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**INSPECTION: A CASE STUDY
AND SELECTED REFERENCES**

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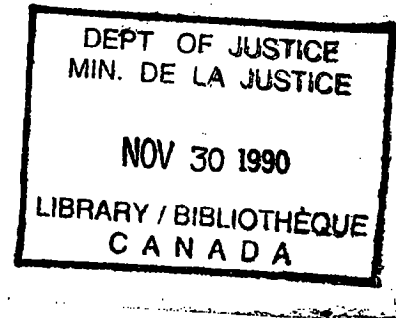
Administrative Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

John C. Clifford, B.A., LL.B.



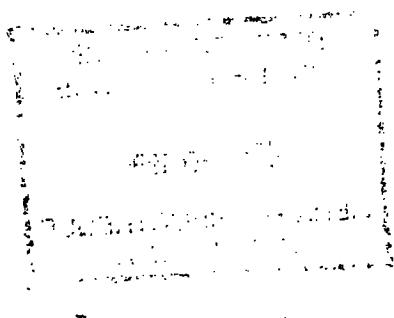
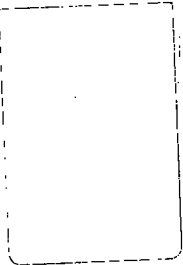


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Foreword

The author thanks Transport Canada for its co-operation which was expressed by all personnel who came within the purview of this study. I am indebted to Weldon Newton, Bob Lafleur and Mike Murphy from Aviation Regulation headquarters, for their insights, goodwill and trust. As well, managers of the other aviation safety inspectorates were co-operative and supportive of this work.

I am particularly thankful to the inspectors in four regions where I shared many hours of flying on surveillance missions. That was where I got a real sense of the nature of inspection, its strengths and its problems. Although I cannot name all the inspectors for reasons of confidentiality, still, I mention Dave Ellison, an airworthiness inspector from the Pacific Region who, to me, exemplified all the attributes of "the good inspector."

During 1985 the author completed field research for the case study in Part One. This was followed by investigation of selected departmental materials. After successive drafts of the case study, the Commission approved a final version for publication in 1987. The selected references which appear in Part Three were compiled during the same period. On August 26, 1987, the author presented an earlier draft of Part Two to a meeting of the Administrative Law Section of the Canadian Bar Association, at Meech Lake, Quebec.

Comments on the case study, received from members of the Canadian Association of Law Teachers and the Canadian Political Science Association at their 1987 meetings were most helpful. As well, the advice of my colleagues in the Commission's Administrative Law Project helped me greatly. Thanks are especially due to Patrick Robardet and John Frecker.

Several persons helped process the text: getting through the many versions was accomplished by Darcy Dixon, Jackie Ralston, Nicole Houle, Carmelle Lavigne and Carole Delorme. Finally, I mention the Commission staff who helped compile the selected materials in Part Three: they are Francine Gauthier, Irene Harrison, Donna Hellman and Judith Rubin. Thanks to all.

John C. Clifford

Frequently Used Abbreviations

AME:	Aircraft Maintenance Engineer
CASB:	Canadian Aviation Safety Board
CAT:	Civil Aviation Tribunal
CATA:	Canadian Air Transportation Administration
CTC:	Canadian Transport Commission
DFTE:	Designated Flight Test Examiners
ICAO:	International Civil Aviation Organization
LRC:	Law Reform Commission of Canada
MOU:	Memorandum of Understanding
TCAG:	Transport Canada Aviation Group

Introduction

I. Background

The present study follows other work of the Commission's Administrative Law Project, in the area of policy implementation and compliance (see, e.g., A62, A105, A308).¹ After completion of Working Paper 51 on this topic (see B76), it was felt that a deeper study was needed into several related matters, including government inspection. Work is needed because of the pervasiveness of inspection in the work of government, and because there has been no Canadian attempt to rationalize this phenomenon. Such work would help improve efficiency and fairness of government.

