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NEW FRONTIERS IN THE LAW OF THE AIR

Address by the Honourable Paul Martin, Secretary of State for External Affairs, to the Second International Conference on Air and Space Law, McGill University, Montreal, November 3, 1967.

It is a distinct honour and pleasure to address such a distinguished audience. It is also challenging, for in my remarks I have been asked to point out new frontiers in the law of the air.

Your meetings today must have prompted you to reflect on the work of those nations which met in Chicago in the winter of 1944. That was a time when those with foresight were preparing for peace and were recognizing the urgency of radical changes to meet the immediate needs of a vastly different world. Perhaps in no single industry had the effects of war been felt more strongly than in aviation. The war proved beyond doubt the tremendous potential of the airplane, both as an awesome and devastating carrier of destruction and a swift and reliable means of transport. It is said that the Second World War telescoped a quarter century of normal peacetime technological development in aviation into six years. If anything, the pace of this development is accelerating. Due to the ingenuity of the scientist, engineer and businessman, the airplane is now a major instrument of commerce and - what is significant for the lawyer - a creator of major international problems.

Aviation today is mainly an international activity requiring, for safety's sake alone, the most complex co-ordination of techniques and laws. Air law is the result of a compromise between national drives and international imperatives. It is a conglomeration of specific branches of national and international law, both private and public.

Aircraft of one nation travelling through the air space of several states, landing in others and carrying large numbers of passengers, create many problems of conflicting legal systems. Without determined and imaginative efforts on the part of those concerned with air law, it will be increasingly difficult for the law to keep pace with social and technological development.

But I am not saying anything startling, or even new. The facts are obvious. Nevertheless, the extent of the danger due to the unprecedented growth of the industry has been seriously underestimated.

The Chicago Convention of 1944 was a major step towards international legal standardization. It is often called "the Constitution of Air Law" or "the Charter of the Air". At Chicago, the strong Canadian delegation, headed by C.D. Howe, then Minister of Reconstruction, played an active role in support of an international air authority. We were strong proponents of the "freedoms of the air" - a term which the Honourable Adolf A. Berle, then head of the American delegation, attributed to Canada. In fact, "Freedom of the Air", the title of your present meeting, is what the late Mayor LaGuardia referred to at Chicago as the "meat" of the Convention, for it lay at the very centre of the problem of the number of services that ought to be permitted on a particular route and the share of each country should have in these services.

The Chicago Convention was but the first chapter, albeit a successful one, in the work of international co-operation which Franklin Roosevelt described then as part of "a great attempt to build enduring institutions of peace". The Canadian Government continues to subscribe fully to this ideal, for as C.D. Howe said, "if we cannot devise a working system of co-operation and collaboration between the nations of the world in the field of air transport, there will be a smaller chance of our enjoying peace for the remainder of our lives".

We are in an age, as Professor Myres S. McDougal has correctly observed, where the important decisions are taken in direct confrontation between state officials. These officials, often individuals in governmental legal bureaus, value highly the constructive opinions of those who Director Edward McWhinney has described as "the general pundits" of university law schools and scientific legal institutes.

What are the problems of the future of aviation to which we should all address ourselves? The trend today is towards greater aircraft productivity and more and longer passenger trips. This means larger, faster, costlier and more complex aircraft flying more often over greater distances. Foreseeable technological developments include "jumbo" jets, supersonic transports, hovercraft, vertical and short take-off aircraft and, eventually, hypersonic vehicles propelled partially by rocket motors with speed and performance characteristics akin to those of spacecraft. Large investments will be required by all governments and airlines, not only for these more sophisticated vehicles but also for related facilities to accommodate the expected increase in traffic. In Canada, we are acutely aware of these problems and are having to revalue estimates we made only a few years ago. The new Canadian Transport Commission is part of our general effort to improve methods of study and co-ordination in the whole field of transportation, including aviation.

