because of the aforesaid agreement. The Board says that as American was selected by the C.A.B. it accepts its findings, and as no objections were filed a one year license was granted.

The Board then goes to great pains to explain the obligations of the licensee, and says that on the Toronto-New York service T.C.A. has the exclusive transportation rights, and similarly with American on the Toronto-Buffalo run. "Consequently," the Board explains, "in granting a license to the applicant between Buffalo and Toronto it is not authorized to engage in the transportation of passengers and goods between points where other licenses are in force, such as Toronto-New York."<sup>119</sup>

In a note added on to the judgment the Board also explains that the Governor in Council rescinded the naming of Toronto and New York under the Act, hence their comments concerning these two points no longer apply.

On June 14, 1941 the Board gave judgment in the other American Airlines case.<sup>120</sup> This was a license application to transport passengers, goods and mail between Windsor and some fifteen American places. Again, the Board followed its stereotyped judgment formula, except that here it again pointed out it cannot deal with a mail application; set forth verbatim the C.A.B. reasons in granting its certificate; all of which was sufficient, for the granting of a one year license. The Board explained that although American has Buffalo-Windsor and Buffalo-Toronto it cannot

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118. *Re American Airlines Inc.* (1942) 53 C.R.T.C. 169.

119. *Ibid.*, p. 173.

120. *Re American Airlines Inc.* (1942) 53 C.R.T.C. 390.

go on the Toronto-Windsor run since that belongs exclusively to T.C.A.; and although T.C.A. has Toronto-New York and Toronto-Windsor, only American can fly New York-Windsor.

Among the reported decisions of the Board of Transport commissioners, *Re Canadian Colonial Airways Ltd. and Quebec Airways Ltd.*<sup>121</sup> is refreshing as it presents a logical and concerted effort by the Board, including the dissenting member, to analyse the pertinent facts presented by the competing applicants, and avoids the hackneyed approach adopted by the Board which we have already seen. Colonial and Quebec Airways competed for service between Montreal, Three Rivers and Rimouski, points named by the Governor in Council in an Order in Council thereby making it necessary (pursuant to the Transport Act) for service to these points to be executed only by a licensed carrier.

Airways already had a license for these points granted to it under the grandfather provision, but because of war conditions (the applications were heard in 1940) it was only providing a monthly service, and was not going into Three Rivers because of lack of airport facilities. Mr. Cross in rendering the majority reasons emphasized that Airways had fulfilled its obligations, and after the presentation of briefs and hearing evidence permitted Airways to add Three Rivers to its license and dismissed the Colonial application.

Mr. Cross mentions the railway's presentation that there is adequate rail service to these points; and mentions the geographic location of Three Rivers, on the route between Montreal and Quebec (and that there is water service and a highway between these points) and seems to indicate that he does not think too much of the argument that the travelling time to-and-from airports nullifies the benefits of such an air service.

With respect to Colonial's application Mr. Cross properly indicates that it had the burden of proving public convenience and necessity, and it failed to do so. Colonial had a license to operate between Montreal and New York, and stressed that it could give continuous service which would have access to the larger American market. It said its flight would come from New York, and provide through service direct to Quebec, with stops at all the said points, but Mr. Cross was not impressed with the fact that passengers would have to change planes at Montreal if Colonial did not get the license. Mr. Cross appears to adopt Airways' position that the granting of a license to Colonial (which asked that Airways' license be cancelled) would provide service exceeding public need.

In his dissent Mr. Garceau emphasized that Airways was flying only

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121. (1942) 53 C.R.T.C. 303.



once a month between Montreal and Quebec, as it admitted in its filed material, so that it could retain its license. This was insufficient, in his view, to allow them to retain this license. Added to which he says that Three Rivers is in a growing area; Airways has no plans to provide a regular service; and has not utilised the possibilities; Colonial can provide regular service, with connections into the United States; there is water and rail service to Three Rivers, but this does not preclude air service; if Colonial is given the license Quebec and Three Rivers would be directly connected with New York and Montreal, and indirectly through T.C.A. with Ottawa and Toronto.