At least thirty-three federal government institutions² make use of approximately one hundred inspectorates.³ Although central agencies control and organize them, these inspectorates are autonomous in several respects. Each institution has its own system for internal control. For example, internal instructions are promulgated according to the vagaries and histories of branches of each institution; practices for delegation of authority are equally various. As well, little is known about the extent to which government uses private parties to do inspection. It is important to raise this issue in the context of contemporary pressures to privatize public services of all kinds. This study paper and subsequent work of the Commission stresses internal controls and the respective positions and responsibilities of private and government inspectors.

The significant presence of inspectors and inspection in western government administrations is reason enough for an attempt to make sense of this phenomenon. Although there exists a considerable body of literature on this subject,⁴ there has been no attempt to treat the Canadian manifestations in a comprehensive fashion. Such work is needed in Canada to build an analytical framework which could help policy makers

1. The alphanumerical notations in brackets refer to the works in the bibliography.

2. Federal government institutions which make use of inspectors, for a variety of inspection functions, include: Atomic Energy Control Board, Agriculture Canada, Canadian Aviation Safety Board, Consumer and Corporate Affairs Canada, Canadian Human Rights Commission, Canada Mortgage and Housing Corporation, Canada Post, Correctional Service Canada, Canadian Transport Commission, Communications Canada, Environment Canada, Employment and Immigration Canada, Energy, Mines and Resources Canada, Canada Oil and Gas Lands Administration, External Affairs Canada, Fisheries and Oceans Canada, Department of Finance Canada, Health and Welfare Canada, Insurance Canada, Labour Canada, National Capital Commission, National Defence, National Energy Board, Ports Canada, Public Service Commission of Canada, Public Works Canada, Revenue Canada — Customs and Excise, Revenue Canada — Taxation, Solicitor General Canada — Canadian Security Intelligence Service, Supply and Services Canada, Treasury Board of Canada (Secretariat), Transport Canada.

3. This group fluctuates with institutional reorganizations.

4. See, e.g., the references listed as "Articles and Books" in Part Three, below.

and administrators in their decisions about whether to use inspection and how to use inspectors. As a first step, the meaning of inspection could be clarified. This can be approached by finding out who the inspectors are and what they do.

To inspect is to "look closely into, examine officially."⁵ An inspector is "one who inspects; (an) official employed to supervise a service and make reports."⁶ As broadly as these terms are defined in dictionaries, the true dimensions of their meanings cannot be fully appreciated without some knowledge about actual inspection and inspectors. With this in mind, the author conducted a field study of an inspectorate in one department to get a sense of the problems encountered by inspectors and to see how the department attempts to control inspection. This was followed by a literature review. The results of this work appear in the present paper as Parts One and Three, respectively.

Research was commenced with some assumptions which ultimately had to be identified, tested and adjusted. For example, a traditional narrow view of inspection includes supervisory activities which ensure that legal requirements have been met and that prohibitions have not been breached. In aid of this, inspectors exercise legal powers and act under lawful authorization, including delegated powers and other formal authorizations to intrude into private affairs. However, the research reported herein, leads to a *broader meaning of "inspection" comprising not only supervision, investigation and enforcement but also provision of services such as grading, advising, and taking decisions for government which affect the ability of private parties to conduct their affairs.* By way of examples, the range of tasks performed by aviation inspectors is more fully set out in Part One below.

Similarly, an assumption about inspectors did not stand up after research. In particular, government supplements its own inspectorates with private parties. Government employees and private parties inspect on behalf of government. Government inspectors are not always designated or classified as such, and so it is difficult to make a definitive enumeration of them. The same is true of private actors performing inspection functions. Private inspectors are in fact the middle persons⁷ between parties being checked on and the government institution which is ultimately responsible for supervision of a particular activity. Much of government's inspection is actually done by private inspectors. This theme is explored in Part One, using the example class of aircraft maintenance engineers (AMEs): they are private sector actors, whether employees of private firms or self employed parties. The AMEs' work consists in inspecting aircraft or components, determining what work is required, executing repair work and certifying to that effect on official logs. The government's airworthiness inspector systematically checks maintenance and journey logs and rarely looks beyond the notations. In essence, many of the duties of government inspectors consist in checking on the work of private inspectors.

