On the part of the Crown and the Court indifference to the mentally retarded offender must always be avoided. The pressure of the court docket and work must not cause him to be passed by. The Court must, if there is any suggestion of mental disability on the part of the accused, protect his rights by assuring legal representation and accepting the assistance of trained experts in the area of treatment and rehabilitation. The retarded accused must not be dealt with in the ordinary way, leaving his retardation to be identified in jail, or later, with the present unsatisfactory consequences as a result.

The Court and the Crown Attorney, if aware of the problems of a mentally retarded offender, will appreciate the fact that this person has difficulty in articulating and appreciating the problems of presenting a proper defence, based on a clear understanding of his rights.

Indifference in this area has a grave effect on the veracity of the judicial system and the correctional system.

I am well aware that the provision of the resources outlined above would not be without cost. Not so much in capital expenditure, but more in that it would take time and money to acquire the required special and trained personnel. But in view of the fact that the problem is an urgent one, can we afford *not* to provide the facilities and programs to deal with the retarded offender?

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CANADA AND THE HIJACKING OF AIRCRAFT

Despite the attempts of the international community, through such multilateral treaties as the Tokyo Convention on Offences and Certain Other Acts committed on board Aircraft (1963)[1], the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970)[2], and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)[3], to combat the increasing number of unlawful seizures of aircraft, sabotage and terrorist activities, the sad fact remains that this kind of activity presents as great a threat to the traveller by air as it did ten years ago when the Tokyo Convention was concluded. After a relatively "quiet" first six months of 1973, major incidents have erupted in July[4] and August[5], giving rise once again to the

* Provincial Judge, Province of Manitoba.

1. Signed at Tokyo, September 14, 1963. I.C.A.O. Doc. 8364; (1964) 2 Int. Legal Materials at 4042.
2. Signed at The Hague, December 16, 1970. (1971) 10 Int. Legal Materials at 133.
3. Signed at Montreal, September 22, 1971. (1971) 10 Int. Legal Materials at 1151.
4. The hi-jacking and destruction of a Japan Airlines "jumbo" jet after leaving Amsterdam for Tokyo. It was eventually flown to Libya, where the passengers were released and the aircraft blown up. On July 29, Libya announced its intention to put on trial the four surviving Japanese hi-jackers.

question whether in fact the combined efforts of the majority of the world community are adequate, from both the technological and purely legal aspects, to prevent such criminal acts or deal with the offenders adequately ex post delicto.[6]

The purpose of this article is to review briefly the substance of the three major multilateral conventions described above, and to note, in addition, particular Canadian initiatives in the form of domestic legislation or bilateral treaty form.

The Background Before 1963:

The unlawful seizure of aircraft was not an international problem at the time when the Geneva Conference on the Law of the Sea was formulating Article 15 of the Convention on the High Seas[7]; otherwise the definition of piracy, jurisdiction over which may be exercised by any State apprehending the offenders, might have appeared in a very different form. Article 15 defines piracy as

> ". . . any illegal acts of violence, detention or any act of depradation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State . . ."

Several aspects of this definition make it impossible to apply it to the usual form of aerial hijacking. First, the requirement of paragraph (a) that the action in question must have been taken against "another ship or aircraft" precludes the assumption of universal jurisdiction under Article 15 over offenders who act exclusively within the confines of one vessel or aircraft. The outcome of the *Santa Maria* incident (1962) may be viewed as a demonstration of the inadequacy of Article 15.

In 1962, one Captain Galvao, an exiled Portuguese political rebel, infiltrated some fifty of his supporters among the passengers sailing on the Portuguese ship *Santa Maria* sailing from a South American port. After the ship sailed from the port, and while it was on the high seas, and thus outside any form of littoral jurisdiction, Galvao and his men took over the ship by force. A British naval frigate was one of the ships closest to the *Santa Maria* at the time of the seizure, and had the sequence of events amounted, legally, to piracy, then there would have devolved

