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 *May 23, 29
 June 26

NORTH COAST AIR SERVICES LIM-
 ITED and ALERT BAY AIR SERV- } APPELLANTS;
 ICES LIMITED

AND

THE CANADIAN TRANSPORT COM- }
 MISSION } RESPONDENT.

APPEAL FROM GENERAL ORDERS OF AIR TRANSPORT BOARD

General orders—Aeronautics—Power of Air Transport Board to make general orders—Power of Air Transport Committee to validate otherwise invalid general orders of Air Transport Board—Aeronautics Act, R.S.C. 1952, c. 2, ss. 8, 13, 15—National Transportation Act, 1966-67 (Can.), c. 69, s. 5—Railway Act, R.S.C. 1952, c. 234.

The appellants are licensed commercial air carriers. Their operations were affected by certain general orders of the Air Transport Board, purporting to regulate commercial air traffic. On January 17, 1968, the Air Transport Committee of the Canadian Transport Commission ordered by General Order 1968-A-5 that these orders of the Air Transport Board be made orders of the Air Transport Committee. The appellants were granted leave, under s. 53 of the *Railway Act*, to appeal to this Court where two questions were in issue: whether the Air Transport Board had power to make the orders in question and whether, if the Board had no such power, the general order enacted by the Air Transport Committee was effective to make these orders valid.

Held: The appeal should be allowed and the orders in question declared invalid.

The general orders of the Air Transport Board, made, as they were, without the approval of the Governor in Council, were invalid. *R. v. North Coast Air Services Ltd.* (1968), 65 D.L.R. (2d) 334, applied.

The wording of s. 5 of the *National Transportation Act*, 1966-67 (Can.), c. 69, was not broad enough to grant to the Canadian Transport Commission power to regulate in matters under the *Aeronautics Act*, which were not given to it by that Act, or to exercise regulatory powers given to it in that Act without the approval of the Governor in Council which was still specifically required by the Act.

Ordonnances générales—Aéronautique—Pouvoir de la Commission des transports aériens d'établir des ordonnances générales—Pouvoir du comité des transports aériens de rendre valide les ordonnances générales de la Commission des transports aériens qui autrement seraient invalides—Loi sur l'aéronautique, S.R.C. 1952, c. 2, art. 8, 13, 15—Loi nationale sur les transports, 1966-67 (Can.), c. 69, art. 5—Loi sur les chemins de fer, S.R.C. 1952, c. 234.

*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson and Ritchie JJ.

Les appelants détiennent un permis d'exploiter des services aériens commerciaux. Certaines ordonnances générales de la Commission des transports aériens, dont le but était de réglementer le trafic aérien commercial, affectent l'exploitation des appelants. Le 17 janvier 1968, le comité des transports aériens de la Commission canadienne des transports a ordonné, par son ordonnance générale 1968-A-5, que les ordonnances en question de la Commission des transports aériens deviennent les ordonnances du comité des transports aériens. Les appelants ont obtenu, en vertu de l'art. 53 de la *Loi sur les chemins de fer*, la permission d'en appeler à cette Cour où deux questions ont été soulevées: à savoir si la Commission des transports aériens avait le pouvoir d'établir les ordonnances en question et si, dans le cas où la Commission n'avait pas ce pouvoir, l'ordonnance générale établie par le comité des transports aériens a eu pour effet de rendre ces ordonnances valides.

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Arrêt: L'appel doit être accueilli et il doit être déclaré que les ordonnances en question étaient invalides.

Les ordonnances générales de la Commission des transports aériens, ayant été établies sans l'approbation du gouverneur en conseil, étaient invalides. *R. v. North Coast Air Services Ltd.* (1968), 65 D.L.R. (2d) 334.

Le langage de l'art. 5 de la *Loi nationale sur les transports*, 1966-67 (Can.), c. 69, n'a pas une étendue assez grande pour permettre à la Commission canadienne des transports de réglementer dans les matières sous la *Loi sur l'aéronautique* qui ne lui sont pas allouées par cette Loi, ou pour exercer des pouvoirs de réglementation qui lui sont alloués dans cette Loi sans l'approbation du gouverneur en conseil, qui est encore spécifiquement requise par la Loi.