Inspection of the work of governmental inspectors and other public servants is a field of activity which is not usually identified as inspection. It is variously labeled

5. See J.B. Sykes, ed., *The Concise Oxford Dictionary of Current English* (Oxford: The Clarendon Press, 1982) at 519.

6. See *ibid.*

7. For fuller development of this idea, see A208, pp. 38-41.

“audit,” “evaluation,” “efficiency testing,” “periodic review,” and so on. Various governmental bodies are empowered to do this work. As well, this kind of inspection is an *ad hoc* or ongoing internal function of many government institutions. Sometimes institutions request other expert bodies of government to perform such inspections in order to support proposals for budget appropriations. Or, the inspection may be done by a central agency of government with the co-operation of the subject institution. Inspection of government’s own inspectorates is therefore done for a variety of purposes, including appropriations, efficiency, fairness, and to prevent or investigate circumstances of fraud.⁸ While this aspect is not fully explored in the present paper it is not to be forgotten in a full study of inspection because of its importance for policy implementation. In other words, securing bureaucratic co-operation merits the same attention of the legal community as the government’s attempts to secure private sector compliance. Even though the present paper is focused on inspection of private parties by government inspectors, the human dynamics in inspection are much the same whether the inspectors and inspected are government or private sector actors.

Over the last two centuries, governments in countries such as Canada, Great Britain and France have used inspectors to help implement public policy. Inspection has an even longer history. In the tax farms of pre-revolutionary France, for example, the *tourneur* maintained direct control through exercise of unlimited authority to inspect and correct.⁹ Among the early nineteenth-century British manifestations were the school inspectors.¹⁰ Their practices and orientations and those of the inspectors of mines and factories are well documented in the literature.¹¹ In nineteenth-century Great Britain, the inspector was directly responsible for ongoing policy advice in ways which are not replicated by inspectors in government today. Today, this function is performed by other government bodies. In new areas of government intervention, advice from field officers is indispensable; for such reasons, inspectors were often recruited from the educated, upper middle class ranks of society. This had the intended effect of enhancing direct communication with the responsible ministers (see, e.g., A215). In these respects, the government inspector worked as an enforcer and adviser among parties who were obliged to comply with the law, while working to improve implementation by recommending directly to government new standards and new concerns which merited interventions.

In the U.K. and France, a few authors have attempted to make sense of the inspectorates and administrative police used by their respective governments (see, e.g., A145, A203, A254). This has not yet been done in Canada. Although much can be learned from foreign classifications and analytical frameworks, there is a need in Canada to develop our own perspectives on the phenomenon of inspection. This is partly because our inspection ought to be seen from the point of view of particular Canadian social needs and circumstances. A recent study of inspection in the U.K. (see A254) classifies seven types of inspectorates and excludes five from detailed discussion.

8. At least one federal government institution is starting to study this area: see B88.

9. See A218, pp. 199-203. The *tourneur* was in fact responsible for inspecting private law enforcement. Historically, this arrangement has given rise to abuses. In some instances, a monopoly or oligopoly in enforcement has evolved.

10. See topical index under “Inspectorates, U.K.: Schools”.

11. See *ibid.*, “Inspectorates, U.K.: factories ... mines”.

In the U.K. the central government inspects local government operations respecting the efficiency with which they perform delegated tasks. This activity is significant in the U.K. but there is no counterpart in Canada.

Hartley's classifications of British government inspectorates provides some basis for conceiving models. For example, he makes distinctions on the basis of style and organization. In respect of style, he distinguishes: *roles* (inspection; advisory); *approach* (substantive, backed by sanctions; non-authoritative, ignore with impunity); and *content* (investigate legality or efficiency or both; hear both sides). Hartley's "organizational" distinctions are based on indicia of independence and responsibilities which are internal or external to the particular institution (see A145). Review of legislation is not enough to make distinctions, let alone construct models. Thus the importance of field study is clear, at least to discern distinguishing features of style and organization.