5. A terrorist attack at Athens airport, August 5.
6. A very large amount of literature on the subject exists. An adequate bibliography would be longer than this article, but the attention of the interested reader is particularly drawn to the following useful points of departure: Samuels, (1967) 42 British Year Book of International Law 271; Sami Shubber, (1968-69) 43 British Year Book of International Law 193; Fitzgerald, (1963) 1 Canadian Yearbook of International Law 230, (1964) 2 Canadian Yearbook of International Law 191, and (1969) 7 Canadian Yearbook of International Law 269. See also Communiqué No. 86, Dept. of External Affairs, Dec. 16, 1970.
7. 450 U.N.T.S. 11.

upon the British government a duty under Article 14 of the Convention[8] to assist in apprehending the mutineers. In fact, however, the British frigate took no direct action. Initially, in response to a request for such assistance received from the Portuguese government, the frigate began to "shadow" the *Santa Maria*. But shortly afterwards, under cover of what many regarded as a rather suspiciously convenient excuse, the British government announced that no further action could be taken, that the frigate was running out of fuel and that the pursuit was being discontinued. (Eventually, the *Santa Maria* was sailed to another South American port where Galvao was granted political asylum.)

A further aspect of Article 15 which seems to preclude the assumption of Universal jurisdiction under the rubric of piracy when aerial hijacking is involved, is that the acts be "committed for private ends"; this at once excludes the politically-inspired hijacking, and creates the same problem which exists in more general terms when an extradition treaty excludes from its ambit the so-called "political offence"[9].

As to paragraph (b) quoted above, quite apart from being extremely ambiguous[10], it is once again extremely limited, in jurisdictional terms, as to the kind of incidents to which it could be applied. For the reference to acts committed "in a place outside the jurisdiction of any State" has the effect that any act committed in the air space (and thus in the jurisdiction) of any State could not possibly be the basis for an exercise of universal jurisdiction under paragraph (b), whatever the precise ambit of that paragraph was intended to be by its framers. Indeed, there may be made a plausible argument for the proposition that, even if a hijacking occurs over the high seas or over a *terra nullius*, the fact that the State of registration of the aircraft has jurisdiction will frustrate any intended operation of paragraph (b). In fact, the commentary of the International Law Commission itself (the body which had drafted the original Article 15) makes it clear that the concept of piracy was being used exclusively to deal with situations where acts originated from one vessel and were directed against another, and *not* to cover the internal violence or hijacking situation.[11]

In short, the Geneva Convention of 1958 was useless in attempting to deal with modern aerial hijacking. Thus it was that the Tokyo Conference was called in 1963.

8. 450 U.N.T.S. 11. "All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."
9. See Green, (1972) 10 Alberta Law Review 72 at 76.
10. Its wording does not make clear whether the act must be, as in paragraph (a), directed against another ship or aircraft.
11. See (1956) 2 U.N. Yearbook of the International Law Commission 282.

The Tokyo Convention, 1963:

The Tokyo Convention on Offences and Certain Other Acts committed on board Aircraft did not set out to create a new offence, at the international level, of hijacking. Rather, it set out only to try to eradicate the more glaring lacunae in the law relating to jurisdiction over those perpetrating certain acts already deemed criminal under domestic laws. In addition, it specified certain courses of action to be followed by contracting States either in order to forestall unlawful seizures of aircraft, or as the case might be, disposing of the crew, passengers cargo and aircraft following such an incident when the aircraft landed.

Thus, the Convention conferred upon the State of registration of the aircraft authority to apply its laws to events taking place on board the aircraft while in flight, wherever the aircraft might be, and in whatever air space it might be in, at the time.[12] In addition, Articles 6 - 10 confer upon the aircraft commander authority to deal with persons who are committing or are about to commit crimes or acts threatening the safety of the aircraft; he is thereby empowered to use whatever force is reasonable and necessary to this end and is rendered immune from any possible civil suit for so acting. Articles 11 - 15 set down the procedures mentioned above for restoring control of the aircraft to its lawful commander, facilitating the continuance of the aircraft's journey, etc., after it has landed in a contracting State other than that of its registration.[13]

Although the Tokyo Convention did represent a positive attempt, at the multilateral level, to do something about the increasing number of hijackings, that something was not of momentous import. So much might have been done; in fact so little was ultimately achieved in the final draft of the Convention. As noted above, no new international offence was created or identified; no obligation was placed upon the State of landing to initiate criminal action against the hijacker; no obligation to extradite offenders against municipal penal law is created and, further, if extradition proceedings should be started by the State of registration, then the Convention in no way interdicted the putting forward of a defence based upon the claim that the offender's offence was a "political" one.