APPEL des ordonnances générales de la Commission des transports aériens. Appel accueilli.

APPEAL from general orders of the Air Transport Board. Appeal allowed.

A. A. W. MacDonell and *B. A. Crane*, for the appellants.

A. M. Garneau, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal, with leave, pursuant to s. 53 of the *Railway Act*, R.S.C. 1952, c. 234, from General Orders No. 5/51, 7/52, 21/58, 46/67 and 49/67, all of which were orders of the Air Transport Board. In brief, these orders dealt with three subject-matters:

1. (a) prohibiting a commercial air carrier from carrying traffic between points named on the same licence of

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any Class 1 or Class 8 scheduled commercial air carriers or between points named on the same licence of any Class 2 or Class 9-2 non-scheduled commercial air carriers.

(b) Prohibiting carriers in Group A from carrying traffic out of the base of another Group A carrier, prohibiting carriers in Group B from carrying traffic out of the base of another Group B or Group C carrier, and prohibiting carriers in Group C from carrying traffic out of the base of another Group C or Group B carrier.

2. Prohibiting Class 4 charter air carriers from chartering aircraft to persons who obtain payment for the transportation of traffic at a toll per unit.
3. Prohibiting the acquisition or the announcement of an intention to acquire by a Canadian air carrier licensed to operate Class 1, 2, 4, 8, 9-2 or 9-4 commercial air services of aircraft having two or more engines with a maximum take-off weight on wheels in excess of 18,000 pounds without first obtaining written approval from the Board.

The appellants are licensed commercial air carriers for non-scheduled flights whose operations were affected by these orders.

Subsequent to the making of these orders, the *National Transportation Act*, 1966-67 (Can.), c. 69, came into effect. Thereafter, on January 17, 1968, the Air Transport Committee enacted General Order No. 1968-A-5, which provided as follows:

WHEREAS the power of the former Air Transport Board to issue orders of general application has been questioned;

AND WHEREAS under the provisions of section 5 of the *National Transportation Act* certain provisions of the *Railway Act* including section 34 thereof are made to apply *mutatis mutandis* to the Canadian Transport Commission;

AND WHEREAS section 34 of the *Railway Act* authorizes the making of orders or regulations which may be made to apply to all cases or to any particular case or class of cases;

IT IS THEREFORE ORDERED:

THAT under the authority of the *Aeronautics Act*, section 5 of the *National Transportation Act* and section 34 of the *Railway Act*:

- (1) the General Orders of the Air Transport Board referred to in Schedule "A" hereto are made orders of the Air Transport Committee; and

- (2) unless otherwise specifically provided compliance with the provisions of the said orders where applicable is hereby made a condition of every licence to operate commercial air services.

Included in the orders listed in Schedule A were the orders to which I have previously referred.

Two questions arise on this appeal. The first is as to whether the Air Transport Board had power to make the orders in question in this appeal. The second, which only arises if the Board is held not to have had such powers, is whether the General Order of the Air Transport Committee was effective to make the orders valid.

The first question involves a consideration of the power of the Air Transport Board to make general orders under the provisions of the *Aeronautics Act*, R.S.C. 1952, c. 2. Under that Act, certain powers were conferred upon the Minister of Transport, others upon the Board.

Thus, under s. 3(f) it was the duty of the Minister to prescribe aerial routes. Under s. 4, the Minister, with the approval of the Governor in Council, was empowered to make regulations, including, under para. (h) of subs. (1), regulations with respect to aerial routes, their use and control.

The powers of the Board were defined in Part II of the Act. Section 8, in subss. (1) and (2), provided as follows:

8. (1) The Board has full jurisdiction to inquire into, hear and determine any matter

- (a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, licence, permit, order or direction made thereunder by the Board, or that any person has done or is doing any act, matter or thing contrary to or in violation of this Part, or any such regulation, licence, permit, order or direction, or
- (b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act, or thing that by this Part or any such regulation, licence, permit, order or direction is prohibited, sanctioned or required to be done.

