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AERONAUTICS AND THE CONSTITUTION*

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Aeronautics or air transport is not mentioned, as such, in the British North America Act.[1] Of course, that is only to be expected in a constitutional instrument of that vintage.

In this article I intend first to trace the judicial search for a constitutional basis for the principal federal involvement in the aeronautics field, an examination that will comprise, essentially, a re-visitation of the *Aeronautics* reference[2] and the *Johannesson* case.[3] Then, I have singled out for particular attention, from the constitutional point of view, intraprovincial air transport, airport ground transportation and airport location and zoning, three subjects which share claims to involving matters of current concern and controversy.

I. "*The Aeronautics Power*".

The development of air transport received a substantial assist in Canada, as in other parts of the world, as a result of the first world war effort. By the end of the war the international climate was sufficiently ripe for the conclusion of the first multilateral treaty on the subject of air navigation. This treaty, the Paris Con-

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[1] 1867, 30 & 31 Vict., c. 3. Hereinafter cited as B.N.A. Act.

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

[3] *Johannesson* v. *Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.

vention,[4] emanating from the Peace Conference of 1919, confirmed sovereignty over air space above national territory, established freedom of innocent passage subject to limited prohibited zones, provided for systems of state registration and markings to evidence the nationality of aircraft, required national certificates of airworthiness for aircraft engaged in international navigation, required pilots and operating crews to be certified as competent and licensed by their respective states, established rules to be observed on landing, departure and in the air, assured the availability of aerodrome facilities to foreign aircraft, provided for the prohibition or restriction of certain classes of air cargo and authorized the establishment, as a continuing body, of the International Commission on Aerial Navigation. The Dominion of Canada, through the Minister of Overseas Forces, was a signatory to the convention, though the convention was also signed on behalf of the United Kingdom and the Dominions by the British Prime Minister.[5] The convention was ratified by His Majesty on behalf of the British Empire on June 1st, 1922 and came into force the following month as between the ratifying states.

With a view to performing Canada's obligations under the convention, when in effect, Parliament enacted the Air Board Act in 1919[6] (re-styled the Aeronautics Act in the general revision of the statutes in 1927[7]), and pursuant thereto the Governor General in Council promulgated detailed Air Regulations.[8] The substantial military orientation of aviation at the time was reflected in the fact that the Air Board included a representative of the Department of Militia and Defence and the Department of Naval Service,[9] with the head of the former Department taking over all the functions and duties of the Air Board in 1922, under the new title of Minister of National Defence.[10]

Following constitutional objections to the federal initiative by the Province of Quebec a reference was made in 1929 by the Governor General in Council to the Supreme Court of Canada for an opinion on the validity of the federal Act and regulations.[11] At the time there was no competing provincial legislation in the

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[4] Reproduced in Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers (1923), vol. III, p. 3768 *et seq.*

[5] For a description of the practices, including this dual signing procedure on behalf of Canada, by which Canada entered into treaties during this period, see MacDonald, Canada's Power to Perform Treaty Obligations (1933), 11 Can. Bar Rev. 581.

[6] S.C., 1919 (1st Sess.), c. 11.

[7] R.S.C., 1927, c. 3.

[8] The Air Regulations, 1920.

[9] *Ibid.*, s. 2(3).

[10] National Defence Act, S.C., 1922, c. 34, s. 7(2).

[11] Under s. 55 of the Supreme Court Act, R.S.C., 1927, c. 35, now R.S.C., 1952, c. 259.

field, though the province of Ontario had established its own aerial survey service.[12] The view of the members of the Supreme Court,[13] though hardly clear-cut either individually or collectively,[14] was, generally speaking, that the federal Act and regulations were invalid. However, on further appeal to the Judicial Committee of the Privy Council, it was held that exclusive jurisdiction in the matters in question rested with the Dominion under section 132 of the B.N.A. Act, 1867, which provides as follows:

> The Parliament and Government of Canada shall have all the Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.[15]

Lord Sankey L.C., speaking for the Judicial Committee in the *Aeronautics* reference, observed that the treaty in question covered "almost every conceivable matter relating to aerial navigation",[16] so that the derivative legislative power of Parliament was necessarily very extensive. However, it may be observed, parenthetically, that the convention did not provide at all for economic, as opposed to navigational, regulation of air traffic, for example, control of air routes and fare structures, a matter which was subsequently to attain importance.[17]

While apparently resting Dominion authority primarily on section 132, Lord Sankey also mentioned as sources of jurisdiction section 91(2) ("The Regulation of Trade and Com-

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[12] *Viz.* the Ontario Provincial Air Service, see Main, Voyageurs of the Air (1967), p. 253 and the *Aeronautics* reference, *supra*, footnote 2, at p. 64. Though not mentioned in the opinion of the Judicial Committee, the Province of Quebec had apparently, by this time, commissioned aerial survey work for mapping and fire detection purposes, see Main, *op. cit.*, pp. 259 and 302.

[13] [1930] S.C.R. 663.

[14] This was largely the fault of the far-ranging, imprecise and somewhat abstract nature of the questions referred, a matter commented on at length in the subsequent Privy Council opinion, *supra*, footnote 2, at pp. 66-69.

[15] For a general discussion of this source of authority and the cases which have concerned it, including the *Aeronautics* reference and a number of the cases considered below, see Matas, Treaty Making in Canada (1947), 25 Can. Bar Rev. 458.

[16] *Supra*, footnote 2, at p. 77.

[17] The International Air Traffic Association (IATA) was formed in 1919 to co-operate "in preparing and organizing international air traffic", but this was a non-political association of airline operators, which had no basis in an international agreement, see Sand, Freitas and Pratt, An Historical Survey of International Air Law Before the Second World War (1960), 7 McGill L.J. 24, at pp. 41-42. Indeed, even the Chicago Convention of 1944, the most recent international treaty on public air law, leaves untouched questions of commercial rights and fares, see Sand, Lyon and Pratt, Historical Survey of International Air Law Since 1944 (1961), 7 McGill L.J. 125, at p. 134.

merce"),[18] section 91(5) ("Postal Service"),[19] Section 91(7) ("Militia, Military and Naval Service, and Defence"),[20] and, to the extent that these specific heads could not support the questioned legislation *in toto*, the federal general power in the opening words of section 91 ("to make Laws for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects . . . assigned exclusively to the Legislatures of the Provinces").[21] "Further," the Lord Chancellor said, "their Lordships are influenced by the facts that the subject of aerial navigation and the fulfillment 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".[22] The latter half of this statement is an exact replica of the language the Privy Council had earlier used[23] and later repeated[24] to describe the situation in which the federal general power might be successfully invoked.[25] On the other hand, Lord Haldane's view was then in vogue that to come within this language a virtual emergency of a national character must exist,[26] a limitation that was only hesitatingly discarded by the highest courts.[27] And, on this approach, the control of aeronautics would not seem to meet the qualifying test. Therefore, without the avail-

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[18] This power had been limited judicially so as to include only international trade, interprovincial trade and general trade throughout the Dominion (see *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, at p. 113), a position which has not been significantly departed from since. For an extensive discussion of this federal head of power, see Smith, The Commerce Power in Canada and the United States (1963).

[19] The first official air mail service in Canada had been inaugurated in 1927, a year that was also marked by Lindbergh's dramatic demonstration of the possibilities of a trans-Atlantic air service, see Main, *op. cit.*, footnote 12, p. 92.

[20] The military emphasis in aviation, at the time, has already been remarked on.

[21] *Supra*, footnote 2, at p. 77.

[22] *Ibid.*

[23] *A.G. for Ont.* v. *A.G. for Can.*, [1896] A.C. 348, at p. 361 (*Local Prohibition* case).

[24] For example, in *A.G. for Can.* v. *A.G. for B.C.*, [1930] A.C. 111, at p. 118 (*Fish Canneries* case).

[25] For a comprehensive discussion of the Privy Council's approach to the federal general power, see Laskin, Peace, Order and Good Government Re-Examined (1947), 25 Can. Bar Rev. 1054. And, for a different view of the office of the peace, order and good government clause, see Abel, What Peace, Order and Good Government? (1968), 7 West. Ont. L. Rev. 1.

[26] See *In re Board of Commerce Act, 1919 and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co.*, [1923] A.C. 695, and *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

[27] The hesitation, after the first bold steps in *A.G. for Ont.* v. *Canada Temperance Federation*, [1946] A.C. 193, is evidenced by the seeming obeisance to the memory of Lord Haldane in the later *Japanese Canadians* case (*Co-operative Committee of Japanese Canadians* v. *A.G. for Can.*, [1947] A.C. 87).

ability of section 132, the federal general power would not, except in an interstitial way, seem to have held much support for the federal regulatory scheme in question, at least on the Haldane view, which Lord Sankey seems to affirm elsewhere in the opinion.[28]

Other suggested sources of federal authority were specifically rejected by His Lordship, namely section 91(10) ("Navigation and Shipping")[29] and the other heads of sections 91 and 92 of the B.N.A. Act which concern other branches of transport.[30] Also held inapplicable were two heads of section 92, which it had been argued supported provincial jurisdiction over the subject-matter in question, namely section 92(13) ("Property and Civil Rights in the Province") and section 92(16) ("Generally all Matters of a merely local or private Nature in the Province").[31]

In the *Radio* reference,[32] a Canadian appeal heard six months later, the Judicial Committee affirmed federal jurisdiction to regulate radio communication. Once again an international treaty, covering generally the matters in question, was in effect and Canada was bound thereunder. However, unlike the situation in the *Aeronautics* reference, Canada, having achieved full maturity as an international person, had entered into the preliminary negotiations and signed and ratified the resultant treaty in her own right and without being involved indirectly as a member of the British Empire. This difference meant that section 132 was no longer available to sustain federal jurisdiction. But the federal general power was invoked to reach the same result, Viscount Dunedin making the enigmatic statement, that while the convention was not of the character defined in section 132, "it comes to the same thing".[33] His Lordship added that it was the Dominion and not the provinces that would be answerable to other states under the terms of the convention.[34] Hence, the necessities of the situation suggested that the Dominion should have implementing power. As an additional ground, the opinion found further federal authority in paragraph (a) of section 92(10), which excepts from provincial jurisdiction shipping lines, railways, canals, telegraphs and other works and undertakings which are interprovincial or extraprovincial in character.[35] It was thought that the undertaking

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[28] *Supra,* footnote 2, at pp. 72-73.