Some of these matters are now specifically dealt with in the Hague and Montreal Conventions; their conspicuous absence from the terms of the Tokyo Convention may partially explain the pronounced reluctance of signatory States to deposit their ratifications of their signatures. Although 42 of 64 States attending the Tokyo Conference actually signed

12. Article 3.
13. These Articles echo a similar provision advanced by the U.S.A. and Venezuela at the Fourteenth Session of the I.C.A.O. Legal Committee (Rome, 1962).

the Tokyo Convention (which was concluded on September 14, 1963), the sad fact was that it was six years before the twelve ratifications necessary before the Convention could come into force were actually deposited.[14] Indeed, on January 6, 1970 the General Assembly of the United Nations was still urging States to ratify or accede to the Tokyo Convention,[15] and a similar plea was put forward by the International Civil Aviation Organisation at its Seventeenth (Extraordinary) Assembly in June, 1970.

It is, perhaps, significant that the Montreal Convention of 1971 substantially followed in its Articles many of the provisions of the Hague Convention of 1970, whereas there was only the most minimal reference back to the Tokyo Convention. Clearly there is more coherence and interrelationship as between the two later of the Conventions.

The Hague Convention, 1970:

In a very real sense, the impetus for the Conference which led to the adoption of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970) arose from the deficiencies of the Tokyo Convention and its large degree of ineffectiveness in checking to any extent the alarming increase in hijacking incidents. Seventy-seven States attended the Hague Convention and a measure of its relatively greater success is the fact that fifty-one States signed it at once on December 16, 1970 and twenty-five more signed it subsequently. The Hague Convention also came into force relatively quickly; on October 14, 1971, thirty days after deposit of the last of the ten requisite ratifications the Convention became "hard" law. Taking into account the fact that substantial changes had to be made in the laws of most ratifying States[16], the entry into effect was indeed rapid.

The Hague Convention contrasts sharply, in its provisions, with the tenor and approach of the Tokyo Convention.

In its first Article it specifically defines the offence of unlawful seizure of aircraft as a model for future national legislation. It proceeds, in Article 2, to provide that "Each Contracting State undertakes to make the offence punishable by severe penalties." No place is left among the signatories of the Hague Convention for those States who claim that they cannot prosecute offenders for hijacking, or must prosecute for lesser offences, because the offence is not on their statute-book.

14. The twelfth instrument of ratification to be deposited was that of the U.S.A., deposited September 5, 1969. The Convention entered into force on December 4, 1969.
15. U.N. Gen. Ass. A/RES/2551 (xxiv). See (1970) 9 Int. Legal Materials 217.
16. See, for example, the Canadian amendments to the Criminal Code effected by the Criminal Law Amendment Act (1972) 21 Elizabeth II Cap. 13 (Aligns Canadian law with Hague and Montreal Conventions).

Again, where the Tokyo Convention had shied away from the admittedly thorny question of extradition[17], the Hague Convention provided in Article 8(1) that, "The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them." In Article 8(2) it is further provided that the Convention can be regarded as a legal basis for extradition where extradition depends on the existence of a treaty, and no such treaty exists.

It seems, however, that blocks to extradition such as the defence that the hijacker's offence was a "political" one (where the facts appear to support such a contention) survive the Hague Convention. However, the potential lacuna in enforcement of the law left by this fact is filled by Article 7 of the Convention. "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." In other words, the hijacker may escape extradition by proving that his acts were, in essence, political crimes, but this does not mean that he will escape trial and punishment; it is the State in which he is found that must discharge this responsibility instead of the State to which he would otherwise have been extradited.

Many writers have contended that the Hague Convention should have been even stricter in its application, and in particular that the "political offence" escape route from extradition procedures should have been rigorously excluded from its ambit. While few can dissent from this proposition as an ideal, the harsh reality was, of course, that had such a provision been inserted, the Convention would inevitably have suffered for political reasons the same fate of the Tokyo Convention or worse.

However, as has been seen, the Hague Convention represented a considerable step forward, as compared to the Tokyo Convention. But it still left untouched and unfilled a serious gap in the law — that relating to sabotage or other interference with aircraft, in a form other than that constituted by acts committed by a "person . . . on board an aircraft in flight."[18]

It is to this problem that the Montreal Convention turned its attention.

