

**NOTES ON THE DEVELOPMENT OF CANADIAN AIR LAW****G. F. FITZGERALD**

Most branches of the law have had a long history, becoming established quite firmly on a national basis before entering upon the international scene; but the development of air law has been peculiar in that it has been from the very beginning both national and international. Even before the flight of the first aeroplane the jurists of many nations were working together to develop an aeronautical code that would gain international acceptance.

In 1889 certain questions of air law were discussed at the first international aeronautical congress held at Paris. In 1900 M. Paul Fauchille, a French lawyer, drew the attention of the members of the Institute of International Law to the necessity of an international air code. Drafts of such a code were discussed by the Institute at Brussels in 1902 and at Ghent in 1906. By 1910 interest in air law was widespread among international lawyers and the debates of the International Air Navigation Conference held at that time resulted in the preparation of a draft convention on air law, although the convention did not get to the stage of signature.

Meetings of various bodies held between 1910 and 1916 ended in the acceptance of certain principles concerning the nationality and registration of aircraft, the sovereignty of the State underlying air-space and the freedom of the air, subject to the right of a State to protect its private and public interests. Other problems explored were the prohibitions, restrictions and regulations attendant upon the passage of an aircraft through the air-space of a State, international air traffic and the possibility of the unification of air law among various States.

As an outcome of the preliminary work on principles carried out by the pioneers of air law, the diplomats at Paris in 1919 were able to draft and sign a Convention on International Aerial Navigation. The Convention came into force on July 11, 1922, and during its twenty-five years of existence the provisions of the Convention and its technical annexes were adopted by most of the important aviation powers of the world, being incorporated into Canadian legislation with only a few minor changes. Canada was always an active participant in the work of the International Commission on Aerial Navigation established, with headquarters at Paris, to ensure the technical development of aviation on a regulated basis.

Canada did not sign the Havana Convention on Commercial Rights in Civil Aviation (1928), nor did this country participate in the Inter-American Technical Aviation Conference held at Lima, Peru, in 1937.

Private international law difficulties attendant upon the growth of aviation were intensified by the mushroom growth of international air transport following the first world war. The first conference on private international air law was held in Paris in 1923 and at this meeting the question of the liability of the air carrier was discussed. In 1925, on the invitation of the French Government, the International Technical Committee of Aerial Legal Experts, known as the CITEJA, was created with headquarters at Paris. This Committee had as members private international air law experts from countries representing a wide diversity of legal systems. Until its liquidation in 1947 the CITEJA gave assiduous study to private international air law problems, its meetings being interrupted only by the outbreak of the second world war.

During its two score years of existence the Committee prepared for signature and adoption such instruments as: The Convention for the unification of Rules concerning Transport by Air, commonly known as the Warsaw Convention of 1929 (this Convention was incorporated into Canadian statute law by the Carriage by Air Act of 1939, but the Act was not proclaimed until 1947); the Rome Convention concerning the Precautionary Attachment of Aircraft (1933); the Rome Convention concerning Damage to Third Parties on the Surface (1933), and the Brussels Protocol to that Convention (1938); and the Brussels Convention on Assistance and Salvage of Aircraft by Aircraft at Sea (1938).

The phenomenal growth of air transport during the second world war prompted the Allied powers to draft and sign at Chicago in 1944, a Convention on International Civil Aviation. An Interim Agreement on International Civil Aviation, signed at the same time, provided for the establishment of a temporary organization to carry out work preparatory to the creation of the International Civil Aviation Organization, known as the ICAO, which came into existence on April 4, 1947. Canada played a major part in the drafting of both the Convention and the Interim Agreement.

The Legal Committee of the ICAO has now taken over the work of the CITEJA in private international air law besides branching out into work in the field of public international air law and the law of international organizations.

The constitutional aspects of civil aviation in Canada were settled by the decision of the Judicial Committee of the Privy Council in the case *In re Regulation and Control of Aeronautics in Canada, Attorney-General of Canada v. Attorney-General of Ontario and Others*, (1932) A. C. 54; 146 L. T. 76; 101 L. J.

**R. 1; (1932) U. S. Av. R. 85, in which it was decided that the authority to regulate all aspects of aerial navigation in Canada was vested exclusively in the Federal Government.** This is rather a fortunate position for the country from the point of view of obtaining uniformity of technical and economic regulations on aviation. In the United States of America, with forty-eight State jurisdictions and one federal jurisdiction all sharing authority on aviation matters, there is a great deal of confusion. An attempt by an American lawyer to obtain a clear-cut picture of aviation law in his country is often a rather discouraging business.

The main authority in Canada from which originate present economic regulations is the Air Transport Board created in 1944. A considerable amount of administrative practice has grown up around applications to the Board for licences to operate air services. Technical regulations on aviation in Canada emanates from the Department of Transport.

There is a limited amount of Canadian case law on aviation and nothing of such a nature as to give a broad picture of the development of air law in general. There are some rather interesting cases on the doctrine of *res ipsa loquitur*.