[29] *Ibid.,* at p. 73. Presumably the collocation of terms suggested that navigation meant navigation by water and not aerial navigation.

[30] *Ibid.,* at pp. 73-74. The heads referred to implicity include s. 91(9), s. 91(13), s. 91(10) and s. 91(29), as read with the exceptions to s. 92(10).

[31] *Ibid.,* at p. 73.

[32] *In re Regulation and Control of Radio Communication in Canada,* [1932] A.C. 304.

[33] *Ibid.,* at p. 312. The statement was later quoted, with apparent approval, by Rinfret C.J. and Kellock J. in the *Johannesson* case, *supra,* footnote 3, at pp. 303, 310-311.

[34] *Ibid.,* at p. 313.

[35] *Ibid.,* at p. 315.

of broadcasting satisfied the geographic criterion and fell within the expression, "other works and undertakings", or "telegraphs", a term that had already been enlarged by that time to cover telephone communication.[36]

The *Labour Conventions* case[37] was later to scotch any notion that legislation to perform a Canadian treaty (as opposed to a British Empire treaty) is necessarily within exclusive Dominion legislative power under the federal general clause or otherwise. Rather, Lord Atkin said in that case, "the distribution [of powers in sections 91 and 92 of the B.N.A. Act] is based on classes of subjects; and as a treaty deals with a particular class of subjects so will a legislative power for performing it be ascertained".[38] The *Aeronautics* reference, it was said, turned on section 132, and the references to the federal general power were described as purely *obiter dicta*.[39] The role of the peace, order and good government clause in the *Aeronautics* opinion, however, was later to be accorded considerably more importance than Lord Atkin here suggested.[40] As far as the *Radio* reference was concerned, Lord Atkin stated that, "the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92, or even within the enumerated classes of s. 91", except to the extent that part of the subject-matter of the convention, namely broadcasting, fell within interprovincial telegraphs in section 92(10)(a), incorporated into section 91 by head 29 thereof.[41] The proposition enunciated in the *Labour Conventions* case that the treaty implementing feature of legislation does not give it a distinctive federal "constitutional value", apart from section 132, has not been explicitly overruled. Though it should be added that some of the language of the Supreme Court of Canada in the recent *Offshore Mineral Rights* reference[42] could be taken as indicating a departure from this view.[43]

[36] See *Toronto* v. *Bell Telephone Co. of Can.*, [1905] A.C. 59.
[37] *A.G. for Can.* v. *A.G. for Ont.*, [1937] A.C. 327.
[38] *Ibid.*, at p. 351. [39] *Ibid.*
[40] Some judges were to continue to cite the *Aeronautics* reference in the context of its discussion of the federal general power (see, *e.g.*, Viscount Simon's judgment in the *Canada Temperance Federation* case, *supra*, footnote 27, at p. 205), sometimes attributing to it the character of an authoritative application of the peace, order and good government clause (see the judgment of Rinfret C.J. in the *Johannesson* case, *supra*, footnote 3, at p. 303).
[41] *Supra*, footnote 37, at p. 351.
[42] *Reference re Ownership of Offshore Mineral Rights*, [1967] S.C.R. 792.
[43] See Head, Canadian Offshore Minerals Reference (1968), 18 U.T.L.J. 131, at p. 154 *et seq.*, and McWhinney, Canadian Federalism and the Foreign Affairs and Treaty Power: The Impact of Quebec's "Quiet Revolution" (1969), 7 Can. Y.B. Int'l. L. 3, at pp. 19-20. Consider also the judgment of Kellock J. in the *Johannesson* case, *supra*, footnote 3, at p. 311.

In 1944 Canada became a signatory in her own right to the Convention on International Civil Aviation (Chicago Convention),[44] which was to replace the 1919 Paris Convention that was considered in the *Aeronautics* reference. The new treaty was ratified by Canada and became binding on April 4th, 1947, at which time the 1919 Convention was denounced. With the occurrence of these events, the Canadian domestic legislation on aeronautics did not change significantly. Indeed the basic outlines of the statute remained the same as at the time of the initial reference. This was the general state of the international and national regimes of control when the Supreme Court of Canada heard and decided the case of *Johannesson* v. *Rural Municipality of West St. Paul*[45] in 1951.

Johannesson had been engaged for a number of years in charter flying, using mostly small planes equipped with floats or skis, depending on the season. He held a licence from the Air Transport Board of Canada to operate an air service at Winnipeg and Flin Flon, Manitoba, and from these points serviced a large area in central and northern Manitoba and northern Saskatchewan. Anxious to obtain a base in the Winnipeg vicinity for the servicing and repairing of aircraft, Johannesson took an option on a property on the Red River in the Rural Municipality of West St. Paul which appeared to provide the only site in the area suitable for the landing of float equipped planes and adequate to satisfy the aerodrome licensing requirements of the federal Department of Transport.[46] The municipality, quick to respond to this development, passed a by-law prohibiting the location of aerodromes, or aircraft testing or repair installations, within certain specified zones, which included the property held under option by Johannesson, and, in other areas, regulating such locations through a licensing device. The by-law was passed under section 921 of the Municipal Act,[47] which provided as follows:

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

Title to the optioned property was taken in the name of Johannesson and his wife and they then applied for a declaration that the by-law and section 921 of the Municipal Act were invalid. The application was dismissed at trial[48] and this decision was affirmed by the Manitoba Court of Appeal.[49]

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[44] For the complete text, see 1944 Canada Treaty Series, no. 36.
[45] *Supra*, footnote 3.
[46] See part III of the Air Regulations, S.O.R./48-221.
[47] R.S.M., 1940, c. 141.
[48] [1949] 3 D.L.R. 694.
[49] [1950] 3 D.L.R. 101.

Johannesson was ultimately successful in the Supreme Court of Canada, the spirit of the *Aeronautics* reference pervading the several, rather diverse, judgments.[50] It was true that section 132, the principal, if not the only, rationale of the earlier determination, was inappropriate in the light of the manner in which Canada had incurred her current international obligations.[51] But the reference did evidence an assessment that aeronautics had, even then, assumed such dimensions as to affect the body politic of the Dominion. And the emergency description of the peace, order and good government clause was no longer thought to embody an exclusive definition. Viscount Simon had said in the *Canada Temperance Federation* case[52] that:

> The true test [for the applicability of the federal general power] must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

This language was found to fit the case at hand. The matter of airports and aerodromes was considered logically an integral part of, or at the very least necessarily incidental to, aerial navigation. On the latter of these alternative views, the field was occupied by the Dominion statute and regulations and there was no room for section 921 of the Municipal Act to operate. Accordingly the municipal by-law and the provincial legislation which purported to authorize it were held to be invalid.

In the *Johannesson* case the aircraft operator provided air services extending into two provinces. The question was later raised, at the level of the British Columbia Court of Appeal, in *Jorgenson* v. *Pool*[53] whether the federal Aeronautics Act and regulations could constitutionally extend to control the operation of aircraft functioning solely within the confines of a single province. The court dismissed, in a very summary fashion, a contention that the federal authority did not reach this far, simply citing in support of the court's position, the *Aeronautics* reference and the *Johannesson* case.

II. *Intraprovincial Air Transport.*

With the cases considered above in mind we come now to the

[50] *Johannesson* v. *Rural Municipality of West St. Paul, supra*, footnote 3.

[51] Though Kerwin J., at p. 307, and Locke J., at pp. 323-324, suggested that as the Aeronautics Act was originally valid under s. 132 subsequent events such as the substitution of a new treaty could not invalidate it.

[52] *Supra*, footnote 27, at p. 205. [53] (1959), 28 W.W.R. 265.

subject of intraprovincial air transport. The question that will be posed here is simply whether there is, or indeed whether there should be, a provincial role in the regulation of purely intraprovincial air transport. In respect of intraprovincial air navigation the constitutional question appears to have been answered in the case of *Jorgenson* v. *Pool*, just referred to, to the effect that the provinces have no jurisdiction. But it is arguable at least, as indicated below, that economic regulation of air transport is a different matter and that in this case there may be provincial jurisdiction in respect of intraprovincial air services.

It may be instructive, for comparative purposes, to look first at the constitutional doctrine and practice in the matter of regulation of intrastate air transport in Australia and the United States, the two countries whose constitutional structures most closely resemble those of Canada.

Australia became bound, in much the same way as Canada, by the terms of the aerial navigation convention signed at Paris in 1919. This Dominion likewise passed implementing legislation at the federal level, the Air Navigation Act, 1920, and adopted extensive regulations thereunder. Section 4 of the Act, which authorized the making of regulations, specified two purposes—to carry out the convention and to provide for the control of navigation in the Commonwealth and in the territories. In *The King* v. *Burgess, ex p. Henry* (the *Goya Henry* case)[54] the High Court of Australia[55] had to consider the constitutional validity of the Act and regulations. While, in general, decisions arising under the B.N.A. Act have not been widely used by the Australian courts in interpreting the Commonwealth constitution,[56] this case provides an exception. The Privy Council opinion in the *Aeronautics* reference was here discussed at some length by the court, and, while not directly in point, clearly assisted the court in finding Commonwealth authority to implement the 1919 convention by legislation under section 51 (xxix), the foreign affairs power of the Constitution.[57] That provision provides that:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to . . .
> (xxix) External Affairs:

[54] (1936), 55 C.L.R. 608.

[55] While not the highest court in Australian constitutional matters, further appeals to the Privy Council being possible, the High Court in practice and because of s. 74 of the Constitution exercised final authority in cases involving federal-state issues apart from some exceptional instances, see Sawer, Australian Federalism in the Courts (1967), pp. 27-28.

[56] See Wynes, Legislative, Executive and Judicial Powers in Australia (4th ed., 1970), pp. 21-23. For a general *caveat* against applying Canadian constitutional decisions, see Dixon J. in *West* v. *Commissioner of Taxation (N.S.W.)* (1936-37), 56 C.L.R. 657, at p. 679.

[57] Commonwealth of Australia Constitution Act, 1900, 63-64 Vict., c. 12.