17. Tokyo Convention, Article 16(2): "Nothing in this Convention shall be deemed to create an obligation to grant extradition."
18. Hague Convention, Article 1.

The Montreal Convention, 1971:

The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation was signed on September 22, 1971, by thirty-one States of sixty originally attending the Conference. Canada ratified the Convention on June 19, 1972.

The Convention, as indicated above, re-iterates certain Articles contained in the Hague Convention. For example, Article 5(2) of the Montreal Convention in essence adapts the thrust of Article 7 of the Hague Convention, which is to ensure trial of the offender by the State in which he is found if he is not extradited. Again, the Articles of the two Conventions relating to extradition run on parallel lines; the framers of the Montreal Convention strove for uniformity in as many essentials as possible as between that instrument and the Hague Convention. As a result, a proposal was rejected by the Conference which would have excluded any possibility of the "political offence" defence against extradition proceedings in respect of offences against Article 1 of the Convention. Thus, the politically-motivated offender may still be able to escape extradition on that ground, but of course he is still going to face trial at the hands of the State holding him, as under the Hague Convention.

The most substantial change and advance represented by the Montreal Convention is, in fact, in the new offences which are created and defined by Articles 1 and 2.

Article 1(1) provides that:

> "Any person commits an offence if he unlawfully and intentionally: (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft or, (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight or, (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight or (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight or, (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight."

Article 1(2) proceeds to create criminal responsibility for those attempting any of the foregoing acts or who are accomplices of those performing them.

The Montreal Convention, in Article 2, defines and distinguishes very precisely between aircraft which are "in flight" and aircraft which are "in service":

> "(a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

> (b) An aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period, during which the aircraft is in flight, as defined in paragraph (a) of this Article."

It may be noted that the concept of an aircraft "in flight" corresponds closely with Article 3(1) of the Hague Convention and represents a much more precise and less ambiguous definition than that of Article 1(3) of the Tokyo Convention. The "in service" concept was subjected to much debate both before and during the Montreal Conference.[19] The beginning of the "in service" period was not basically nor difficult to define; the time at which the period was to come to an end was, on the other hand, much discussed. Ultimately, the extension of the "in service" period to a point in time twenty-four hours after any landing was decided upon. This was to take account of the frequent rather lengthy stop-overs which aircraft have to make in foreign countries while awaiting a turn-around and beginning of its homeward flight. It may be noted that Canada has enacted these definitions in its national law, by virtue of section 3 of the Criminal Law Amendment Act, 1972.[20]

This, then, is in capsule form the substance of the Montreal Convention; it clearly builds upon the foundation of the Hague Convention, preserving much of that Convention and adding new and important concepts.

Canadian Initiatives:

Canada, in the last few years, has played a leading role at the major Conferences referred to above, and in addition has been active in amending its own national law to meet its new international obligations and also in pursuing bilateral agreements on, for example, extradition further to bolster up the multilateral mechanisms created.

At the Hague Conference in 1970, the Canadian delegation played an active role in promoting a generally acceptable treaty and was particularly instrumental in securing adoption of the "strong prosecution" provision (Article 7).[21] Again, as host State and participant, Canada contributed substantially to the Montreal Convention. In the words of the Bureau of Legal Affairs of the Canadian Department of External Affairs,[22] Canada has been in the forefront of international efforts to come to grips with the inter-related aspects of the insidious problem of unlaw-

19. See, for example, Summary of the Work of the I.C.A.O. Legal Committee during its Eighteenth Session, London, Sept. 29 - Oct. 22, 1970. I.C.A.O. Doc. 8910, LC/163.
20. See footnote 16 above.
21. See Communiqué No. 86, Dept. of External Affairs, December 16, 1970.
22. "Some Examples of Current Issues of International Law of Particular Importance to Canada", issued by Bureau of Legal Affairs, Dept. of External Affairs, October 14, 1972, at p. 17.

ful interference with civil aviation. It is axiomatic that the most effective way of dealing with the problem is by promoting the implementation of more rigorous national and international preventive security measures, and Canada will continue to be active in this area. However, the Legal Bureau of the Department of External Affairs, in consultation with other Bureaus of the Department and the Ministry of Transport, Department of Justice and Canadian Transport Commission, has also contributed significantly to the negotiation, under the auspices of the International Civil Aviation Organization (ICAO), of a series of international conventions which, in their totality, will make it difficult for individuals who commit acts of unlawful interference to escape prosecution.