Mr. Garceau's dissent, which is telling answer to the majority (are we dealing here with competition between a Canadian and an American-based firm, and is the Board waving the Canadian maple leaf?) says that Airways

“ . . . can only operate between Montreal, Three Rivers and Quebec. This airline is too short to be operated with financial success, for it is a matter of common experience that the longer the route, the greater the revenue per plane.”<sup>122</sup>

Continuous service which Colonial can provide, and the admission by Airways that it is conducting a monthly service only to retain its license, coupled with the fact “that Quebec and Three Rivers should be given the advantage of airway connection with the outside world”<sup>123</sup> militates, Mr. Garceau says, in favor of Colonial and against Airways. In his reasons Mr. Garceau appears to be more knowledgeable about the area involved, and presumably this acquaintance is based upon the evidence presented plus his personal information; and if this is so, this would indicate that one of the considerations in selecting members for boards involved with issuing air licenses should be regionality i.e. members should be picked from different areas of Canada.

At a hearing in 1940, the Board was called upon to explain the application of section 5 of the Transport Act in a case where a complaint was lodged by one carrier that another carrier was not qualified under section 5 (2), the grandfather clause, to serve certain places.<sup>124</sup>

The Board explained the operation of section 5 in this way:

1. Section 5 applies to all licenses (water, air), but for air carriers one must look specifically to Part III of the Act.

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122. *Ibid.*, p. 315.

123. *Ibid.*, p. 317.

124. *Wings Ltd. v. Canadian Airways Ltd.* (1942) 53 C.R.T.C. 64.

2. Under section 5 (1) an applicant for a license must prove a public convenience and necessity requirement for the transport.

3. Once this is established, section 13 of Part III applies and it permits the Board to license aircraft for the transport of passengers and/or goods between specified points or places within Canada, or between such specified points or places in Canada and specified points or places outside Canada.

4. There is, the Board says, "nothing in this section [13] that makes any reference whatsoever to any 'part of Canada' or area. The license must be issued between specified points or places, and insofar as any reference in Part III to 'route' is made, it is only that the Board may prescribe the route, and, . . . this means identifying it by specifying the points and places, and by number or some such means, and providing for the schedule of services."<sup>125</sup>

Under the provisions of section 401 of the Federal Aviation Act of 1958<sup>126</sup> the C.A.B. issues certificates for air transportation, and subsection (c) (1) states that "Each certificate . . . shall specify the terminal points and intermediate points . . . between which the air carrier is authorized to engage in air transportation . . .". Subsection (c) (2) deals with certificates for foreign air transportation which shall "designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed." And in section 401 (e) (4) it is provided: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add or to change schedules, equipment . . . except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation. . ."

When the Arbitration Tribunal rendered its decision in 1963 in the United States-France dispute<sup>127</sup> it made reference to the C.A.B. Docket No. 855 of June 1, 1945<sup>128</sup> which stated that in issuing certificates for foreign transportation general route patterns need only be specified rather than point-to-point patterns. The Canadian Board of Transport Commissioners, although they were dealing only with a domestic case, made it clear that they must specify points and places; and note that unlike the C.A.B. they are concerned with the schedule of services as well.

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125. *Ibid.*, p. 68.

126. 72 Stat. 754, as amended by 76 Stat. 143, 82 Stat. 867, 49 U.S.C. 1371.

127. Decision of the Arbitration Tribunal established pursuant to the Arbitration Agreement signed at Paris, on Jan. 22, 1963, between the United States of America and France, decided at Geneva on Dec. 22, 1963. *Int'l. Legal Materials*, July 1964, p. 668.