(2) The Board may order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board so far as it is not inconsistent with this Act, any act, matter or thing that such person is or may be required to do under this Part, or any regulation, licence, permit, order or direction made thereunder by the Board and may forbid the doing or continuing of any act, matter or thing that is contrary to this Part or any such regulation, licence, permit, order

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or direction and, for the purposes of this section, has full jurisdiction to hear and determine all matters, whether of law or fact.

As to subs. (1), I agree with the views expressed by Tysoe J.A., delivering the judgment of the Court of Appeal for British Columbia, in *R. v. North Coast Air Services Ltd.*¹. The Court was dealing with an appeal by the present appellant from a conviction for disobeying an order of the Air Transport Board (No. 5/51). At p. 338 he said:

I am unable to accede to this argument. In my view, s-s. (1) of s. 8 does not empower the Board to make an "order" but merely to "inquire into, hear and determine any matter" where it appears to the Board that any of the circumstances set out in para. (a) or (b) of the subsection have arisen. Subsection (1)(b), on which counsel particularly relied, does no more than authorize an inquiry into and a hearing and determination of any matter in cases where a question has arisen whether the Board should, in the public interest, make any order or give any direction, leave, sanction or approval *that by law it is authorized to make or give*, etc.

Subsection (2) deals only with the making of mandatory orders to compel the enforcement of duties or obligations imposed upon a person by Part II of the Act, or under any regulation, licence, permit, order or direction made by the Board under Part II.

Section 13 deals with the power of the Board to make regulations, subject to the approval of the Governor in Council. The only portions of this section which might be relevant are paras. (i) and (o), which define the subject-matter of regulations as follows:

(i) respecting traffic, tolls and tariffs, and providing for the disallowance or suspension of any tariff or toll by the Board, the substitution of a tariff or toll satisfactory to the Board or the prescription by the Board of other tariffs or tolls in lieu of the tariffs or tolls so disallowed;

(o) providing for the effective carrying out of the provisions of this Part.

It is doubtful whether the Board's orders in issue fell within either of these paragraphs, but, in any event, the approval of the Governor General was not obtained in respect of any of these orders.

Section 15 of the Act deals with the issuance of licences, and subs. (6) of that section provides:

(6) In issuing any licence, the Board may prescribe the routes that may be followed or the areas to be served and may attach to the licence

¹ (1968), 65 D.L.R. (2d) 334, [1968] 2 C.C.C. 214.

such conditions as the Board may consider necessary or desirable in the public interest, and, without limiting the generality of the foregoing, the Board may impose conditions respecting schedules, places of call, carriage of passengers and freight, insurance, and, subject to the *Post Office Act*, the carriage of mail.

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With respect to this provision I agree with what was said by Tysoe J.A., in the *North Coast Air Services Ltd.* case, at p. 337:

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Section 15 appears to me to have no relation to licensees as a group or class but to individual applicants for licences and licences issued to specific individuals. The General Order cannot be supported under that section.

I am in agreement with the conclusions reached by the Court of Appeal in that case regarding the power of the Board to enact the order which was in question, and the reasoning, in my opinion, applies equally to the other orders involved in this appeal.

I am therefore of the opinion that the general orders in question, made, as they were, without the approval of the Governor in Council, were invalid.

Is the situation altered by General Order 1968-A-5 of the Air Transport Committee?

The submission of the respondent is that s. 5 of the *National Transportation Act*, which made certain provisions of the *Railway Act*, R.S.C. 1952, c. 234, applicable to the newly created Canadian Transport Commission, has the effect, by reason of the operation of s. 34 of the *Railway Act*, of authorizing the Air Transport Committee (created by s. 17 of the *National Transportation Act*) to make regulations or orders generally for carrying the *Aeronautics Act* into effect, without the sanction of the Governor in Council.

Section 5 of the *National Transportation Act* provides as follows:

5. (1) Except as otherwise expressly provided by this Act, the provisions of the *Railway Act* relating to sittings of the Commission and the disposal of business, witnesses and evidence, practice and procedure, orders and decisions of the Commission and review thereof and appeals therefrom apply in the case of every inquiry, complaint, application or other proceeding under this Act, the *Aeronautics Act* or the *Transport Act* or any other Act of the Parliament of Canada imposing any duty or function on the Commission; and the Commission shall exercise and enjoys the same jurisdiction and authority in matters under any such Acts as are vested in the Commission under the *Railway Act*.