In addition to its participation in the multilateral Conference, Canada has sought further improvement at the bilateral and national levels.

Of particular importance, for obvious reasons, was the signing in Ottawa on February 15, 1973, of the Canada-Cuba Hijacking Agreement. This agreement was the outcome of very long and protracted negotiations and stands as a testimonial to the perseverance of those involved. On February 22, 1971, the Department of External Affairs stated that, "On February 20, the Canadian and Cuban Delegations concluded the talks held in Havana . . . The Havana meetings took place after a series of contacts between Canadian and Cuban officials over a period of more than a year."[23] Almost a year later the agreement, providing for the prosecution or return of hijackers of both aircraft and vessels, was signed.[24]

As the text of this agreement may not be easily available to readers through usual library sources at the time of publication of this article, the agreement is reproduced here in full:

The Government of Canada and the Government of the Republic of Cuba, on the basis of sovereign equality, friendly relations and reciprocal co-operation, agree:

ARTICLE 1

1. Any person who hereafter seizes, removes, appropriates or diverts from its normal route or activities an aircraft or vessel registered under the laws of one of the parties and brings it to the territory of the other party shall be considered to have committed an offence and therefore shall either be returned to the party of registry of the aircraft or vessel to be tried by the courts of that party in conformity with its laws or be brought before the courts of the party whose territory he reached for

23. See Communiqué No. 12, Dept. of External Affairs, February 22, 1971.
24. See Communiqué No. 19, Dept. of External Affairs, February 15, 1972.

trial in conformity with its laws for the offence punishable by the most severe penalty according to the circumstances and the seriousness of the acts to which this Article refers. In addition, the party whose territory is reached by the aircraft or vessel shall take all necessary steps to facilitate without delay the continuation of the journey of the passengers and crew innocent of the hijacking of the aircraft or vessel in question, with their belongings, as well as the journey of the aircraft or vessel itself with all goods carried with it, including any funds obtained by extortion or other illegal means, or the return of the foregoing to the territory of the first party; likewise, it shall take all steps to protect the physical integrity of the aircraft or vessel, and all goods carried with it, including any funds obtained by extortion or other illegal means, and the physical integrity of the passengers and crew innocent of the hijacking, and their belongings, while they are in its territory as a consequence of or in connection with the acts to which this Article refers.

2. In the event that the offences referred to above are not punishable under the laws existing in the country to which the persons committing them arrived, the party in question shall be obligated, except in the case of minor offences, to return the persons who have committed such acts, in accordance with the applicable legal procedures, to the territory of the other party to be tried by its courts in conformity with its laws.

ARTICLE 2

Each party shall try with a view to severe punishment in accordance with its laws any person who, within its territory, hereafter conspires to promote, or promotes, or prepares, or directs, or forms part of an expedition which from its territory or any other place carries out acts of violence or depredation against aircraft or vessels of any kind or registration coming from or going to the territory of the other party.

ARTICLE 3

Each party shall apply strictly its own laws to any national of the other party who, coming from the territory of the other party, enters its territory, violating its laws as well as national and international requirements pertaining to immigration, health, customs and the like.

ARTICLE 4

The party in whose territory the perpetrators of the acts described in Article 1 arrive may take into consideration any extenuating or mitigating circumstances in those cases in which the persons responsible for the acts were being sought for strictly political reasons and were in real and imminent danger of death without a viable alternative for leaving the

country, provided there was no financial extortion or physical injury to the members of the crew, passengers or other persons in connection with the hijacking.

ARTICLE 5

1. This Agreement may be amended or expanded by decision of the parties.

2. This Agreement shall be in force for five years and may be renewed for an equal term by express decision of the parties.

3. Either party may inform the other of its decision to terminate this Agreement at any time while it is in force by written denunciation submitted six months in advance.