128. See 6 C.A.B. 319 (1945).

5. Part III of the Transport Act, in section 15 provides for the naming of points and places by the Governor in Council "as a condition precedent to the issuing of the license".<sup>129</sup>

The Board states that the Act is regulatory in nature; the fact that a point is on or approximate to the route between terminal points in a license, or is in that part of Canada to which the license relates is not sufficient to give the carrier rights to transportation for those places, notwithstanding the words "that part of Canada" used in the grandfather provision (section 5 (2) ) which if interpreted broadly and liberally would give it too wide a scope and meaning; and moreover the Board is required under the Railway and Transport Acts to give those statutes "such fair interpretation . . . as will best attain the co-ordinating and harmonizing of the operation of all carriers engaged in transport by railways, ships and aircraft" and to say that the words "that part of Canada" could include "anything from a whole province down to a mining district"<sup>130</sup> would nullify the said requirement for fair interpretation. Furthermore, the Board concludes, a licensee under the grandfather clause cannot add or include points approximate to its own route without showing public convenience and necessity under section 5 (1).

The contestants in the aforementioned case continued their conflict, and Wings Ltd. made an application for leave to appeal to the Supreme Court of Canada on a point of law.<sup>131</sup> The Board states that in the previous hearing involving these contestants<sup>132</sup> all that the Board did was to refuse to vary the license with respect to one point as granted to Canadian Airways under the grandfather provision, and it was not a grant of a license; and as there was no point of law involved the application was dismissed.

In the David and Goliath case,<sup>133</sup> when Canadian Airways Ltd. took on T.C.A., represented by I. C. Rand, K.C., later Mr. Justice Rand of the Supreme Court of Canada, the result was Solomonic. T.C.A. applied to extend its trans-continental service to Victoria, B.C., and it was granted this right, except that Canadian Airways was allowed to retain the local Victoria-Vancouver run. This is one of the better reported deci-

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129. *Supra*, footnote 124, p. 68. In the United States of America section 401(e)(1) of the Federal Aviation Act 1958 states that each certificate which is issued "shall specify terminal points and intermediate points". See Lowenfeld, *supra*, footnote 85, "Who Makes Aviation Policy And Why", Chap. IV, IV-5.

130. *Ibid.*, p. 70.

131. *Wings Ltd. v. Canadian Airways Ltd.* (1942) 53 C.R.T.C. 253 (section 4 of the 1938 Transport Act and section 52(3) of the Railway Act).

132. *Supra*, footnote 124.

133. *Re Trans-Canada Air Lines* (1944) 56 C.R.T.C. 120.

sions of the Board in terms of delineation of issues and pertinent facts. The Board details the available transportation facilities for Victoria; discusses the difficulties Canadian Airways was having in providing mail service for Victoria which is "a substantial element of public convenience and necessity,"<sup>134</sup> the airport facilities at Victoria, the equipment of Canadian Airways and its objection to the application. One could easily have predicted the outcome of this contest on the basis of T.C.A.'s ability to provide a national through service from coast to coast by adding Victoria.

Chief Commissioner Cross who gave the majority reasons in the T.C.A. application concerning Victoria, B.C., also rendered the majority reasons in *Re Quebec Airways Ltd.*<sup>135</sup> Whether the Board was improving with age and experience, or it was a personal quality of Mr. Cross, or both, this decision is worth reading as it touches all bases. Quebec Airways had been operating an unlicensed service to Saguenay, and was applying to extend its license to that point and others.

Chief Commissioner Cross gives us the objections filed by the C.N.R. and Canada Steamship Lines which say that they are providing adequate transport facilities, and adding Quebec Airways would create unnecessary competition and deprive them of traffic and income (the diversion argument).

Let us proceed with Mr. Cross's analysis: the Saguenay Airport is adequate; and local manufacturing interests would benefit; the rail service takes many hours, and the steamship service is limited to certain seasons; the air service would be faster, in spite of the time getting to-and-from airports; no other airline is involved; Quebec Airways has had a brisk business to Saguenay, and it has the mail contract too; and he outlines the equipment they use; testimony of witnesses was in favor of the additional service; as the C.N.R. charges less for transportation of passengers and goods this reduces the competitive feature, and the proposed service will probably not adversely affect the railways,<sup>136</sup> hence the application was granted.

When two airlines and a railway met head-on in a fare reduction dispute in 1941, the Board gave the matter careful consideration.<sup>137</sup> The Board stated it must be mindful of its obligation under section 3 (2) of the Transport Act which provides that it shall coordinate and harmonize

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134. *Ibid.*, p. 129.