This power, though wider than that embodied in section 132 of the B.N.A. Act, included, it was said, the power of implementation of treaty obligations as under section 132. However, in the view of the High Court the implementing legislation, to be valid, must be in precise fulfillment of the treaty. Though some limited discretions might be considered as vested in Parliament and the executive at the stage of giving effect to the treaty, depending on the latter's terms, here it was found that the limits of the 1919 convention had been exceeded. The regulations were held to be inconsistent in some of their details with the convention and, accordingly, they were held to be invalid as was section 4 of the parent Act to the extent that it authorized regulations for the purpose of controlling air navigation generally in the Commonwealth. The Privy Council in the Canadian *Aeronautics* reference had, in a sharply contrasting approach, refused to be drawn into a comparative examination of the particularities of the federal measures as against the terms of the convention.[58] This the Australian High Court did not hesitate to do[59] and arrived at a different disposition from that of the Privy Council on the validity of the particular federal statute and regulations.

The High Court of Australia also found that, in so far as placitum xxix could not support the regulatory scheme, the trade and commerce power (section 51(i))[60] was inadequate to completely fill the gap. The court refused to apply the intermingling or commingling doctrine familiar in American constitutional jurisprudence, which it was argued justified the regulation of intrastate air navigation on the basis that it was closely tied up with and intimately affected interstate trade and commerce in the form of interstate air navigation. Therefore, to the extent that the subject was not covered by the treaty, the Commonwealth Parliament could not regulate intrastate aviation. It could, of course, regulate interstate aviation under the trade and commerce power, but the Act and regulations in question were not so limited.

Following this decision the Air Navigation Act and regulations were changed.[61] The validity of one of the new regulations, pro-

[58] *Supra*, footnote 2, at p. 67. Some of the members of the Supreme Court below, the decision of which was reversed on appeal, had felt compelled to embark on a comparative analysis of the fine-tooth comb variety, see [1930] S.C.R. 663.

[59] The second *Goya Henry* decision, *The King* v. *Poole; ex p. Henry [No. 2]* (1939), 61 C.L.R. 634, was later to suggest a greater willingness to support regulatory provisions pursuant to s. 51(xxix) that were simply "necessarily incidental" to the effectuation of the terms of an international agreement (at p. 647).

[60] "Trade and Commerce with other countries, and among the States." For a comparison between the Australian and Canadian trade and commerce powers as interpreted by the courts, see generally MacKinnon, Comparative Federalism (1965).

[61] See the Air Navigation Act, 1936, and the Air Navigation Regulations, 1937.

hibiting low flying over aerodromes, was challenged in *The King* v. *Poole; ex p. Henry* [*No. 2*].[62] The majortiy of the High Court upheld the regulation, though whether this conclusion embodied a finding of *intra vires* in the constitutional or administrative law sense is unclear.[63]

The Commonwealth now made an attempt to amend the Constitution[64] to add a specific federal power over "air navigation and aircraft", but the necessary majorities in state referenda were not obtained.[65] When resort to the amending process proved unsuccessful, the six states, by agreement, passed uniform Air Navigation Acts,[66] incorporating as state laws the Air Navigation Regulations, in force from time to time under the Commonwealth Act, in relation to air navigation within the states.[67] Administration of the scheme was entrusted to the federal authorities. This system of controls continued in effect until 1964, the states showing no inclination during this period to assume the regulation of intrastate air navigation.[68]

In incorporating the federal regulations, however, a number of the states reserved the power to license aircraft under their general transport statutes in respect of purely intrastate services. Airlines of New South Wales held such a licence, specifying the local routes it was authorized to serve, under the State Transport (Co-ordination) Act, 1931-1936, of New South Wales. This organization, a close corporate relative of the private sector's participant in the two mainline carrier system maintained in Austra-

[62] *Supra*, footnote 59.

[63] Under s. 4 of the Act, as amended, the authority to make regulations was restricted, in the relevant portion, to "the purpose of carrying out and giving effect to the Convention . . .", a limitation which appears to be equivalent to that of the constitutional power delineated in the first *Goya Henry* case. The opinions of the members of the court considered this limitation, frequently without putting the discussion clearly in the administrative or the constitutional law context.

[64] Under s. 128 of the Constitution.

[65] See Richardson, Aviation Law in Australia (1965), 1 F.L. Rev. 242, at p. 252.

[66] See the Air Navigation Act, 1938-1964 (N.S.W.); Air Navigation Acts, 1937-1947 (Q.); Air Navigation Act, 1958 (Vic.); Air Navigation Act, 1937 (S.A.); Air Navigation Act, 1937-1945 (W.A.); and the Air Navigation Act, 1937 (Tas.).

[67] Before the first *Goya Henry* case steps had been taken toward providing for a direct delegation by some states of aviation powers to the Commonwealth under s. 51 (xxxvii) of the Constitution, which confers express authority on the central Parliament to legislate in respect of such specifically delegated matters. However this arrangement never came to fruition, see the *Goya Henry* case, *supra*, footnote 54, at p. 626. Likewise, a later more far-reaching delegation by the states after the second world war as a reconstruction measure, and including, *inter alia*, the subject of air transport, was frustrated by reason of a number of events, see *Airlines of New South Wales Pty. Ltd.* v. *New South Wales* (1963-64), 113 C.L.R. 1, at p. 37.

[68] See Richardson and Poulton, Australia's Two-Airline Policy—Law and the Layman (1968), 3 F.L. Rev. 64, at p. 74.

lia,[69] operated on both intrastate and interstate routes. As well as the state licence it held licences under the Commonwealth Air Navigation Act and regulations, permitting its aircraft to be used in regular public transport on the same routes for which it was licensed under the state Act. The administrator under the state legislation indicated formally that the company's licence was to be amended deleting authority to operate certain of the lucrative routes which the company had been serving under its licence. This, in turn, prompted the company to bring judicial proceedings, which at the High Court level[70] raised, principally, the question of whether there was an inconsistency between the two legislative schemes, bringing section 109 of the Constitution,[71] and consequently Commonwealth paramouncy, into play.

In the High Court, Dixon C.J. recognized the authority for federal controls in the field of aeronautics as arising under the trade and commerce power and the foreign affairs power, though he felt the regulatory scheme in effect to have been, in fact, an exercise of the former power.[72] He suggested that more extensive Commonwealth legislation might well be possible under the foreign affairs head. But, in the absence of a more ambitious federal approach, state regulation of route allocation could certainly operate, he felt, consistently with the Air Navigation Act and regulations. Taylor J. and Windeyer J. both attempted to clearly distinguish the federal and state statutes in relation to their purposes, characterizing the former as directed to safety in relation to aerial navigation[73] or to control of movement in Australian air space, including incidentally control of airports, take-off and safety precautions,[74] and the latter as directed to co-ordination of transport services within the state[75] or restriction of purposes for which aircraft may be used, subject to Commonwealth regulations.[76] Windeyer J., like the Chief Justice, also suggested that the Commonwealth Parliament might have validly imposed more far-reaching controls in the area of air navigation than it had in fact chosen to do, the nature and circumstances of travel by air having changed

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[69] See, generally, Brogden, Australia's Two-Airline Policy (1968).

[70] *Airlines of New South Wales Pty. Ltd.* v. *New South Wales, supra*, footnote 67. The background to this case and the subsequent case of the same name (see *infra*) is interestingly related in Brogden, *op. cit.*, footnote 69, pp. 160-166.

[71] "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

[72] In the earlier case. *The King* v. *Poole, ex p. Henry* [*No. 2*], *supra*, footnote 59, Dixon J., as he then was, had also preferred to frame his judgment within the context of the limitations of the trade and commerce power.

[73] *Supra*, footnote 67, per Taylor J., at p. 32.

[74] *Ibid.*, per Windeyer J., at p. 50.

[75] *Ibid.*, per Taylor J., at p. 32.

[76] *Ibid.*, per Windeyer J., at p. 51.

significantly since the first *Goya Henry* case. In the result, the High Court found no fatal inconsistency between the state and federal statutes and regulations.

Encouraged no doubt by the dicta in this case suggesting that a more expansive Commonwealth aeronautics jurisdiction might be exercised, the central government amended the Air Navigation Regulations in 1964 so that they clearly applied to intrastate air navigation. The immediate effect was to supersede the co-operative scheme involving an ambulatory referential incorporation for state purposes of the federal regulations, referred to earlier. Airlines of New South Wales, having been denied a licence for a desired route under the state legislation, once again brought proceedings, which raised the question of the validity of the new Commonwealth regulations to the extent that they purported to regulate public transport solely within New South Wales and, secondly, the question of whether the regulations, if valid, were inconsistent with the state licensing scheme and so prevailed under section 109 of the Constitution.[77]

The High Court sustained the extension of the federal regulations to intrastate air navigation with the exception of one provision which purported to give to federal licensees the absolute right to carry on intrastate transport. A majority of the members of the court rested the decision on the trade and commerce power, though there was also substantial support for the foreign affairs power as an adequate base.[78]

As in Canada the courts had changed the emphasis, over the years, from one constitutional source of power to another quite different source as support for federal aeronautics legislation. In the Canadian context, however, the transition from section 132 (in the *Aeronautics* reference) to the federal general power (in the *Johannesson* case) was in a sense a forced move due to the rather sudden redundancy of section 132, while in Australia the treaty power, originally resorted to in the first *Goya Henry* case, remained viable though possessed of a rather elusive content, and has not been completely abandoned as a source of federal aeronautics jurisdiction.

The High Court in the second *Airlines of New South Wales*[79] case also upheld the state licensing legislation, finding no inconsistency with the federal Act and regulations. The state Act was directed to economic control of intrastate air transport with licences issued on the basis of public needs whereas the federal

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[77] *Airlines of New South Wales Pty. Ltd.* v. *New South Wales* [*No. 2*] (1964-65), 113 C.L.R. 54. And see an excellent note on this case by Miss P. Armstrong (1965), 1 F.L. Rev. 348.

[78] In this connection, Menzies J. cited as support the *Aeronautics* reference, see p. 145 (see also Owen J., at p. 159).

[79] *Supra*, footnote 77.

regulatory scheme, as affecting intrastate air navigation, was concerned with matters of safety, regularity and efficiency and, as already intimated, could be reasonably justified to protect interstate and overseas trade.[79A]

The present position in Australia, therefore, is that there is significant scope for state regulation of intrastate air transport. A distinction has been made between regulation in the line of air safety requirements and air navigation procedures, on the one hand, and economic regulation such as access to routes and the control of competition in the public interest, on the other hand. The latter is a matter for state control in respect of intrastate commerce. Where states have exercised this authority, Commonwealth-state machinery has, on occasion, evolved to provide for a co-ordinated approach to intrastate route allocation.[80] Otherwise, it is quite possible that intrastate operations might be hamstrung as a result of action on the part of either state or national authorities. But this is a problem, to a large extent, endemic to federalism.