In France, the situation is different because of the differences in legal systems. Even though the idea of administrative police is well known in France, the author of a learned treatise finds few common threads with which one might knit together the notion of administrative police (see A241). Even though the notion is attractive in some respects, it might only fit within a system of administrative law which has no counterpart in Canada.

II. Method and Presentation

To become acquainted with actual field level problems, the author accompanied aviation safety inspectors from Transport Canada on surveillance missions in four of six regions. This was complemented by interviews of inspectors and managers, examination of legislation, jurisprudence, manuals, internal instructions and various governmental studies of the aviation safety inspectorate. Written surveillance instructions,¹² enforcement statistics (see, e.g., B61) and enforcement instructions¹³ have, with many other aspects of the research, provided a basis for understanding the enforcement function and its variations. No departmental files were examined for the study. Following the field study, the author researched selected materials from law, published literature and official documents. On the basis of that work, an index was developed which reflected the theoretical concerns arising from the field study and the materials consulted. This should provide a better basis for undertaking further research and is a necessary step towards responsible legal harmonization.

The next step planned for this area is a survey of federal inspectorates. It is necessary to do this work so that a basic source of information will be available. The survey will address matters which have been focused on by the work done to date. Analysis of survey responses should provide a basis for making recommendations for reform of federal inspection, and for the development and control of inspection.

12. See *infra*, note 38, and accompanying text.

13. See *infra*, note 35.

The three parts which follow are analagous to a "reader" in that they share common threads but are also completely separable. However, each part complements the others: for example, the themes of the case study in Part One are reflected in many parts of the topical index in Part Three, and the selected materials in Part Three are given some life by real examples exposed in the case study. Part Two is a synthesis of field study and literature review, and is a basis for systematic study of government inspection.

The dimensions of the problems surveyed and the time necessary to complete a study in this area indicated that publication of the present work could be useful to help stimulate interest in this subject.

As a practical matter, working on administrative law questions and reform should be aimed at improving government. This is the orientation which was adopted for the research and findings reported in this text. In particular, how can law improve the deployment and control of inspectors? These are basic administrative law issues.¹⁴ To approach these issues, it is necessary to know how inspectors are deployed at present, what they do, who they are and what the law is governing inspection. Therefore the purpose of the present paper is to catalyse thinking and discussion about the nature of inspection, the identity of inspectors and control of inspection. This is in keeping with themes outlined in a Law Reform Commission consultation paper, *Towards a Modern Federal Administrative Law* (B79). In particular, the present paper addresses matters, within the research program of the Administrative Law Project, including legal powers, organization and control of administrative policing.¹⁵

14. A typical characterization of this administrative law orientation has been stated as a "secondary meaning of the rule of law ... that government should be conducted within a framework of recognised rules and principles which restrict discretionary power." See A306, p. 22.

15. While this phrase is not in common use in Canada, it does convey a true sense of what inspectors do. In particular, the notion of administrative policing may be useful for organizing reform of Canada's federal inspectorates. Even though each inspectorate has unique features, they all share common functional threads and problems. As used here, the phrase "administrative policing" includes the work of government administrators, other than those who are responsible for administration of the criminal law, who are authorized by government to exercise police power. Police power is the power of the state to act in the public interest; it is delegated to individuals and institutions through explicit and implicit authorizations. See topical index under "police, administrative", and "power."

PART ONE

Aviation Safety Inspection — A Case Study¹⁶

I. Introduction

A. Background

In a Working Paper entitled *Policy Implementation, Compliance and Administrative Law* (B76), the Law Reform Commission commented on aspects of relations between aviation safety inspectors and *administrés*.¹⁷ This was done in the context of a general thesis about the importance of mutual accommodations for the achievement of governmental objectives (see B76, p. 19ff). Because of the prevalence of inspectorates in the federal government¹⁸ the many legal regimes regulating their deployment,¹⁹ and their importance for policy implementation, it was recognized that there was need for more study in this area. Hence, a limited field study of one government department's inspectors was undertaken to help develop a framework for analysis, and to identify avenues for reform.