135. (1944) 56 C.R.T.C. 203.

136. It would be interesting to study this aspect in the light of conditions today.

137. *Re Canadian Airways Ltd., Mackenzie Air Service Ltd. and Northern Alberta Railways* (1941) 52 C.R.T.C. 321.

the operations of all carriers (water, air, rail) and give the Railway and Transport Acts a "fair interpretation" to achieve that object; and it refers to Part IV of the Transport Act which in general provided that tariffs and tolls shall be filed with the Board, and undue or unreasonable preference or advantage should not be given to anybody, nor should the tariffs and tolls be unreasonable or discriminatory having regard to the interests of the public.<sup>138</sup>

The Board states that its "functions under the *Railway Act* are strictly remedial and not managerial . . . managerial discretion has remained with the carriers . . ." <sup>139</sup> The railways have a right to meet competition, but tariffs and tolls must be reasonable and not destructive.<sup>140</sup>

### *Air Transport Board*

As we have seen this Board which came into being in 1944, had licensing power, subject to the approval of the Minister of Transport (to whom appeals could be made, subject to the right of appeal to the Supreme Court of Canada on matters of law or jurisdiction), with a specific authorization to favor T.C.A. so that it could execute its agreement with the government, and thereby avoid the possibility of competition which it faced, for example, in the dispute concerning air transportation between Victoria and Vancouver.<sup>141</sup>

Professor Currie tells us that this situation was not without its critics. He says:<sup>142</sup>

"The extensive powers given the Minister were denounced by the Opposition. They accused Mr. Howe of setting himself up as a dictator. In the United States the Civil Aeronautics Board carries on without interference from the President, although it derives its authority from his executive powers. To be sure, he countersigns every order relating to services between the United States and other countries but he does this only to ensure proper co-ordination be-

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138. Cf. with section 404 of the Federal Aviation Act of 1958 which provides that just and reasonable fares should be charged, and no undue or unreasonable preference or advantage should be given to anybody. See also *Re Tariff Regulations of Air Carriers* (1940) 50 C.R.T.C. 289 and *Re "Discounts from Monthly Transportation Accounts"* and *"Contract Rates"* (1940) 50 C.R.T.C. 295, where the Board of Transport Commissioners held that undue preferences and discriminatory rates could not be allowed; the reduced rates solely for the purpose of attracting competitors traffic are in that category.

139. *Supra*, footnote 137, p. 330.

140. *Ibid.*, p. 340.

141. *Supra*, footnote 133.

142. *Supra*, footnote 92, p. 554.

tween the Board and the Departments of State and National Defense. Yet Canadian legislation apparently puts the entire direction of civil aviation in the hands of one man, the Minister of Transport."<sup>143</sup>

Bearing in mind that "Canada is the largest country in the western hemisphere" but "she has a comparatively small population" and "acquired her wings" with the advent of World War I<sup>144</sup> we must remember that Canadian government policy favored the establishment and growth of T.C.A. (whether out of national pride and/or pure economic necessity). Hence in 1956 the Minister of Transport announced that C.P.A. would be given the Pacific area, and T.C.A. would be left with the Atlantic and Caribbean.<sup>145</sup>

With this as a background it is not untoward to speculate that the possibilities for major confrontations between Canada's two major carriers were avoided, and many possible difficulties were avoided for the Air Transport Board.

As for the activities of this Board it is worth repeating the comments of Professor Currie:<sup>146</sup>

"In one controversial case which came before the Air Transport Board, three companies formed by ex-servicemen applied to operate a local service between Vancouver and Lethbridge. The Board re-