Commonwealth control over intrastate air transport, however, is rather pervasive as a practical matter as a result of a number of factors, including ownership and operation of major aerodromes, regulation of "controlled air space", licensing for air navigation purposes, subsidization of local carriers, and control of the importation of aircraft.[81] Nonetheless the constitutionally recognized state role does bring the state into the picture in such a way that state priorities in local air traffic may be formally asserted consistently with general intrastate transport policies, state jurisdiction being unquestioned in respect of non-airborne modes of transport.[82]

In the United States the basic constitutional issues in matters of air transport have been resolved in favour of jurisdiction in Congress. The regulation of air transport is considered to fall within the interstate commerce clause.[83] Because of the wide scope given judicially to that power and the nature of aviation, it would seem that all commercial aviation sufficiently "affects" interstate commerce so as to bring even intrastate air commerce within federal

[79A] If not also, on the view of some members of the court, to carry out Australia's obligations under the Chicago Convention on International Civil Aviation of 1944.

[80] See Brogden, *op. cit.*, footnote 69, pp. 166-167.

[81] The import controls were held not to run afoul of s. 92 of the Constitution in *R.* v. *Anderson* (1965), 113 C.L.R. 177.

[82] Subject to the limitations of s. 92 of the Constitution preventing any burdens on interstate trade, commerce or intercourse. In the air transport area, this provision was invoked to strike down a Commonwealth monopoly to a government instrumentality for certain interstate services, see *Australian National Airways Pty. Ltd.* v. *the Commonwealth* (1945), 71 C.L.R. 29.

[83] Art. 1, s. 8, cl. 2: "Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States and with the Indian Tribes." And see *Rosenham* v. *United States* (1942), 131 F. 2d 932 (10th Cir.), cert. denied (1943), 318 U.S. 790.

authority.[84] However, there is in fact a significant area of intrastate air commerce left open to state economic control. This is possible because the federal power in respect of interstate commerce has been held to be exclusive of state authority only in relation to subjects by their nature national and admitting of only one uniform system of regulation.[85] Otherwise, where local conditions demand a diversity of approaches, the states may legislate, subject to the over-riding authority of Congress to occupy the field exclusively, should it choose to do so.

The regulation of airplanes as such, as instrumentalities of interstate commerce (registration, airworthiness certification, registration of security interests in aircraft) and the imposition of safety regulation of aircraft operation and navigation (safety in air and safety in respect of property or persons on the ground) are matters which have been more or less exclusively dealt with by Congress in the Federal Aviation Act of 1958,[86] which succeeded the Civil Aeronautics Act of 1938.[87] However, with respect to economic controls (route allocation, abandonment and extension of routes, rates) the federal exercise of authority under this same Act, which vests the principal economic regulatory functions in the Civil Aeronautics Board, is confined to interstate air carriers in their interstate operations and intrastate carriers using airspace outside the state or carrying goods and passengers as part of an interstate journey.[88] Accordingly, there is room for state control of fares of interstate carriers in their intrastate operations, possibly state control over the intrastate routes of interstate carriers,[89] and state control over the routes and fares of intrastate carriers, notwithstanding that they may be in direct competition with interstate carriers. In all these instances a number of states, to a greater or lesser degree, have in fact exercised the jurisdiction which is open to them.[90] Of late there has been a significant increase in intrastate air commerce with the increase in air travel generally and the greater economic and technical feasibility of short-hop air trips. As a result state legislative activity in this area has been more and more intensive, particularly in the larger, more densely populated states such as California.

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[84] Compare *Southern Ry. Co.* v. *United States* (1911), 222 U.S. 20.

[85] *Cooley* v. *Board of Wardens of the Port of Philadelphia* (1851), 12 How. 299.

[86] 49 U.S.C. §§ 1301-1542.

[87] 49 U.S.C. §§ 401-722. See, on these matters, Calkins, Federal-State Regulation of Aviation (1964), 50 Va. L. Rev. 1386.

[88] See, generally, Sheppard, State-Federal Economic Regulation of Commercial Aviation (1969), 47 Texas L. Rev. 275.

[89] Sheppard, *op. cit., ibid.*, argues that this form of state route control is incompatible with the federal jurisdiction of the Civil Aeronautics Board in respect of the over-all routes of interstate carriers including, therefore, intrastate segments, see at pp. 281-284.

[90] *Sheppard, op. cit., ibid.*, at p. 275.

The existing division of responsibilities between federal and state authorities has been criticized in some of its detail, but generally speaking the state economic regulation of purely intrastate carriers has apparently worked well, promoting the development of air services responsive to local transportation needs and a cheaper and more efficient service.[91] It is notable that, as in Australia, a distinction has been recognized between regulation in the navigational and safety aspects of aeronautics and regulation of air traffic in the economic sense. The former is considered appropriate for federal regulation and the latter for both federal and state regulation in specific interstate and intrastate phases respectively. The principal difference between the situation in the two countries, of course, is that in Australia the distinction is based on constitutional mandate while, in the United States, it flows from a federal legislative determination, together with a bifurcated interpretation of the commerce clause.

Returning now to the Canadian situation, it will be remembered that the *Johannesson* case, as read with the *Aeronautics* reference, suggests a very broad federal jurisdiction over aeronautics under the federal general clause. Emphasizing the facts before the court in *Johannesson*, it may be argued that the decision stands simply for the proposition that airport location, as a matter relating to aeronautics in the sense of air navigation, is within the scope of federal jurisdiction. Therefore, economic regulation of air transport may be regarded as untouched by the decision. Certainly the latter form of regulation was not contemplated as involved in Canada's international obligations under either the Paris Convention of 1919, considered in the *Aeronautics* reference, or its successor, the Chicago Convention of 1944.

That there is a logical distinction between air navigation, air safety or aircraft regulation, on the one hand, and economic regulation of air services, on the other hand, is recognized legislatively in Canada, the former being exercised directly by the Department of Transport, recently re-titled unofficially the Ministry of Transport and the latter by a quasi-independent Crown agency, the Canadian Transport Commission.[92]

Considering, for a moment, the constitutional authority to regulate shipping, another form of transport, the recent Supreme Court decision in *Agence Maritime Inc.* v. *Conseil Canadien des*

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[91] *Sheppard, op. cit., ibid.*

[92] The jurisdiction of the Air Transport Committee of the Commission was exercised by the Air Transport Board before the enactment in 1967 of the National Transportation Act, S.C., 1967, c. 60. An appeal lies directly to the Minister of Transport from the Commission's decision on an application for a commercial air service licence, see Aeronautics Act, R.S.C., 1952, c. 2, s. 15(4a).

Relations Ouvrières et al.[93] recognizes, in this context, a limited federal jurisdiction over the mode of transport in its non-navigational aspects (inter- or extra-provincial shipping, but not intra-provincial shipping) and, at the same time, an extensive jurisdiction over the navigational aspects of shipping. This treatment of the subject is not dictated by the language of section 91(10) of the B.N.A. Act, which refers to "Navigation and Shipping" without qualification or distinction. However, the result arrived at by the Supreme Court was based on a reading in of section 92(10)(a) and (b) and section 91(29) so as to limit the natural meaning of "Shipping" to those lines of ships of an inter- or extra-provincial nature that alone are brought within federal jurisdiction under the latter provisions. It was suggested that no similar limitation is appropriate to the expression "Navigation".

With respect to land based modes of transport, federal jurisdiction is limited to those works and undertakings which are inter- or extra-provincial in nature.[94] Once either of these characteristics is demonstrated, however, the work or undertaking as such is subject to federal jurisdiction, including its purely intraprovincial phases. Nonetheless this leaves considerable scope for provincial regulation of transport facilities. Indeed, the provincial role has been enlarged by the delegation to provincial boards by Parliament of authority to regulate inter- and extra-provincial highway transport.[95] In the case of motor vehicle transport even the rules of the road, the rough equivalent of the navigational aspects of air and water transport, have always been regarded as within provincial rather than federal jurisdiction.

Notwithstanding the actual fact situation in *Johannesson* and arguments by analogy from the constitutional treatment of other modes of transport, it is submitted that the courts would probably find economic regulation of intraprovincial air transport to be within federal jurisdiction. Unlike the situation with respect to other transport modes, there are no enumerated heads of power in the B.N.A. Act which are fairly specific in their language, and are appropriate to cover the subject-matter,[96] and which might,

[93] [1969] S.C.R. 851. See also *Reference re Validity of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (*Stevedoring* reference).

[94] See, generally, McNairn, Transportation, Communication and the Constitution, The Scope of Federal Jurisdiction (1969), 47 Can. Bar Rev. 355.

[95] Under the Motor Vehicle Transport Act, S.C., 1954, c. 59. But see part III of the National Transportation Act, S.C., 1966-67, c. 69, which has not yet been proclaimed in force, but which provides for the exercise of the heretofore delegated authority by the Canadian Transport Commission.

[96] Of the provincial heads, the general language of s. 92 (13), s. 92(16) and the principal clause of s. 92(10) might cover local air transport but general powers of this kind may be rendered inapplicable on a finding that the subject-matter transcends local matters, as indeed the finding was in the

either explicitly or inferentially, limit the scope of federal authority. It is probably too late in the day to argue that an air transport undertaking is within the terms of the expression, "other Works and Undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province" in section 92(10)(a), and incorporated as a head of federal jurisdiction by the operation of section 91(29). This head has been heretofore excluded from consideration in the cases concerning aeronautics presumably because transport by air was considered generically different from the other transport and communication facilities listed in section 92(10)(a), and, possibly, because it was clearly outside the realm of contemplation at 1867. Though it should be observed that, as an alternate ground in the *Radio* reference, the Privy Council was prepared to treat radio communication as sufficiently analogous to telegraph communication so as to bring the former within section 92(10)(a), though radio communication was not envisaged when the B.N.A. Act was drafted. But, perhaps that is not a particularly great extension of language by comparison.

Though the question of economic regulation was not directly in issue in *Johannesson*, once aerial navigation is brought within federal jurisdiction under the introductory clause of section 91, a court would thereafter be extremely reluctant to admit of extensive dual control over a large number of air carriers, without a specific constitutional mandate, separating the subject-matter of economic control and somehow recognizing, as distinctive constitutionally, the local and national aspects thereof.[97] In any event the language of *Johannesson* is very broad, suggesting that nothing in the field of aeronautics is left to the provinces, at least where Parliament fully exercises its plenary authority. And since the Supreme Court seems to affirm the outcome of the *Aeronautics* reference in contemporary terms, on the basis of the federal general power, then the proposition for which the *Johannesson* case stands would seem to be very much wider than the facts of that case might suggest.