The Chicago Convention was a dual purpose treaty. It contained an international civil aviation code and it established the International Civil Aviation Organization (ICAO). There are now over 115 member states in ICAO. It is a continuing source of pride to Canadians that ICAO should have its headquarters in this city. Every day ICAO assists in matters of co-ordination, technical assistance and education, to help its members with difficulties which

are often beyond their individual ability to overcome. Considerably more could be done, however, to utilize ICAO for the general benefit. Greater use of ICAO machinery for the settlement of disputes should be actively encouraged. The economic necessity of using the large and costly aircraft to their fullest capacity, and therefore of international airlines obtaining traffic rights in as many places as possible, underlines the desirability of having impartial means of arbitrating disputes and a larger degree of standardization and unification in the rules, regulations and laws governing the international use of air space. The international legal implications of aircraft now in the drafting and experimental stages of development also require our urgent attention. Take the hovercraft, for example. Is it a surface vessel or an airplane? The legal arguments need resolution since this vehicle has a potential for international commerce.

In 1964, Canada faced domestically something similar to what is now a common international problem: the competing claims and interests of large airlines. The Government decided that the international air services provided by Canadian airlines should be integrated into a single plan which would avoid unnecessary competition or conflict. This means that outside Canada neither of our two major airlines (Air Canada and Canadian Pacific Airlines) serves any point served by the other. The Government also made it clear that any development of competition in domestic main line services must not put the Government airline, Air Canada, "into the red". In addition, Canadian regional air carriers were given an enlarged role in relation to domestic main line carriers. The application of these three principles has strengthened Canada's position in world aviation. For instance, since 1964 there have been successful negotiations with several countries, designed to achieve international route extensions and improvements for both Air Canada and Canadian Pacific Airlines.

Projecting this domestic example onto the international scene, would be to suggest that perhaps the logical course for public and private international air law is in the direction advocated by the late John Cobb Cooper, the first director of the then McGill Institute of International Air Law, of one set of rules to govern all flight at whatever altitude.

If international air law is to abandon the techniques of bilateral negotiation, with its jungle of complicated agreements based on the narrow application of national sovereign rights, then it could probably take a lesson from developments in the law of outer space. A new frontier for the law of the air figuratively and literally lies at the fringe of outer space. In 1963, the UN Declaration of Legal Principles Governing Activities by States in the Exploration and Use of Outer Space marked the end of the speculative phase in which the "general pundits" conjectured on whether certain maritime and air-law principles of national sovereignty and freedom of the seas were applicable in outer space. Events since then, such as the recent Outer Space Treaty, suggest that a new legal order is emerging - that of the world community acting for the common good and welfare of all mankind.

The main provisions of the Outer Space Treaty are that outer space, the moon and other celestial bodies shall be explored and used for peaceful purposes only. Like the Limited Test Ban Agreement of 1963, it is part of a series of international agreements leading towards general and complete disarmament. Hopefully, more agreements are on the way - a non-proliferation treaty and,

interestingly, an item now before the General Assembly calling for a treaty on the peaceful use of the sea-bed and the ocean floor and their resources in the interests of mankind. First outer space, now the sea-bed and ocean floor. What environment will be next? Air space? What a blessing it would be if by universal agreement the use of the air were reserved exclusively for peaceful purposes, in the common interest of all men.

The main thrust of outer space law is today towards two conventions - one on assistance and return of astronauts and space vehicles, the other on liability for damage caused by the launching of objects into outer space. The implications of these conventions for air law are obvious. Considerable attention is also being given to defining outer space in legal terms. Again, this cannot but affect the law of the air for, apart from drawing a boundary between air and space, there is the related problem of defining spacecraft and hybrid-air-and-spacecraft in legal terms and of co-ordinating international regulations for their use in air space. We must avoid the confusion of having different and possibly conflicting regulations for space vehicles and aircraft flying in the same environment. In this regard, it seems a pity that there is not more contact between air lawyers and space lawyers.