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143. *Ibid.*, see sections 801, 802 of the *Federal Aviation Act* of 1958; as an example of Presidential meddling see *The Transpacific Case* 20 C.A.B. 47, 48 (1955); 26 C.A.B. 481, 486 n. 10; 32 C.A.B. 928 (1961); C.A.B. Order 22625, 2 CCH Av. L. Rep. 21, 576.02 (Sept. 3, 1965); C.A.B. Order No. 68-12-105, 2 CCH Av. L. Rep. 21, 833 (Dec. 18, 1968). Professor Currie's statement about the role of the President is too all-embracing. For a critical analysis of his role see Lowenfeld, *supra*, footnote 85, Chapter IV, "International Aviation and the Role of the President", IV-96 to IV-126; and see also the *Note* entitled *Section 801 of The Federal Aviation Act—The President And The Award Of International Air Routes to Domestic Carriers: A Proposal For Change*, (1970) 45 N.Y.U. L. Rev. 517 where it is suggested that section 801 should be amended so that the decision-making for routes involving overseas flights for American carriers should be left to the President, and the carrier selection left to the C.A.B. because of past abuses *e.g.* in the days before the enactment of the 1938 Civil Aeronautics Act selected carriers met in "spoils conferences" and agreed to a division of government mail contracts which carried with them subsidies (see *Note, op. cit.*, p. 517), and the controversial Transpacific Route Investigation (see *Note*, pp. 527-533) in which two Presidents "were charged with 'cronyism' and one allegedly acceded to the wishes of one of the competing carriers" (*ibid.*, p. 532).

144. Rosevear, "Scheduled International Air Transport; A Canadian Analysis" 123, 128 being an essay in *The Freedom of the Air* edited by Edwards McWhinney, *Oceana Publications*, 1968.

145. *Ibid.*, p. 130.

146. *Supra*, footnote 92, p. 555.

jected all these applications because the traffic potential was low, rail and bus service was satisfactory, weather conditions were bad for flying, and no one type of aircraft could be used for regular and efficient operation. The Post Office offered to pay 22 ½ cents per planemile for the carriage of mail but this, even with anticipated revenue from passengers and express, was insufficient to prevent heavy losses.

When the case originally came before the Board, Canadian Pacific Air Lines could not apply for this route because of the divestment order. Later when the order was partially rescinded, it received the license. The Air Transport Board felt that a large company would be able to absorb initial losses and wait for a profitable volume of traffic. It owned the different kinds of aircraft which were needed and so could fly the route regularly and at lower cost than if one type of plane had to be used over the entire distance with its varying terrain and weather.”

Under the provisions of section 402 of the Federal Aviation Act of 1958 every foreign carrier must apply and obtain a permit from the C.A.B. which could result in a hearing and opposition from other carriers; however, in Canada the Board (and now the Commission) must exercise its powers “subject to any international agreement or convention relating to civil aviation to which Canada is a party”.<sup>147</sup> A public hearing is usually not held and “if the carriers concerned are well known for their competence in international services”, Mr. Rosevear tells us, “there is usually a short delay only between the time the agreement takes effect and the inauguration of the air services”.<sup>148</sup> In spite of the fact that Canada and the United States have a bilateral agreement, it is necessary for a Canadian carrier wishing to go into the United States to obtain a permit from the C.A.B. Hence it was possible for an American carrier, Colonial Airlines, which had a monopoly on the Montreal-New York run, to stall and delay T.C.A. in obtaining a C.A.B. permit for this run. The stalling technique adopted by Colonial Airlines is illustrated in *Colonial Airlines, Inc. v. Adams*<sup>149</sup> where Colonial sued the defendants alleging they unlawfully conspired to grant Trans-Canada Airlines a permit to maintain a line in competition with theirs. The majority held that an injunction could not be granted, and that the C.A.B. could constitutionally issue such a permit with Presidential approval.<sup>150</sup> Colonial backed-off after Canada

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147. *Aeronautics Act*, R.S.C. 1970, c. A-3, s. 19.

148. *Supra*, footnote 144, p. 133.

149. 87 F. Supp. 242 (1952), 338 U.S. 947 (appeal dismissed).