Research of inspection was initially based on an interest in the ways in which inspectors try to get private parties to comply with legal requirements. Using the analysis from Working Paper 51, the author assumed that inspectors got compliance by using licences and other instruments of permission which can be granted, withdrawn or altered by inspectors, depending on compliance. As well, many violations of legislated standards should be prosecuted as regulatory offences. In these contexts, aviation safety inspectors work with persuasion, incentives and coercion to achieve policy objectives.

16. An earlier version of this part was presented at the annual meetings of the Canadian Association of Law Teachers and the Canadian Political Science Association at the Learned Societies Conference, McMaster University, Hamilton, Ontario, in May and June 1987.

17. There is no English equivalent for the term "administré". In French it conveys a meaning which includes both users of public service and parties under governmental administration or jurisdiction.

18. Clearly some definitions of "inspection" and "inspector" are needed to inform a count of inspectorates. Preliminary work for a survey, without settled definitions, indicates that there are approximately 100 federal inspectorates.

19. The variations are evidenced by 166 federal statutes which govern inspection (see section C of bibliography).

During the 1980s, the Administrative Law Project kept under general consideration the work of Transport Canada's Task Force on Aviation Safety (see, e.g., A78) and related recommendations of the Royal Commission of Inquiry into Aviation Safety.²⁰ These initiatives have precipitated important changes in law and administration governing aviation safety inspectors. By keeping abreast of such changes, researchers took account of actual problems faced by administrators charged with the difficult task of getting the job done.

An overarching purpose of research about inspection and inspectorates has been to discover the actual nature of inspection. When it comes to checking on compliance with the law, one typically conjures ideas about police and intrusions. But there are lots of other people doing police work. Let us call them "inspectors." Inspectors are experts. Government employs experts to check for compliance with law, whether expressed as requirements or prohibitions. This is done to protect and advance the interests of citizens.

In aviation safety, as in many other federal government policies, inspectors are front-line personnel who help government to implement policy. Through supervision and service, they try to secure private sector compliance with legal requirements. Government also inspects the work of government inspectors to ensure efficiency, fairness and honesty. As well, much of government's inspection work is in fact done by the private sector. This gives rise to other issues which complicate a seemingly straightforward area of public administration.

Government inspectors and private parties inspect to see that required steps have been taken in all aspects of aviation. As is the case with many other areas of public policy, inspection is both more and less than this. Inspection is more than checking on legal requirements: inspectors wear white hats too. As good public administrators, inspectors are more concerned about achieving policy goals (namely, safe aviation) than punishing. There can never be "enough" inspection to ensure that all legal requirements have been met; therefore, inspection sometimes seems to be less than it should be. However, there are very real limits in available human and other resources.

Before embarking on wide research about inspectorates it was thought wise to research one department's inspectorates in some detail, to get a better understanding of the general nature of the problems and the extent to which law reform could help. In 1985, the author accompanied aviation safety inspectors from Transport Canada on several surveillance missions. This direct study of inspection practices in the field was the beginning of the Commission's research on inspection.

The paper does not address in detail the relations between inspectors and private actors because sources of information were mainly government inspectors. This was

20. See B15. Many recommendations have been followed; for example, Transport Canada has created a new branch of inspectors dedicated to enforcement.

partially offset by soliciting, from the private aviation community, criticisms and comments about inspection and enforcement, and by investigating the legal problems of one group of private inspectors: the AMEs.²¹

B. Aviation, Safety and Inspection

The grim reality of aviation safety is expressed in terms of fatal and non-fatal accidents. In 1978, *Flight International* made comparisons of national records and it was found that, on the basis of accidents and fatalities, and using a number of ranking methods, Canada was in thirteenth place. By early 1985, the same periodical reported that Canada:

has moved up to eighth place — perhaps a result of the 1981 Government Safety inquiry which was prompted by the 1979 *Flight* analysis. Canada is still below average when measured by number of crashes (A249, p. 32).²²

The government inquiry (see B15) helped to bring about important changes in government administration.²³ The Aviation Group at Transport Canada (TCAG) is the leading federal government institution responsible for aviation regulation. The changes have profoundly affected deployment of personnel within TCAG's several inspectorates. This is clear on the face of a new act, from the dedication of a new branch to enforcement, and from other improvements in internal instructions, delegation arrangements within government and new training programs. Serious broader problems persist and are discussed interstitially below.