In fact, Parliament has exercised jurisdiction over licensing of

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Johannesson case. Of the federal heads, the general language of the trade and commerce clause (s. 91(2)) might appear at first blush to cover air transport. In Australia and the United States, as has been seen, the commerce clause of the Constitution has been held to encompass the instrumentalities of trade and commerce, such as air carriers. However, in Canada, the specification of several varieties of transport undertakings amongst federal heads other than s. 91 (2) has led to a judicial reading of s. 91(2) as not extending to transport facilities, see Smith, *op. cit.*, footnote 18, p. 74.

[97] Compare the judicial abhorrence of dual control over the essential functions of an interprovincial work or undertaking, see, for example, *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co. and City of Quebec*, [1927] S.C.R. 545, at p. 559.

commercial air services and over air transport tariffs.[98]

The question remains, however, as to whether it would be appropriate for a division of responsibility to be worked out, through the delegation device,[99] between federal and provincial authorities along interprovincial and intraprovincial lines. In many respects today constitutional practice is reflecting a division of responsibilities between the provinces and the Dominion by agreement rather than strictly along the lines of the division of powers in the B.N.A. Act.

The arguments which fall just short of establishing a constitutional role for the provinces and the comparative position in Australia and the United States suggest that it may be feasible, logical and not without some merit to evolve some provincial role in the economic regulation of air transport. On a question of this kind, however, the perspectives of other disciplines than law ought clearly to be brought to bear. Most important, perhaps, would be the views of the transportation economist.

As indicated earlier, other modes of transport are under the jurisdiction of the provinces as carried on by intraprovincial carriers. But because of the terms of the B.N.A. Act and the fact that air transport is recent in origin and technologically distinctive in form the latter variety of transport has been treated differently for constitutional purposes. Yet within the total context of the control of aviation the experience of the Canadian and other jurisdictions is that economic regulation of air services has a certain distinctive quality and unity about it. It may or may not follow that some portion of economic regulation should, ideally, be removed from the reach of the unit of government which is involved in the regulation of air navigation, air safety and, generally speaking, airports. Assuming such a segregation is not particularly objectionable, the burden may well be shifted and the question asked whether commercial air services, in their economic aspects, are sufficiently distinguishable from land based transport services to warrant regulation at a different level of government. From the provincial point of view. of course, there would likely be considerable attraction in being able to co-ordinate and harmonize all types of local transport services generally within a province.[100] Though in

[98] See the Aeronautics Act, R.S.C., 1952, c. 2, s. 13, and the Commercial Air Services Regulations. S.O.R., Cons./55, vol. 1, 28, as amended.

[99] As approved constitutionally in *P.E.I. Potato Marketing Board* v. *H. B. Willis Inc. and A.G. of Can.*, [1952] 2 S.C.R. 392, and *Coughlin* v. *Ont. Highway Transport Board*, [1968] S.C.R. 569.

[100] The Province of Ontario, an intervenant in the recent Transair application to provide service between Winnipeg, Thunder Bay, Sault Ste. Marie and Toronto, has objected strongly to the decision of the Air Transport Committee granting two licenses to Transair (decision serial no. 2954, dated March 9th, 1970) on the grounds that it was not based on any comprehensive policy, taking account of, *inter alia*, provincial developmental needs. In the result, one government department (Mines and Northern

respect of land and water based modes of transport the province could now only do this, directly and without federal delegation, in relation to such services that were part of a purely intraprovincial work or undertaking. The importance of air transport in the total provincial transportation scene is doubtless on the increase with the more extensive use generally of air transport, especially in the air cargo field, the growing emphasis on inter-modal transportation and the prospect of effective STOL (short take-off and landing) aircraft systems to operate on a short haul, inter-city basis. On the other hand factors such as the prevalence and character of interline arrangements in the airline industry, the dependence on airport and ground facilities which are, in major centres, federally owned and operated, may well suggest that an intraprovincial air transport work or undertaking should be recognized as being in a quite different position from an intraprovincial transport work or undertaking of any other variety.

Were a share of responsibility in the economic regulation of commercial air traffic to be devolved to the provinces it might, within limits comparable to those of the provinces' constitutional function in respect of other modes of transport, include the licensing of intraprovincial air services as carried on by operators whose total enterprise was purely intraprovincial, the licensing of such services only when non-scheduled (for instance charter or contract carriers) and consequently when no interline arrangements with interprovincial air carriers for ticketing, baggage, fares and so on were in effect, or the licensing of such services only if of a specialty character (for instance spray services, aerial survey, flying clubs). In every case the provincial authority would be less extensive than that resting with state authorities in Australia and the United States. And even the first alternative would leave the Canadian mainline and regional carriers, all of which operate interprovincially, subject to federal economic regulation, though it would open the door to a province to authorize a third level carrier to operate over a route which formed a segment of a route operated by a mainline or regional carrier and hence in competition with the latter.

In summary, it has been concluded that the provinces do not have jurisdiction to assume economic control of intraprovincial

Affairs) has suggested that the Ontario Northland Transportation Commission, a provincial Crown agent, might get into the air carrier business (see the Toronto Star, April 23rd, 1970) and another government department (Transport) is reported to have set up a branch to act as a watchdog over the Canadian Transport Commission (see the Toronto Globe & Mail, July 8th, 1970). In Alberta, the Minister of Highways and Transport, after reciting his discontent with the extensive jurisdiction now exercised by the Canadian Transport Commission, has indicated that that province will be shortly approaching the federal authorities with the proposal that economic regulation of intraprovincial air carriers be transferred to the provinces, see the Calgary Herald, Nov. 19th, 1970.

air transport or intraprovincial air transport works or undertakings. However, the division of responsibility worked out in Australia and the United States in the matter of economic regulation of air services holds some lessons for Canada. Moreover, a roughly comparable federal-provincial sharing of jurisdiction in Canada would reflect the constitutional division of authority in respect of other modes of transport. But whether the introduction of dual control of air transport to this extent is desirable, on balance, is a multifaceted question to which the constitutional lawyer alone cannot offer a complete answer.

III. *Airport Ground Transportation.*

The successful operation of an air transport industry requires a supporting ground transportation system for the movement of goods, passengers and personnel to and from the air terminal. Except in the case of air express these services are not supplied directly by the air carriers. Nor are they supplied by the airport owner or operator, usually the federal Department of Transport in the larger Canadian traffic centres. The facilities for passenger ground transport are provided independently and consist of rental vehicles, metered taxis, limousines, buses, rapid transit lines and helicopters.[101] In every case the ground transport sector is subject to a separate charge, there being no door-to-door fare schedule incorporating ground and air transport tariffs. In addition, of course, to the commercial varieties of ground transport mentioned the airlines' customers may proceed to and from the air terminal by private vehicle.

The provision and maintenance of a highway network to serve the airport is obviously of vital importance to those ground transportation services of the motor transport variety. However, highway construction is regarded as a responsibility of the state and not within the scope of the function of the ground carriers themselves. It is, therefore, a matter more appropriately left for fuller discussion in the next part of this article. For the moment attention will be confined to the regulation of ground carriers. Nonetheless the dependence of the highway carriers on an efficient network of roads should be kept in mind.

In the regulation of commercial ground transportation there is a complicated interplay between federal, provincial and municipal jurisdictions. Licensing functions in respect of taxi-cabs are generally entrusted by provincial legislation to municipalities.[102]

[101] The last of these is not, of course, a surface transport mode though it is a possible means of local transport for a passenger once he reaches ground or before he leaves ground at the point of arrival or departure, respectively, of his non-local air trip. Hence it may properly be treated as a variety of ground transport.

[102] For example, see the Municipal Act, R.S.O., 1960, c. 249, s. 395, para. 1.

This authority usually includes the power to set fares and to limit the number of licensed vehicles.[103] This delegation of responsibility, together with the absence of any provincial rules to deal with inter-municipal taxi transport, results in an absence of any general regulation of inter-municipal taxi trips in the way of fare structures and otherwise. Such trips are fairly limited occurrences since a taxi would usually have to "deadhead" (travel empty) back to the municipality in which it was licensed since, to solicit passengers in any other municipality, would normally run afoul of that municipality's licensing by-law.[104] This problem is minimized to some extent where taxi licensing takes place on a metropolitan or regional basis,[105] so that fairly extensive trips may be made without leaving the licensing jurisdiction. However, because major airports must serve large regional areas of high population density and, for obvious reasons, cannot normally be located in the heart of the major population centre it follows that taxi service to and from such airports will normally cross one or more municipal boundaries. If the normal licensing rules of the municipality in which the airport is located apply, airport-destined cabs from outside would not be entitled (except where expressly called by phone) to take on passengers at the airport. The question of whether, and to what extent, the Dominion may validly override municipal by-laws in this respect is considered below.

Further municipal level involvement with airport ground transportation may occur through extensions of local public transit services directly to an airport. Toronto International Airport, for example, is served by the Toronto Transit Commission which runs buses between the airport and its subway system.

Public vehicles other than taxis are generally regulated by a provincial government agency.[106] If they operate interprovincially or extraprovincially, the provincial boards generally still have authority, in this case under the terms of the federal Motor Vehicle

[103] *Ibid.*

[104] But see *Ross* v. *The Queen*, [1955] S.C.R. 430, holding that a by-law under s. 395, para. 1, of the Ontario Municipal Act, R.S.O., 1960, c. 249, could not prohibit a taxi, not licensed or otherwise required to be licensed by the municipality, from standing on private lands in the municipality while in use for hire.

[105] For example, in Metropolitan Toronto the matter is handled at the metro, rather than the borough level, by the Metropolitan Licensing Commission, acting under a metro by-law passed under the authority of s. 211(2) of the Municipality of Metropolitan Toronto Act, R.S.O., 1960, c. 260. At the Bill stage, the new Montreal Urban Community Act, S.Q., 1969, c. 89, provided that the Urban Community Council might assume responsibility for the licensing of taxis over the whole island of Montreal, but this provision does not appear in the Act as passed by the National Assembly.

[106] In Ontario it is the Ontario Highway Transport Board operating under the Public Vehicles Act, R.S.O., 1960, c. 337, and the Ontario Highway Transport Board Act, R.S.O., 1960, c. 273. And, for the Quebec situation, see the Transportation Board Act, R.S.Q., 1964, c. 228.