150. See also *The Lufthansa Case*, being *Pan American—Grace Airways, Inc. v. C.A.B.*,

brought pressure to bear upon the American government.<sup>151</sup>

A suggestion has been made (which may be open to doubt) that the A.T.B. was “primarily an advisory body”<sup>152</sup> because the Aeronautics Act uses phrases indicating that the Board “may make recommendations” and similar ones, hence it was not a semi-judicial body like the Board of Transport Commissioners. The license-granting power was given to the A.T.B., albeit subject to the approval of the Minister, and this presumably included the necessity for holding hearings when required. There is no doubt that the Board of Transport Commissioners, A.T.B., and now the Canadian Transport Commission operated and operate subject to the control and discretion of the Minister of Transport; accordingly, government policy is most likely to prevail and predominate over any step taken by any one of these bodies during its history. The A.T.B. did advise the government about airports, runways, tariffs; surveyed Canadian passenger travel; was a participant in international flight negotiations; and one chairman resigned because of the government’s failure to delineate air policy.<sup>153</sup>

### *Canadian Transport Commission*

Presumably to avoid the sort of criticism which has been levelled at the C.A.B.—administrative inefficiency, lack of criteria and standards, non-judicial behavior, excessive delay in arriving at decisions<sup>154</sup>—the National Transportation Act was passed which sets out national transportation criteria (albeit somewhat generally) and creates one national Canadian Transport Commission which in turn establishes committees for rail, air, water, motor vehicle, commodity pipeline transportation. The Air Transport Committee is one of these, and it operates within the framework of the National Transportation and Aeronautics Acts. There was some fear that the new Commission in its work of coordinating the regulation of all national transport “might become a bureaucratic monster”.<sup>155</sup>

Unlike its predecessor, the A.T.C. has been studying regional air policy; and has studied international charter regulations; studied air services in the Northwest Territories; in 1969, in accordance with government

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342 F. 2d 905 (D.C. Cir. 1965), discussed in Lowenfeld, *supra*, footnote 85, “Regulation of International Air Transportation”, II-98 to II-101.

151. *Supra*, footnote 144, pp. 133, 134.

152. *Supra*, footnote 19, p. 393.

153. *Ibid.*

154. Hector, *Problems of the C.A.B. and the Independent Regulatory Commissions*, 69 Yale L.J. 931 (1960).

155. *Supra*, footnote 19, p. 397.



policy permitted C.P.A. to increase its transcontinental service; approved special half-fare rates for C.P.A. and Air Canada on domestic routes for young persons and senior citizens on a standby basis; and negotiated new international bilateral agreements.<sup>156</sup> In 1969 the C.T.C. was involved in a variety of international negotiations, and directed its attention to the development of regional air carrier services.<sup>157</sup> In line with declared government policy for regional air development, the C.T.C. in 1970 continued its program of granting licenses on that basis; gave regional carriers access to cities served by Air Canada; was involved in international negotiations concerning bilateral agreements, and held consultations and review meetings with Mexico and the United States.<sup>158</sup> In 1968, 1969, and 1970 the C.T.C. (it was in fact the A.T.C. which acted in these matters) held public hearings upon a variety of license applications.

An examination of some of the decisions of the A.T.C. in 1971 are revelatory:

1. On an application for service between Kingston, Ontario and Toronto the A.T.C. examined the travel demand; existing alternative transportation; the material filed in support; the objections of intervenors; and decided that in spite of the previous unsatisfactory attempts to establish this service, the applicant "should be afforded an opportunity to test the market" especially as this will provide a regular service between a small community and a large one.<sup>159</sup>

2. When an application was brought to the C.T.C. to review one of its orders on the basis that public notice of the proposed transfer was not given, the C.T.C. stated that it feels "bound to observe in its proceedings the principles of natural justice, and that the rule *Audi alteram partem* forms part of these principles. The opportunity for a party to present his case does not, however, mean in all instances in open court". The Commission and its Committees must conduct its business "for the speedy despatch of business". The applicant was aware of the proceedings and made numerous representations, therefore its application must be dismissed.<sup>160</sup>

3. In their decisions the A.T.C. specifies the insurance coverage which a carrier must have, and this includes international carriage with reference to each of the Warsaw Convention and Hague Protocol.<sup>161</sup>

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156. C.T.C., 2nd Annual Report, 1968, pp. 4, 5.