This very short and informal survey of air law in Canada brings out the conclusion that this country has a well-balanced system of law on aviation considering the recent development of the art of flight. The technical and economic aspects of Canadian air law are amply covered by legislation. In briefing cases on aviation question the Canadian lawyer will have to refer to British and American decisions for strict air law precedents, although he will more often than not get the bulk of his assistance from the familiar cases establishing the general principles of common law.

For the past thirty years Canada has participated in international air conferences. In the beginning this participation was from the technical standpoint only, but within the last few years this country has played a leading role in the development of both public and private international air law. Canada has been active at all the ICAO legal meetings and took a leading part in the First Session of the new Legal Committee of the ICAO at Brussels in September, 1947, at which was drafted a proposed Convention on the International Recognition of Rights in Aircraft. It is presumed that Canada will be present at the Second Session of the Committee which will take place in Geneva about the end of May, 1948.

The Canadian lawyer will find it of increasing interest to study such questions of international air law as the revision of the Warsaw Convention, the legal status of the aircraft commander, salvage of aircraft at sea, collisions and related topics all of which are under consideration by air lawyers at the present time. There is always the possibility that an increasing number of these subjects will be incorporated into the statute law of the country following the signature and ratification of conventions on private international air law.

### ANNEX—CANADIAN CASES ON AIR LAW

- 1—Aero Insurance Company v. Obalski-Chibougamau Mining Co., (1931) U. S. Av. R. 53. Court of King's Bench of Quebec. Insurance—airplane wrecked while flying in violation of governmental regulations.
- 2—Williams v. Columbia Airways, Inc., (1931) 2 D. L. R. 823; (1936) U. S. Av. R. 55. Supreme Court of Quebec. Attachment of aircraft.
- 3—Pentz v. The King, (1931) Ex. C. R. 172; (1936) U. S. Av. R. 294. Exchequer Court of Canada. Forced landing—reporting to customs.
- 4—In re Regulation and Control of Aeronautics in Canada, Attorney-General of Canada v. Attorney-General of Ontario and Others, (1932) A. C. 54; 146 L. T. 76; 101 L. J. R. 1; (1932) U. S. Av. R. 85. Judicial Committee of the Privy Council. Constitutional aspects of aviation in Canada.
- 5—Attorney-General of Canada v. McDougall, 42 Man. Rep. 117; (1936) U. S. Av. 144. Court of Appeal of Manitoba. Dismissal of case for erroneous information.
- 6—McInnerney et al. v. McDougall, 47 Man. Rep. 119; (1937) 3 W. W. R. 625; 1 Avi. 718; (1938) U. S. Av. R. 166. Court of King's Bench of Manitoba. *Res ipsa loquitur*.
- 7—Galer v. Wings, 47 Man. Rep. 281; (1938) 3 W. W. R. 481; 1 Avi. 778; (1938) U. S. Av. 177. Court of King's Bench of Manitoba. *Res ipsa loquitur*.
- 8—McDonald v. United Air Transport Ltd., (1939) 2 W. W. R. 253; (1939) U. S. Av. R. 230. Court of Appeal of British Columbia. Aero-plane pilot an "officer" of company for purposes of discovery.
- 9—Reynard and Reynard v. Mutual Life Assurance Co. of Canada, 55 B. C. 161; (1940) 2 W. W. R. 145; 1 Avi. 887. Court of Appeal of British Columbia. Violation of aeronautics clause of insurance policy.
- 10—McCoy et al. v. Stinson Aircraft Corporation, (1942) U. S. Av. R. 154; 1 Avi. 868. Supreme Court of Ontario. Liability of manufacturer.
- 11—Turgeon v. Quebec Airways, Ltd., (1942) U. S. Av. R. 201. Superior Court of Quebec. Contract of common carriage.
- 12—Anson v. Wings, Ltd. and Nysted v. Wings, Ltd., 51 Man. Rep. 63; (1943) 3 D. L. R. 336; 1 Avi. 1036; (1942) U. S. Av. R. 120. Court of King's Bench of Manitoba. *Res ipsa loquitur*.
- 13—Moss v. Trans-Canada Airlines and Malone v. Trans-Airlines, (1942) O. R. 453; (1942) 3 D. L. R. 369; 1 Avi. 1028; (1942) U. S. Av. R. 1944. Court of Appeal of Ontario. *Res ipsa loquitur*.
- 14—Salamandick and Salamandick v. Canadian Utilities Limited, (1947) U. S. Av. R. 161. Supreme Court of Alberta. Negligence and nuisance.
- 15—Ludditt v. Ginger Coote Airways, Ltd., (1947) A. C. -; (1947) U. S. Av. R. 1. Judicial Committee of the Privy Council. Exemptions and limitations of liability of carrier.
- 16—Attorney-General of Ontario et al. v. R. C. Stevenson for Union Marine Underwriters at Lloyd's, London, 14 I. L. R. 143. Court of Appeal of Ontario. Aviation insurance—insurable interest.

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