4. This Agreement shall enter into force on the date of signature.

In addition to incorporating into the agreement many of the principles of law already existing at the multilateral level (e.g. the "strong prosecution" concept noted above), the parties extended its ambit to include vessels as well as aircraft. The "political offence" situation is covered by Article 4; political reasons for the acts do not exonerate, but may be considered as extenuating or mitigating factors, provided that no financial extortion or physical violence attended the incident. As will be seen from Article 5, the agreement is in force, in the first instance, for five years.

Canada has also, as noted above[25], amended its national law to fulfill its international obligations which stem from its acceptance of the Hague and Montreal Conventions. Sections 3 and 6 of the Criminal Law Amendment Act, 1972, provide as follows:

> 3. (1) Subsection 6(1) of the said Act is repealed and the following substituted therefor:
>
> "6. (1) Notwithstanding anything in this Act or any other Act, every one who
>
> (a) on or in respect of an aircraft
>
> (i) registered in Canada under regulations made under the Aeronautics Act, or
>
> (ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft registered in Canada under those regulations,
>
> while the aircraft is in flight, or
>
> (b) on any aircraft, while the aircraft is in flight if the flight terminated in Canada,
>
> commits an act or omission in or outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

25. See footnote 16 above.

(1.1) Notwithstanding this Act or any other Act, every one who

(a) on an aircraft, while the aircraft is in flight, commits an act or omission outside Canada that if committed in Canada or on an aircraft registered in Canada under regulations made under the Aeronautics Act would be an offence against section 76.1 or paragraph 76.2(a),

(b) in relation to an aircraft in service, commits an act or omission outside Canada that if committed in Canada would be an offence against any of paragraphs 76.2(b), (c) or (e), or

(c) in relation to an air navigation facility used in international air navigation, commits an act or omission outside Canada that if committed in Canada would be an offence against paragraph 76.2(d)

shall, if he is found anywhere in Canada, be deemed to have committed that act or omission in Canada."

(2) Subsections 6(3) and (4) of the said Act are repealed and the following substituted therefor:

"(3) Where a person has committed an act or omission that is an offence by virtue of subsection (1), (1.1) or (2) the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the territorial division where he is found in the same manner as if the offence had been committed in that territorial division.

(4) Where, as a result of committing an act or omission that is an offence by virtue of subsection (1), (1.1) or (2), a person has been tried and convicted or acquitted outside Canada, he may, if charged with an offence in Canada arising out of the same act or omission, plead the special pleas of autrefois acquit or autrefois convict and sections 535, 536, 537 and 538 apply mutatis mutandis."

(3) Subsection 6(6) of the said Act is repealed and the following substituted therefor:

"(6) For the purposes of this section, of the definition "peace officer" in section 2 and of sections 76.1 and 76.2, "flight" means the act of flying or moving through the air and an aircraft shall be deemed to be in flight from the time when all external doors are closed following embarkation until the later of

(a) the time at which any such door is opened for the purpose of disembarkation; and

(b) where the aircraft makes a forced landing in circumstances in which the owner or operator thereof or a person acting on behalf of either of them is not in control of the aircraft, the time at which control of the aircraft is restored to the owner or operator thereof or a person acting on behalf of either of them.

(7) For the purposes of this section and section 76.2 an aircraft shall be deemed to be in service from the time when pre-flight preparation of the aircraft by ground personnel or the crew thereof begins for a specific flight until

(a) the flight is cancelled before the aircraft is in flight,

(b) twenty-four hours after the aircraft, having commenced the flight, lands, or

(c) the aircraft, having commenced the flight, ceases to be in flight, whichever is the latest."

6. The said Act is further amended by adding thereto, immediately after section 76 thereof, the following heading and sections:

"OFFENCES RELATING TO AIRCRAFT

76.1 Every one who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with intent

(a) to cause any person on board the aircraft to be confined or imprisoned against his will,

(b) to cause any person on board the aircraft to be transported against his will to any place other than the next scheduled place of landing of the aircraft,

(c) to hold any person on board the aircraft for ransom or to service against his will, or

(d) to cause the aircraft to deviate in a material respect from its flight plan,

is guilty of an indictable offence and is liable to imprisonment for life.