Transport Act,[107] delegating that jurisdiction in the matter that rests constitutionally with Parliament.[108] The board certification will usually be based on "public convenience and necessity" and may relate to particular routes.[109] Tariff schedules may have to be filed and approved by the board.[110] Provincially regulated services of this kind may well serve a ground transportation role for airports.

Existing regulations under the Department of Transport Act[111] impose certain controls on vehicles operating within federal airports.[112] These regulations include a qualified prohibition against the operation of a commercial vehicle in an airport without the authority in writing of the Minister of Transport.[113] The Departmental practice at major airports has been to enter agreements for the provision of bus, limousine and taxi services on the part of one major franchisee. Others are excluded by the regulations except for delivery of passengers to the airport and except those taxis responding to specific telephone requests or acting pursuant to a pre-existing contract with the client-passenger or his firm.[114] The regulations require,[115] and the franchise is usually subject to the condition,[116] that the operation of vehicles within an airport be in compliance with the laws, regulations and by-laws of the province and the municipality. This condition would seem to require, therefore, that for taxis the local municipal by-laws be complied with and, for other forms of commercial transport, the provincial requirements be satisfied.

The purpose of the franchise system is to attempt to provide an assurance of the following: available vehicles, a uniform high quality of service and equipment, the orderly flow of traffic into

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[107] S.C., 1954, c. 59.

[108] The delegation under the Act was held to be unobjectionable from a constitutional point of view in *Coughlin* v. *Ontario Highway Transport Board, supra*, footnote 99. It is proposed, however, to withdraw this delegation of authority, see *supra*, footnote 95.

[109] See, for example, the Public Vehicles Act, R.S.O., 1960, c. 337, ss 3, 5 & 6.

[110] See, for example, the Public Vehicles Act, R.S.O., 1960, c. 337, s. 10, and the Transportation Board Act, R.S.Q., 1964, c. 228, ss 18-19.

[111] R.S.C., 1952, c. 79, s. 25.

[112] See part I of the Airport Vehicle Control Regulations, S.O.R./64-354, and s. 3 of the Government Airport Concession Operations Regulations, S.O.R./61-4, as amended by S.O.R./64-456.

[113] Section 3 of the Government Airport Concession Operations Regulations. A predecessor of this section of the regulations, then embodied in the Airport Vehicle Control Regulations, was held to be *intra vires* the Governor General in Council under s. 25 of the Department of Transport Act in *Des Rosiers* v. *Thinel*, [1962] S.C.R. 575, foll'd in *R.* v. *Johnson* (1965), 49 D.L.R. (2d) 373 (Man. C.A.).

[114] For the specific terms of the exceptions see the Government Airport Concession Operations Regulations, s. 3(2).

[115] Airport Vehicle Control Regulations, ss 4 & 5.

[116] See, for example, *Re Colonial Coach Lines Ltd. & Ontario Highway Transport Board*, [1967] 2 O.R. 25, at p. 35 (H.C.), decision aff'd on different grounds at [1967] 2 O.R. 243 (C.A.).

and out of the airport, and the least possible burden on airport parking and vehicle standing areas. The franchises have been criticized as unnecessarily monopolistic, unfair to taxi operators who must operate "one-way" to the airport, and unfair to the traveller who is not offered a free choice as to his method of airport-city travel, the franchisees generally concentrating on bus and limousine service to the exclusion of the taxi option. The criticism has escalated to violence, on occasion, in the City of Montreal, Murray Hill Limousine Service Ltd., the franchise holder at Dorval Airport, bearing the brunt of the attacks. The Standing Committee on Transport and Communications of the House of Commons has recently concluded a series of hearings in several major Canadian centres on the subject of ground transportation at airports in Canada.[117] This led to a recommendation for the widening of the ground transport facilities available at major airports but not, notably, the abandonment of the single major franchise system with its characteristics of exclusiveness.[118]

The existing federal controls, so far as they go, find constitutional support under either the Dominion authority in respect of federal property (section 91(1A))[119] or the federal general power as encompassing aeronautics, on the authority of the *Johannesson* case. Two further questions suggest themselves however—namely:

(a) can the municipal and provincial regulatory schemes constitutionally apply to transport to and from airports, and

(b) if so, is it open to the Dominion to override the provincial and municipal schemes and confer rights to service the airport without regard to the statutes, regulations and by-laws that would normally govern the chosen carriers?

The *Johannesson* case, discussed in detail above, substantiates in peace, order and good government terms a fairly wide federal authority over aeronautics. But does ground transport, albeit to airports, have only a federal aspect? Is it so integral to air transport as to fall within the exclusive jurisdiction of Parliament? Donohue J. in *Re Colonial Coach and Ontario Highway Transport Board*[120] obviously thought the answer to the latter question

[117] For the record of proceedings see Minutes of Proceedings and Evidence, Standing Committee on Transport and Communications, 28th Parlia., 2nd Sess., 1969, issues nos. 4-6, 8-10, 21-25.

[118] See no. 150, Votes and Proceedings of the House of Commons, 19 Eliz. II, p. 1096 (June 23rd, 1970). The federal government, however, is reported to have made a more far-reaching proposal in respect of the Toronto and Montreal airports that would permit all area taxis to pick up passengers at the airport at a common taxi stand, a fee per pick-up to be charged by the Department of Transport, see Toronto Globe & Mail, Sept. 2nd, 1970.

[119] See *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1933] S.C.R. 629. And see, for further reference, LaForest, Natural Resources and Public Property under the Canadian Constitution (1969), c. 8.

[120] *Supra*, footnote 116.

was no since he concluded that the highway transport service to the Toronto Airport of Air Terminal Transport Ltd. could not even be considered as "necessarily incidental" to the operation of the airport.[121] He classified the benefits of the service as flowing primarily to the passengers, secondarily to the airlines and only, in a tertiary way, to the airport.[122] Put tersely, the significant distinction between ground transport and aeronautics was thought to be the objectively apparent one, "there are things celestial and there are things terrestrial".[123] While this sort of dichotomy may have been useful in the case at hand it would not mark off a difference between aeronautics and ground transport in the form of an airport helicopter service.[124] But the later variety of ground transport is, in fact, within exclusive federal jurisdiction not because of the function it performs for the airport but rather because it is an airborne mode of travel and itself within the broad federal aeronautics authority enunciated in *Johannesson*.

In the *Colonial Coach* case, Donohue J. distinguished the *Stevedoring* reference.[125] The Supreme Court of Canada opinion in that reference upheld part I of the federal Industrial Relations and Disputes Investigation Act[126] and held its provisions constitutionally applicable to the Eastern Stevedoring Company and its employees. That company provided stevedoring and terminal services for ships operating on regular schedules between Canada and foreign ports. These activities were held to fall within navigation and shipping (section 91(10)) or interprovincial lines of ships (section 92(10), required to be read with section 91(29)). The interdependence of the two functions of vessel loading and unloading, on the one hand, and the operation of shipping or lines of ships, on the other, is much more evident than that existing between ground transport and air transport. In the latter case there is an intervening element in the form of the airport complex through which passengers and goods are processed and loaded onto the aircraft. However, this observation must be tempered by a recognition that the operation of the airport itself is, to a

[121] For the purposes of the case at hand His Lordship need only have concluded that Air Terminal Transport's services were not an integral part of the operation of the airport, or that there was a provincial aspect to the provincial public vehicle licensing legislation as applied to Air Terminal Transport, albeit that it might also have a federal aspect. It was the validity of provincial legislation, that did not visibly conflict with federal legislation, that was in question in that case.

[122] *Supra*, footnote 16, at p. 32.

[123] *Ibid.*

[124] Such a service has been in operation, from time to time, between downtown Toronto and the Toronto Airport. It has been operated under the name of Pegasus Airlifts by a company associated with Air Terminal Transport, the principal ground transport franchisee at the Toronto airport.

[125] *Supra*, footnote 93.

[126] R.S.C., 1952, c. 152.

substantial degree, under federal authority either because it is usually federal property (section 91(1A)) or because of the important role it plays in relation to aeronautics.[127]

In *Murray Hill Limousine Service Ltd.* v. *Batson*[128] the Quebec Queen's Bench, Appeal Side, held that Murray Hill, the principal ground transport franchisee at Montreal's Dorval Airport, fell constitutionally under the Quebec Minimum Wage Act[129] in respect of porters which it employed at the airport. The argument that the functions of these employees brought them within federal jurisdiction in respect of aeronautics was rejected by the court. Only Rinfret J., dissenting, considered the position of the porters to be analogous to that of the stevedores in the *Stevedoring* reference.

To discover the appropriate principles to determine whether airport surface transport should properly be regarded as an integral part of, or even incidental to, aeronautics some assistance may be derived from the cases concerning questions of whether particular local works and undertakings are to be treated, for constitutional purposes, as part of related interprovincial or extraprovincial transport works and undertakings, mentioned within the exceptions of section 92(10) of the B.N.A. Act, and falling under exclusive federal jurisdiction. Because of the differences between the constitutional powers in issue in the two classes of cases some caution must be exercised in attempting to discern universal principles applicable in respect of the relationship between all modes of transport. With this *caveat* in mind, however, the rationale of the section 92(10) "interconnexion cases" may usefully be looked at.

From the cases concerning the extent of an interprovincial work or undertaking it is clear that emphasis is placed on a consideration of the integration between the "connecting" local and the interprovincial transport work or undertaking. Accordingly, it has been found necessary to look at such matters as the corporate tie-in between the operators of the respective works or undertakings, the physical connection between the two systems, the inherent compatability of the two enterprises and the operational relationship between the two systems.[130] These factors, if applied to determine the integration between ground transport and air transport, suggest that the two matters are constitutionally distinct. The ground transport operation is not under the aegis of the air transport companies, the two systems do not physically connect, the two opera-

[127] See the *Johannesson* case, *supra*, footnote 3.
[128] [1965] B.R. 778.
[129] R.S.Q., 1964, c. 144.
[130] The cases are discussed in detail in McNairn, *op. cit.*, footnote 94, and need not be further elaborated here. And see also, since the date of the latter article, *Regina* v. *O.L.R.B. ex p. Northern Electric Co.* (1970), 11 D.L.R. (3d) 640 (Ont. H.C.).

tions are not generically of the same kind[131] and the ground transport sector of air travel is operationally distinct since, for example, it is charged to customers separately, baggage is handled separately by the two carriers involved, and so on.