Let us look for a moment at a few problems which will require international legal action. A major problem facing us all in this machine age is noise. We are continually bombarded with noise, and despite our increasingly elastic thresholds of tolerance, jet aircraft have multiplied this attendant disturbance to the point of nuisance. Unless there are some major technological improvements, the larger and faster jets with their greater power take-offs and shallower landing paths will compound this problem. There are several possible solutions: airport curfews, to enable some quiet periods; relocation of airports and runways and restrictions on building near them; and better insulation of dwellings and offices - but each of these national solutions will require some kind of international agreement to be made completely effective. I hope that the fifth Air Navigation Conference of ICAO starting in Montreal soon, will succeed in agreeing on an international standard unit for noise measurement as the first step towards an international agreement on aircraft noise. Perhaps international air lawyers could then produce regulations and provisions for their world-wide enforcement. The time may come when all new aircraft will be required to demonstrate that they do not exceed a set of internationally accepted noise levels.

One of the agreements signed at Chicago was the International Air Services Transit Agreement - commonly known as "the two freedoms agreement" - in which freedom of mutual overflight was guaranteed. Such flights, if at supersonic speeds, promise to disturb and annoy those on the ground under the SST's flight path. Consequently, if overflight is to be permitted, international agreements will have to be reached on the level of the noise from the sonic boom to be tolerated.

Domestically, old common law conceptions of property ownership from the soil upwards usque ad coelum, have been limited legislatively and judicially to meet the requirements of country-wide air travel. To have recognized private claims to air space would have interfered with development of aviation in the

public interest. The extent to which airlines will be able to take advantage of technological progress in aviation, will depend upon the willingness of countries to exchange "freedom of the air" on a multilateral basis.

Another specific problem is that of liability. In 1965, the United States denounced certain provisions of the Warsaw Convention of 1929 limiting the liability of air carriers for personal injury or death of passengers in international air carriage. This denunciation was withdrawn last year when most of the world's major airlines entered into an agreement in which they accepted considerably increased limits of passenger liability. It would not seem advisable, however, that a matter of this nature, which is really one of governmental responsibility, should continue to function for too long as an agreement between carriers. It is time some fresh attempts were made to draft new protocols, perhaps introducing some flexibility in the amount of the limits of liability. I might mention that the draft convention on liability now under active consideration in the UN Legal Sub-Committee on Outer Space will probably adopt criteria of absolute liability for damage caused on earth or in the air space. Urgent thought should, therefore, be given by air lawyers as to how this may affect private international air law.

Still another problem which may require action internationally is that of integration. There is a growing tendency towards private arrangements for international co-operation. There are pooling arrangements, airline unions and various regional efforts at multilateralism, such as the Scandinavian Airlines System and Air Afrique and the proposed Air Union in Europe. The enormous cost of the next generation of aircraft will accelerate the merging process and, in turn, cause further difficulties in the negotiation of traffic rights, particularly if each of these new organizations considers its individual members to be one entity. Many bilateral agreements will become obsolete and require complicated renegotiation. On the brighter side, however, these same joint operational arrangements may well be regarded as useful precedents for future, far-reaching multilateral conventions.

The airplanes of the past will serve the common interests of the future no better than will the law of the past. Therefore, we must effect a breakthrough in legal attitudes every bit as impressive and functional as the everyday wonders in which we fly. More effort should be made by governmental policy makers, by the academic community and the legal fraternity, to insure that international civil aviation realizes its full potential for the economic and cultural development of our world.

There is a requirement for multilateral agreements regulating the scheduled commercial operation of international civil aviation. A serious attempt was made at Chicago in the International Air Transport Agreement and in the forthright proposal by Australia and New Zealand, supported I understand by France, of a plan for the internationalization of civil aviation. We should not, nor if the predictions are accurate can we, continue to say that the time is not yet ripe for such a development. Nevertheless, whatever international arrangements are made, they must ideally, be both fair and functional and allow

for profitable commercial operations and future expansion. Moreover, they should bring to the industry a far larger amount of certainty than that which exists today, thereby enabling airlines and governments to effect more orderly planning and programming to avoid such troublesome matters as excess capacity.

I have spoken mainly in general terms for I realize fully that I am in the company of highly qualified air law experts. To my mind, international air law may well be at an important cross-road. We would probably be wise to use this opportunity to review the path of past practice and to consider "banking" in the direction of common international reform, wherein lie promising new frontiers.

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