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(2) For greater certainty and the avoidance of doubt, but without limiting the generality of subsection (1), it is declared that the following provisions of the *Railway Act*, namely sections 12, 13, 18 to 21, 30, 32 to 41 and 43 to 72 apply *mutatis mutandis* in respect of any proceedings before the Commission pursuant to this Act, the *Aeronautics Act* or the *Transport Act*, and in the event of any conflict between those provisions of the *Railway Act* and the provisions of the *Aeronautics Act* or the *Transport Act* those provisions of the *Railway Act* prevail.

Martland J. Section 34 of the *Railway Act* is as follows:

34. (1) The Board may make orders or regulations

- (a) with respect to any matter, act or thing that by this or the Special Act is sanctioned, required to be done, or prohibited;
- (b) generally for carrying this Act into effect; and
- (c) for exercising any jurisdiction conferred on the Board by any other Act of the Parliament of Canada.

(2) Any such orders or regulations may be made to apply to all cases or to any particular case or class of cases, or to any particular district, or to any railway or other work, or section or portion thereof; and the Board may exempt any railway or other work, or section or portion thereof, from the operation of any such order or regulation for such time or during such period as the Board deems expedient; and such orders or regulations may be for such time as the Board deems fit, and may be rescinded, amended, changed, altered or varied as the Board thinks proper.

(3) The Board may by regulation or order provide penalties, when not already provided in this Act, to which every company or person who offends against any regulation or order made by the Board shall be liable.

(4) The imposition of any such penalty does not lessen or affect any other liability that any company or person may have incurred.

I do not construe these provisions as having this broad effect. The *National Transportation Act*, while it repealed certain portions of the *Aeronautics Act*, left most of it intact. The power to make regulations, conferred by s. 13 upon the Air Transport Board (and now upon the Canadian Transport Commission), remains the same, and can be exercised only subject to the approval of the Governor in Council. It is difficult to see what purpose is served by retaining that section if, as the respondent contends, the Commission has a general power to regulate without such approval.

In my opinion s. 5 of the *National Transportation Act* does not have the effect which is claimed. Subsection (1) makes applicable those sections of the *Railway Act* relating to sittings of the Commission, disposal of business, witnesses and evidence, practice and procedure, orders and

decisions of the Commission and review and appeals therefrom “*in the case of every inquiry, complaint, application or other proceeding*”. It is in this context that the subsection then goes on to say that the Commission shall exercise and enjoy the same *jurisdiction and authority in matters under any such Acts* as are vested in the Commission under the *Railway Act*.

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Subsection (2) makes reference to specific sections of the *Railway Act* which are to apply, *mutatis mutandis*, in respect of proceedings before the Commission.

Section 5 is therefore concerned with proceedings before the Commission under the *National Transportation Act*, the *Aeronautics Act*, the *Transport Act* and other statutes governing its duties and function. It is with respect to proceedings of the Board and matters coming before it that it is given the same jurisdiction and authority as the Board of Transport Commissioners enjoyed under the *Railway Act*.

My view as to the meaning of s. 5 is strengthened by the wording of the French text. In the English text, in subs. (1) the word “procedure” is used in one place, and the word “proceeding” in another, both words occurring in the same sentence, but in the French text the word “procédure” is used in both places. In subs. (2) where the English text refers to “proceedings”, the word “procédures” is used in the French text. This emphasizes the fact that s. 5 is concerned with procedural matters.

In my opinion, therefore, the wording of the section is not broad enough to grant to the Commission power to regulate, in matters under the *Aeronautics Act*, which are not given to it by that Act, or to exercise regulatory powers given to it in that Act without the approval of the Governor in Council which is still specifically required by the Act.

In my opinion, therefore, this appeal should be allowed, and the respective orders of the Air Transport Board, 5/51, 7/52, 21/58, 46/67 and 49/67, declared invalid.

Appeal allowed.

Solicitors for the appellants: MacDonell, Shaw, Graham & Errico, Prince Rupert.

Solicitor for the respondent: D. S. Maxwell, Ottawa.