This theme would be varied somewhat if, as in some jurisdictions, a central air passenger terminus were established in a downtown location, from which ground transport vehicles, possibly operated directly by the airlines, were despatched to the airport, and where airline passengers might check in and check their baggage to its ultimate destination. These factors suggest a closer integration between the ground transport and air transport sectors than presently exists. However, the constitutional position is probably not changed in the circumstances.

The other related question that has been posed is whether the Dominion may validly override the provincial and municipal regulations governing ground transport facilities. As to the operation of the ground carriers within the confines of the airport this, as indicated earlier, has been made subject to federal regulations, which would seem to find ample authority under section 91(1A) and the federal general power, on the authority of the *Johannesson* case. Where the laws of the province or municipality are inconsistent the federal controls are given an explicit priority.[132] Considering that the matters covered in the federal regulatory scheme are confined exclusively to traffic and vehicles as they operate *within the airport* this too would seem to be equally valid.

Would it be open, then, to the Dominion to confer an effective airport ground transport franchise on a company notwithstanding the company's inability to obtain the relevant provincial or municipal licence to cover the phase of its ground transit to and from the airport?

In cases where airports are federal Crown property, section 91(1A) may permit of an exercise of power which has significant effects beyond the physical confines of the federal property.[133] By conditioning the use of federal property, it may be possible to validly assume control of closely related activities of the user after he has left federal property. And, airport ground transport over provincial and municipal routes is intimately connected with use

[131] Except perhaps where the ground transport sector consists of a helicopter service.

[132] Airport Vehicle Control Regulations, S.O.R./64-354, s. 5(2).

[133] See *Smylie* v. *The Queen* (1900), 27 O.A.R. 172, which concerned the comparable provincial power in respect of provincial lands (s. 92(5)), holding that the province of Ontario could validly require the manufacture of lumber in Canada by way of statutory condition in provincial timber leases notwithstanding the trade and commerce (s. 91(2)) implications of such a policy. This case, however, had this difference from the case we have to consider—that the use of Crown property involved a taking of part of the property, the processing of that property being controlled thereafter by the legislation in question.

of the airport as a debarkation and embarkation point. But whether this would permit the Dominion to give its chosen airport ground carriers absolute rights to transport passengers to and from an airport, notwithstanding provincial and municipal public vehicle requirements, remains very questionable. A lot would depend on the nature of the provincial and municipal controls. The usual municipal by-law prohibition against a locally unlicensed taxi soliciting passengers within the municipality could likely be validly overridden by federal legislation, because the municipal by-law concerns embarkation which takes place, in the airport context, on federal property. As to provincial controls there is little question that the general vehicle licensing, operator licensing and highway traffic provisions would be held to continue to apply to ground carriers on the segment of airport trips outside the airport proper and any attempt by Parliament to exclude this application would be held invalid.[134] Where the provincial regulations involve a commercial vehicle licensing system on the basis of public convenience and necessity, it is doubtful that this could be validly displaced in respect of airport ground transport carriers by federal legislation under section 91(1A). This appears to be one of those areas in respect of which federal-provincial co-operation is necessary.

The federal power over aeronautics, found in *Johannesson* to be embodied in the general power, would not seem to offer any greater scope for federal pre-emption of provincial public vehicle legislation. This view is supported by the *Colonial Coach* and *Batson* cases, discussed above. Consideration of the extent of integration between ground transport and air transport would lead to the same result as suggested above. That is, airport ground transport would likely be regarded as distinct from air transport or airports, with the result that the federal authority over aeronautics would be held not to encompass the attendant ground transport services.

It would seem then, in conclusion, that there is a significant provincial role, either directly or through municipalities, in the regulation of airport ground transportation. But, because of the federal control, through ownership of airports, as well as under the federal general clause, the Dominion can also exercise considerable control because of its jurisdiction at the airport end of the ground transport function.

IV. *Airport Location and Airport Zoning.*

Considerable federal-provincial friction has been generated recently on the matter of the location of new international airports. By and large, the decision on sites has been a federal one with

[134] Compare *A.G. for Ont.* v. *Winner*, [1954] A.C. 541.

only limited consultation with the affected province. In particular, the selection of Sainte Scolastique as the site of the new Montreal airport raised the hackles of the Union Nationale government of Quebec, which preferred a location to the east of Montreal, consistent with its economic development plans for the province.[135] At the time of writing the federal Department of Transport has under consideration a number of possible sites for a new international airport for the Toronto region. It is understood that there has been considerably more consultation to date with the concerned province than occurred in respect of the Sainte Scolastique decision.

The provision of new and expanded airports, further removed from urban centres than heretofore, is thought to be necessary to accommodate the new jumbo jets and supersonic aircraft (the latter being still at the developmental stage). Ground transportation services, therefore, will have to be extended. Because of the relative remoteness of the sites, and differing capabilities required to handle the jumbo and traditional size aircraft, other facilities will probably have to be maintained or developed to service inter-city traffic. This, in turn, involves further ground transportation demands, since a significant proportion of inter-city traffic is of a feeder character for the long distance mainline and international routes and will require inter-airport movement.

The provincial interest in the siting of major airports in far-reaching. A large airport provides jobs and a general stimulus to the economy of the locality. It interferes with residential development in the immediate vicinity but provides a boost for commercial development in the area. In short, it exerts a general influence, by its location, on patterns of urban growth.

Ground transportation facilities, as indicated, must be modified to serve the airport. Moreover, highway networks must be built and keyed in to the airport. This is a provincial responsibility the financial burden of which is tremendous. Heretofore all highway costs have been met out of the provincial purse though federal spending on highways, with agreement from the concerned provinces, would appear to be unobjectionable from a constitutional point of view.[136] Large airports impose a considerable servicing burden on the municipalities (water, sewage, electric power, and so on), while at the same time drastically reducing their tax base but encouraging other municipal revenue generating activities. Provincial officials have estimated privately that fully sixty-five to seventy per cent of the net costs of all publicly provided

[135] The "quarrel" is documented by Professor McWhinney in Canadian Federalism, and the Foreign Affairs and Treaty Power, *op. cit.*, footnote 43, at pp. 20-24.

[136] Consider the Trans-Canada Highway Act, R.S.C., 1952, c. 269, and, on the "federal spending power" generally, see LaForest, *op. cit.*, footnote 119, pp. 136-143.

services, including highways, for a new airport are attributable to matters within provincial-municipal rather than federal responsibility. Though, on the other hand, the benefits of a new airport in respect of matters of provincial concern, while difficult to quantify, are probably at least proportionate to the burden of costs which the province bears. It is on the basis of these factors that provincial claims have been advanced for a greater role in the decision-making function.

In light of the *Johannesson* case, which after all directly concerned aerodrome location, it is difficult to argue that the province of location of a major airport has a constitutionally supported veto power on the question of siting. *Johannesson* indicates that the authority to regulate aerodromes, even as a zoning matter, comes within federal jurisdiction. Though we might distinguish in practical terms between the location of a small service depot for a single charter carrier, in question in *Johannesson*, and an international jumbo jetport, it is doubtful that a court would hold that a constitutional difference resulted. Airports are equally, if not more, vital in this latter case to the matter of aeronautics generally.

However, a strong case can be made, considering the extent of provincial interests involved, for a co-operative solution to the problem of airport location. Some sort of formal structure for provincial involvement in the decision-making itself might usefully be developed. Those who would argue generally for a municipal role in discussions and agreements relating to the allocation of powers would doubtless maintain that this is a clear case for significant municipal involvement as well.

While most of the major Canadian airports are owned and operated by the Department of Transport, some aerodromes are owned or operated by the armed forces, municipalities, private individuals or corporations. Where a municipality establishes an airport[137] that level of government has considerable control over the location factor. However, the site must be able to satisfy the aerodrome licensing requirements of the Air Regulations under the Aeronautics Act.[138] And, in view of the high costs involved in operating an airport, a municipality may be further limited in its freedom of choice to the extent that it is obliged to secure financial assistance from the federal Department of Transport. It bears mentioning that in Ontario there is also a very significant provincial scheme of assistance in the capital costs of airport construction or expansion which may operate, in any case, either alone or

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[137] In Ontario, the authority of a municipality to establish, operate, maintain, improve or grant aid to an air harbour or landing ground is found in the Municipal Act, R.S.O., 1960, c. 249, s. 377, para. 7.

[138] S.O.R./61-10, as amended, part III.

together with the federal scheme.[139]

Once a major airport is located it may be found necessary to restrict and control development in the immediate vicinity because of,

(a) the airspace required for low flying on take-off and landing, or

(b) the disturbance (noise, air pollution and vibration) attendant upon the use of the airport by large aircraft.

The necessity for this type of regulation, at least over a wide area, is minimized to the extent that the land acquired for an airport site includes an extensive buffer zone, sometimes called "noise lands"—not to be used for airport facilities but to be acquired and controlled.[140] In this way those owners whose land use would be most seriously impaired as a result of an airport siting are bought out and compensated by the federal government. This is obviously an approach which, from the point of view of the landowner, is to be commended on equitable grounds. The federal authority to acquire this protective belt of land under a legislative power of expropriation, rather than by purchase, would seem to be undoubted as it may be legitimately viewed as compulsory acquisition in aid of aeronautics under the peace, order and good government clause of the Constitution.[141]

The management development programme which the federal authorities may impose on the acquired "noise lands" has important implications for neighbouring municipalities in terms of available tax revenues to meet the cost of needed services and the land use planning process. The lands may, in whole or in part, be held in a raw state, developed publicly, sold subject to restrictive covenants or leased subject to conditions to control use. Retention by the federal Crown will generally put the land beyond the reach of municipal property taxes, though grants in lieu of taxes, which are however generally below the otherwise available tax yield, may be made at the discretion of the federal Crown.[142] Uses of the "noise lands" most compatible with the airport are likely to include many high tax revenue uses, of an industrial or commercial character, while the development of the

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[139] See the Airports Act, S.O., 1968, c. 4. Some other provinces have similar, but less ambitious, assistance schemes.

[140] The federal government apparently intends to include in the land acquired for the proposed new international airport at Toronto a fairly wide area of "noise lands". The Minister of Transport has indicated that the physical area to be acquired for the airport will be between 78 and 125 square miles, see Toronto Globe & Mail, May 20th, 1970. Likewise the area designated for the Ste. Scolastique site includes a significant area of "noise lands" in addition to "facility lands".