76.2 Every one who,

(a) on board an aircraft in flight, commits an assault that is likely to endanger the safety of the aircraft,

(b) causes damage to an aircraft in service that renders the aircraft incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(c) places or causes to be placed on board an aircraft in service anything that is likely to cause damage to the aircraft that will render it incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(d) causes damages to or interferes with the operation of any air navigation facility where the damage or interference is likely to endanger the safety of an aircraft in flight, or

(e) endangers the safety of an aircraft in flight by communicating to any other person any information that he knows to be false,

is guilty of an indictable offence and is liable to imprisonment for life.

76.3 (1) Everyone, other than a peace officer engaged in the execution of his duty, who takes on board a civil aircraft an offensive weapon or any explosive substance,

(a) without the consent of the owner or operator of the aircraft or of a person duly authorized by either of them to consent thereto, or

(b) with the consent referred to in paragraph (a) but without complying with all terms and conditions on which the consent was given,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) For the purposes of this section, "civil aircraft" means all aircraft other than aircraft operated by the Canadian Forces, a police force in Canada or persons engaged in the administration or enforcement of the Customs Act or the Excise Act."

These, then are the further specific Canadian steps taken in this regard. Further, Canada was a member (together with Brazil, Chile, Egypt, Israel, Japan, Netherlands, Spain, Tanzania, U.S.A., U.S.S.R., France, U.K. and Jamaica) of a Special Legal Sub-Committee of I.C.A.O. which met in Washington from September 4 to 15, 1972, to consider joint enforcement action against States which fail to live up to their legal obligations pertaining to international civil aviation. The report of this Sub-Committee will, it is hoped, lead to a further convention which will ensure adherence to legal obligations of States in this sphere.

Canada's contribution to the development of both national and international law relating to unlawful seizure of aircraft, sabotage and other interferences with aircraft has been considerable.

Few would claim that the Conventions and legislation described above represent *per se* a solution to the problems of modern aerial piracy and hijacking. The technological, political and other factors are equally, if not more, important in analysis of the total problem. Yet what we have seen, in the last two or three years, is the remedying of great, gaping deficiencies in the law which, as long as they persisted, presented serious

jurisdictional and substantive barriers to the prosecution, conviction and punishment of hijackers.

Even these legal deficiencies have not been completely cured; as long as States like France, Mexico and Spain choose not to take part in or accept the end product of the multilateral approach, preferring to enact their own, different national legislation, then the multilateral mechanism cannot be regarded as the only possible approach. Some have doubted, indeed, whether regulation in this field through the means of the international convention has even any minimal value or effectiveness.[26] This writer would not share this rather negative view. To be sure, the efforts in multilateral form have not, thus far, provided the ultimate solution, and it is highly unlikely that such efforts will, alone, do so in the future. Yet to abandon completely the multilateral approach would seem to invite disaster; it is suggested that only a rational blend of activity at all levels of agreement and jurisdiction can contribute to the eventual eradication or reduction to minimal proportions of the modern scourge of hijacking. Time alone will be judge of the value and effectiveness of these Canadian efforts.

*J. M. SHARP

BROWNRIDGE v. THE QUEEN:[1] ENIGMA OR ANATHEMA?

It is submitted that *Brownridge* v. *The Queen*[2] is a case the *ratio decidendi* of which, though it is difficult to sift one out of the confusion, will be seen to be very important, not in itself, but in the way it affects, affirms, and fills in the gaps of pre-existing case law. It is by no means a case which civil libertarians ought to herald without taking a long hard second look. Two main questions will be dealt with: first, what exactly was said in *Brownridge* and how does it sit with previous cases and second, what is its effect on the status of illegally obtained evidence?

On first sight, the Supreme Court's decision in *Brownridge* seems exceedingly unclear.[3] However, it is suggested that a *ratio* may be deduced from the case, though on a very pragmatic basis, viz. to ignore the judgments of Hall and Laskin, JJ. as well as the dissenting judgments. For reasons shortly to be explained, this course would seem to be the

26. For example, Thomas and Kirby, (1973) 22 International and Comparative Law Quarterly 163, at 172.

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1. (1972), 18 C.R.N.S. 308 (S.C.C.).
2. Ibid.
3. Infra, fn. 5.
For a brief discussion of whether this course of action is prevented by the fact that more judges disagreed with Ritchie J., than agreed, see Appendix 1.