157. C.T.C., 3rd Annual Report, 1969, pp. 8-14.

158. C.T.C., 4th Annual Report, 1970, pp. 9-13, 14, 15.

159. Decision No. 3172, May 11, 1971 (application by Paul F. Little).

160. Decision of Review Committee of C.T.C., May 14, 1971.

161. See, for example, A.T.C. order No. 1971-A130, June 10, 1971, Vercoa Air Service,

In the United States the C.A.B. members are appointed by the President with the advice and consent of the Senate (section 201 Federal Aviation Act of 1958), and save for the exercise of presidential prerogative under section 801 with respect to international service, it operates free of all other governmental direction. The C.T.C. is appointed by the Canadian cabinet and is under the direct aegis of the Minister of Transport, and must carry out declared governmental air policy.

International carriers may obtain licenses in conformity with the international agreements entered into by Canada. After a C.A.B. decision or ruling, except possibly concerning matters under section 801,<sup>162</sup> the parties may apply to the court for judicial review, but on the Canadian scene the appeal in the first instance is to the Minister of Transport, and then to the cabinet; and on matters of law or jurisdiction to the Supreme Court of Canada. From the foregoing it appears that the C.A.B. is an independent regulatory agency—subject to consideration of the Hector complaints, and except for the provisions of section 801 already mentioned—whereas the C.T.C. (and accordingly the A.T.C.) are directly under and subject to governmental influence, direction and guidance. Presumably since the C.T.C. is concerned with all of Canada's national transportation, it escapes the Hector criticism of the C.A.B. to the effect that the latter in effect operates *in vacuo* (except to some extent for international travel).

While American courts will not hesitate to review a C.A.B. order or decision, in Canada there was only one appeal from an A.T.B. order, and the cabinet overruled the Board.<sup>163</sup> There have been few appeals from the regulatory bodies, and where the appeal has been to the cabinet (which does not hold a public hearing, although there has been press coverage of these) generally speaking the cabinet has not reversed, save that on rate appeals it has sent the matters back for rehearing.<sup>164</sup> Save for presidential

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Inc., international non-scheduled charter commercial air service from Danville, Illinois to points in the Province of Quebec.

162. *Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); cf. *American Airlines, Inc. v. Civil Aeronautics Board*, 348 F. 2d 349 (1965).

163. *Supra*, footnote 19, p. 402; C.P.A. was prevented from competing with T.C.A. on flights between Montreal, Vancouver and intermediate points.

164. *Supra*, footnote 19, pp. 402-405. Professor Currie in footnote no. 23, at p. 694 says: "Of the roughly 2,300 formal cases before the Board from its inception in 1904 to 1950, only 79 were appealed to the Supreme Court of Canada and 54 to the Governor-in-Council. The Board's judgment was reversed in 16 cases by the Court and 3 by the Cabinet. In addition, the Board itself referred 7 cases to the Supreme Court. In the 1940's and 1950's two appeals on general rates went to the Supreme Court which rejected one on leave to appeal and in *C.P.R. v. Alberta* (1949) 64 C.R.T.C. 129, [1950] 2 D.L.R. 405, S.C.R. 25 scolded the Board for not carrying out its function as required by law. Almost every general rate case was carried to the Cabinet with varying results . . ."

approval required under section 801 the C.A.B. need not concern itself with the possibility of direct governmental interference in its decision making.

Court delineation of the powers of the A.T.B. may provide a useful basis to assess the powers and role of the C.T.C. (and the A.T.C., and the Minister of Transport too). In *Samuels and Charter Airways Ltd. v. Attorney-General for Canada and Air Transport Board*<sup>165</sup> the court upheld an order adding the A.T.B. as a party defendant where it was alleged that the Board in making an order was biased, and being a quasi-judicial body it took into account a report which the plaintiff had not seen. It was argued that it was not the Board which should be added, but the individuals comprising it, but the court rejected that saying that the orders are that of the Board and not the individuals.

In *Regina v. Klotwyck*,<sup>166</sup> Munroe, J. held that a regulation made by the Minister requiring licensed commercial aircraft have a safety certificate, is a valid regulation made under the provisions of section 4 of the Aeronautics Act, and is *intra vires* his powers for the regulation and control of air navigation over Canada.