[141] See *Shepherd* v. *The Queen*. [1964] Ex. C.R. 274, and *cf. Munro* v. *National Capital Commission*, [1966] S.C.R. 663.

[142] Under the Municipal Grants Act, R.S.C., 1952, c. 182.

federal lands may necessitate the provision of services which can only be located on the adjacent unacquired lands. Moreover, the federal controls may, in many cases, prove incompatible with the adjacent zoning controls. The impact on the general planning process is evident. The character of the management development programme for "noise lands" involves issues on which, once again, consultation and co-ordination with provincial or provincial and municipal officials is very necessary.

Normally, some zoning controls, dictated principally by the proximity of the airport, will be desirable, if not imperative. Generally speaking land use control is within provincial jurisdiction.[143] But there are certainly many particular instances in which the Dominion may intrude upon provincial land development planning, for example in the location of such federal creatures as banks, post offices and, as has been seen, airports. But to what extent may the Dominion regulate the use of privately held land adjacent to such federal entities as airports?

Section 4 of the Aeronautics Act[144] authorizes the Minister of Transport to make regulations with respect to the height, use and location of structures in the vicinity of airports "for purposes relating to navigation of aircraft and use and operation of airports". Any person whose property is injuriously affected by such a zoning regulation is entitled to compensation from the Crown.[145] Regulations pursuant to this section have been adopted in respect of a number of Canadian airports.[146] The land use restrictions thereunder are confined to elevation limitations. The federal involvement in the zoning function is, therefore, limited to the imposition of controls to facilitate the use of the airport, including the approach and departure of aircraft as an airport activity. If the parent provision of the Act can be read as equally restricted in the authority it confers then, once again, there would seem to be no constitutional objection to the federal exercise of jurisdiction. It is suggested that such a reading would find judicial support, particularly in light of the disposition of courts to construe a statute, so far as reasonably possible, in a sense that will result

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[143] See s. 92(8), (13) and (16) of the B.N.A. Act.

[144] R.S.C., 1952, c. 3, as amended by S.C., 1952, c. 302, see sub-section (j).

[145] S. 4(8).

[146] See, for example, the Toronto Malton Airport Zoning Regulations, S.O.R., *Cons./55*, vol. 1, 37, as amended. Airport Zoning Regulations are in force in respect of the following airports: Abbotsford, Calgary International, Cartierville, Edmonton International, Halifax International, Hamilton, Lakehead, Lethbridge, London, Moncton, Montreal International, Namao, Ottawa, Penticton, Prince George, Quebec, Regina, Saskatoon, Sault Ste. Marie, Shearwater Naval Air Station, Toronto International, Vancouver Sea Island, Victoria International, Windsor, Winnipeg and Yarmouth.

in its constitutional validity.[147]

Different considerations would seem to arise, however, when it comes to zoning controls designed not to facilitate airport use but to minimize the detrimental effects of the same in respect of adjacent land. Such regulation is seen to relate more closely to the privately held land than to the airport, as an essential element of aeronautics. Here, the general provincial zoning power comes into play. Therefore, it is within the provinces' authority to designate certain airport periphery zones as limited to certain uses found to be the least incompatible with the presence of high aircraft noise, emission or vibration levels. It is, however, arguable that legislation along these lines might have a valid federal aspect as well. The control of development in the vicinity of an airport may well be designed to safeguard the continued suitability of the airport site in future years. For example, a logical basis for the limitation of residential development adjacent to a major airport might be to assure, so far as possible, that the accommodation of larger aircraft, more frequent airport use, and airport expansion could be realized with the minimum of damage and dislocation in the immediate area. Viewed in this way the controls in question would seem to have a very compelling airport aspect and to find support in section 91(1A) and the federal general power.

If, on practical grounds, all development in the zone closest to an airport is to be effectively precluded then general zoning limitations are inappropriate[148] and the area of the zone ought to be acquired by the state. The question then becomes who should take this action and, more importantly, who should pay the bill. *Prima facie* the answer would seem to be the federal government as owner-operator of the airport. Indeed such responsibility is assumed, as indicated above, in cases where a significant area of "noise lands" is included in the property acquired for a new airport.

In fact, the federal Department of Transport has disclaimed any authority to control land use in the vicinity of airports, "other than with respect to the height of structures".[149] This may have been conceding too much or, if you will, defaulting on federal responsibilities. The context of the disclaimer, a formal statement by the Department, of May, 1968, indicates that what was particularly in mind as outside federal responsibility was restriction of land use due to aircraft noise levels.

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[147] See, for example, *A.G. for Ont.* v. *Reciprocal Insurers*, [1924] A.C. 328, at p. 342.

[148] Compare the device of "open space" or "park" zoning, sometimes resorted to by municipalities, which is criticized in Milner, An Introduction to Zoning Enabling Legislation (1962), 40 Can. Bar Rev. 1, at pp. 8-9.

[149] See Departmental statement, dated May, 1968.

As far as the source of noise,[150] emissions or vibration is concerned, Parliament clearly has jurisdiction to act under the federal general power, as embodying authority in respect of aeronautics, to require that aircraft be provided with equipment to reduce disturbance levels or to require that aircraft follow prescribed operational procedures with a view to minimizing any or all of the disturbance factors. In this sense, the need for special airport vicinity zoning by the provinces or municipalities may be reduced depending on what federal initiative is taken at the source of the disturbance. But should Parliament fail to act[151] there may be some doubt as to whether a general provincial or municipal anti-noise or air pollution provision could constitutionally apply in respect of aircraft and airports.[152] It cleary could not if the necessary result was to force aircraft to depart from federal operational requirements or to make it impossible, on practical grounds, for aircraft to use an airport.[153] And provincial or municipal enactments could not, in any case, bind the federal Crown, of their own force, as operator of an airport.[154]

Acting, it would seem on the invitation of federal authorities in the May, 1968 statement, the Minister of Municipal Affairs for Ontario has recently made public a land use compatibility table for a series of noise sensitivity zones in the vicinity of Toronto International Airport which he has indicated will guide him in his statutory role[155] of approving official plans of municipalities, plans of subdivision and urban renewal proposals.[156] Within the various zones, which have been developed on the basis of measurement of the physical noise environment, taking account of magnitude, frequency, and times of occurrence, only those uses are to be permitted which are considered compatible with the expected noise

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[150] On the subject of aircraft noise, see generally Rosevear, Noise in the Vicinity of Airports and Sonic Boom (1969), 17 Chitty's L.J. 3.

[151] Parliament has acted in respect of ships as a source of air and water pollution, see the Canada Shipping Act, R.S.C., 1952, c. 29, as amended, ss 495A and 495B. And see the regulations passed pursuant to those enabling provisions, S.O.R. 64/97, as amended, and S.O.R. 68/434.

[152] See *Regina* v. *Rice*, [1963] 1 C.C.C. 108 (Ont. Mag. Ct), holding a municipal anti-noise by-law inapplicable to an outboard racing on a public navigable stream on the basis of the "Navigation and Shipping" power (s. 91(10)) of the B.N.A. Act. And, see also *Regina* v. *C.S.L. Ltd.*, [1960] O.R. 277 (Co'y. Ct), holding, on similar grounds, that a municipal anti-smoke by-law was inapplicable to a ship in Toronto harbour.

[153] Compare *Allegheny Airlines* v. *Village of Cedarhurst et al.* (1956), 238 F. 2d 812 (2nd Cir.).

[154] See *Gauthier* v. *The King* (1918), 56 S.C.R. 176, a decision which has subsequently been followed or applied on many occasions. But some doubt was cast on this decision in *Dominion Building Corporation* v. *The King*, [1933] A.C. 533, at pp. 548-549 (and see further *The Queen* v. *Murray*, [1967] S.C.R. 262, at p. 270).

[155] Under the Planning Act, R.S.O., 1960, c. 296, ss 16, 20 and 28.

[156] See statement of the Minister of Municipal Affairs re Aircraft Noise at Toronto International Airport (Malton) of Oct. 9th, 1969.

level therein. This, as indicated, is the type of airport zoning control that would seem to be clearly within provincial jurisdiction, though arguably also within federal jurisdiction. But even if some question were entertained as to the position which the Ontario government has now taken, it would be difficult to challenge the provincial action since it has no legislative basis but consists simply of a policy statement of the Minister as to how he will guide himself in the exercise of certain of his discretionary functions.[157]

In summary, it has been concluded that there is a legitimate provincial claim to be involved in an intimate way in the determination of major airport locations and attendant management development programmes for airport "noise lands", though constitutionally the function of airport siting is a federal one. As to zoning in the vicinity of airports the jurisdiction is to a large extent provincial, though the federal authorities may clearly act, as they have done in a limited way, to prevent activities and structures which would interfere with the use of an airport. The rationale of this type of control may possibly be extended to cover regulation of peripheral areas designed to facilitate future use and extension of airports. In any event control of the source of disturbances consequent upon airport use is open to Parliament. But the provinces may clearly act, in the absence of conflicting federal zoning regulations, to reduce noise and pollution damage from airports by restricting development in the airport vicinity.

In the circumstances, one can feel considerable sympathy for the homeowners who find the beneficial use and enjoyment of their property impaired or threatened because of an existing or proposed airport and would dearly love to assign political responsibility to one level of government or another. This is one more area, therefore, in which a rational division of responsibility and agreement on co-ordination and co-operation ought to be worked out on a fairly detailed and permanent basis.[158]

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[157] But see *Re Schepull et al.*, [1954] 2 D.L.R. 5 (Ont. H.C.). An argument might be made, with some chance of success, that the Minister's policy statement constituted an unlawful fetter on his discretion, see de Smith, Judicial Review of Administrative Action (2nd ed., 1968), pp. 294-297. The principle in question is also discussed in the recent cases of *Re Hopedale Developments Ltd.* v. *Town of Oakville* (1965), 47 D.L.R. (2d) 482 (Ont. C.A.) and *Lavender & Son Ltd.* v. *Minister of Housing and Local Government*, [1970] 1 W.L.R. 1231 (Q.B.D.).

[158] Since this article was completed, in November, 1970, the Ontario courts have dismissed, as disclosing no reasonable cause of action, a claim by a developer for a declaration that the Minister of Municipal Affairs could not constitutionally exercise the airport zoning controls envisaged by the policy statement of Oct., 1969, see *Bramalea Consolidated Developments Ltd.* v. *A.G. for Ont. et al.*, [1971] 1 O.R. 252 (H.C.), upheld by the Court of Appeal at [1971] 2 O.R. 570.