Two other decisions dealing with the A.T.B.'s power are *Regina v. North Coast Air Services Ltd.*<sup>167</sup> and *North Coast Air Services Ltd. v. Canadian Transport Commission*.<sup>168</sup> In the first mentioned decision the court considered a blanket A.T.B. order of general application to the entire body of commercial air carriers in Canada which (with some exceptions) prohibited commercial air carriers from carrying traffic between points specified in licenses issued to certain classes of commercial air carriers. Tysoe, J. A. in rendering the court's reasons says that while the Board may attach conditions in a license, and it can order air carriers to maintain service at regular intervals according to a published schedule, that does not give it power to make the instant order. He explains the operation of section 4 of the Aeronautics Act:<sup>169</sup>

“Section 4 [since rep. & sub. 1964-65, c. 22, s. 7] of the Act empowers the Minister of Transport, with the approval of the Governor in Council, to make regulations to control and regulate air navigation over Canada including, *inter alia*, regulations with respect to aerial routes, their use and control. Broadly speaking the Board is empowered to administer the Act and the ministerial regu-

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165. (1956) 73 C.R.T.C. 330 (Alberta Supreme Court, Appellate Division).

166. (1962) 40 W.W.R. 289 (B.C. S.C.).

167. (1967) 65 D.L.R. (2d) 334 (B.C. C.A.).

168. (1968) 69 D.L.R. (2d) 425 (S.C.C.).

169. *Supra*, footnote 167, p. 336.

lations and, with the approval of the Governor in Council, to make detailed regulations for this purpose. Subject to the approval of the Minister, the Board may issue licenses to operate commercial air services and prescribe the routes that may be followed or the areas to be served and may attach to each license such conditions as the Board may consider necessary or desirable in the public interest. Counsel for the Crown properly conceded that the powers of the Board are only those conferred upon it by the Act.”

In the second-mentioned case the Supreme Court of Canada took the same position as the British Columbia Court of Appeals did in the first mentioned case, and held that the A.T.B. cannot make such general orders without approval by the Governor in Council; and likewise the A.T.C. cannot validate such general orders made by the A.T.B., without approval by the Governor in Council.

### *Conclusion*

In Canada all air navigation is under the aegis and control of the federal government; and in the forefront the government-controlled airline Air Canada occupies a preferred position.

The major public airports are run by the federal government which passes regulations for their control. All commercial aircraft must be licensed, and this too is done by the federal government which sets policy, and has the final word if it so wants. There is no problem of many competing airlines as in the United States; and no problem of appearing to control aeronautics by an independent regulatory agency such as the C.A.B.;<sup>170</sup> the federal government runs the show, and there is no independence to be considered. Perhaps in a sense, in a large country, with a tenth of the American population, constantly under pressure from the south both economically and culturally, it may be sound politics to put aeronautics into the firm hand of the federal government as part of a broad national policy of survival and growth. If the airlines suffer the same fate as the railways did which resulted in the formation of the C.N.R., then there is ample justification in history for tight government-controlled aeronautics in Canada. It could be argued that this will stifle competition. Perhaps that is so, to some extent; but, having regard to the large costs involved in operating and running airlines, it is not likely that

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170. For a discussion of the criteria which the C.A.B. considers in granting certification see Richmond, *Regulation and Competition in Air Transportation*, Chapters VIII and IX, Columbia University Press, New York, 1961.

there will be a stampede of air carriers competing to take over from Air Canada. Undoubtedly there is a place for regional carriers, and they have established themselves with a firm toehold. Professor Currie sums it all up when he says,<sup>171</sup>

“A fundamental and persistent problem in the history of Canadian transportation is the interplay of two radically different concepts: straight business principles on the one hand and such matters as national unity, the movement of trade through Canadian parts, the opening up of new areas, defence, and avoiding the ruination of national credit on the other.”

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171. *Supra*, footnote 19, p. 3.

\* Prof., Univ. of Windsor, Faculty of Law, Ontario. LL.M. New York Univ., B.A., M.A., Univ. of Toronto.