As important as inspection is for safety of aviation, many other aspects of the system merit attention as well. For example, the consistently high safety record of Australia has been attributed to short "power distance," that is, "the extent to which crew and staff can argue with the boss" (see A249, p. 29). This factor is also important for aviation safety inspection, whether performed by government personnel or private actors.

Deregulation of economic aspects of aviation may precipitate problems in other areas, such as inspection. Inspection is performed to ensure that personnel, equipment and flight services are safe. One might say that flying is an act of faith in aviation safety, and in the elements of the system, such as inspection. Measurement of aviation safety is a much qualified exercise; improvements in safety are at least as difficult to measure. Similarly it is difficult to attribute credit for actual improvements or declines in safety. Assignment of responsibility for safety failures is more precisely performed during investigation of specific accidents or incidents. Nonetheless, continuous

21. This was achieved mainly through interviews with several AMEs in one region and attendance at regional AME association meetings. Problems faced by these professionals exemplify difficulties faced by private actors who are caught between performance of duties for government and private employers. AMEs do not have strong professional associations, and so they are left on their own to resolve many potential conflict of interest problems on a case-by-case basis.

22. See also A248.

23. This has included creation of two new agencies, the Canadian Aviation Safety Board (CASB) and CAT, as well as major changes at Transport Canada.

evaluations and adjustments must be made by government and private parties to try to improve safety, notwithstanding the constraints posed by deregulation.²⁴

Government plays its parts through various institutions and their employees, including inspectors. In the private sector, the aviation community also employs inspectors. On both sides, the inspectors perform a variety of tasks which, on reflection, expand the actual meaning and nuance of inspection. Indeed, many actors who perform inspection tasks are not labeled "inspectors". In various ways they are responsible for maintaining and improving public and private interests in aviation safety.

Measurements of aviation safety provide benchmarks for all parties interested in this field. However, inspectors concern themselves with secondary measurements related to the qualifications of personnel, equipment and services. Essentially, this is preventive work and is accomplished through routine tasks such as maintenance, testing, surveillance, discussion, and so on. The systemic goal of aviation safety is therefore approached through emphasis on tasks which may enhance safety. Safety may or may not be achieved or enhanced through inspection; however, this is matter for analysis and opinion and is beyond the scope of the present paper.

There are many problems in the administration of aviation safety inspection. In some respects, these problems can be approached through adjustments of legal arrangements. However, this should not be done with easy assumptions. Within this perspective it is important to try and discern the roots of problems. Some of the problems are topical in that they are particular to aviation. Others are typical Canadian problems; still others are problems of public administration and law. This case study explores some actual problems and arrangements in the specific context of aviation safety inspection, as a way of raising issues which are of significance for inspection generally.

Aviation and aviation safety inspection have grown dramatically in Canada. Examples in the following table will illustrate:

Table I: Canadian Aviation and Inspection 1948-1985²⁵

	1948	1960	1985
Passengers ('000)	919	4,830	29,000
Kilometres Flown ('000,000)	529	4,507	48,812
Cargo-Kilograms ('000)	15,693	95,401	498,199
Mail-Kilograms ('000)	4,034	15,709	82,458
Hours Flown ('000)	292	879	2,434
Registered Aircraft	2,021	5,318	26,801
Pilot Licences	4,353	19,153	60,838
AME Licences		1,953	6,300 +
Government Inspectorate (person-years)	33		713 (1984)

24. Deregulation facilitates market entry; new airlines increased demands for personnel and inspectors are natural candidates for these new positions. Staffing inspectorates therefore becomes more difficult, at least during the early phase of deregulation. This may change after the "shakedown" of competition. See A64.

25. Information for this table was compiled from data which appears in the following texts: B63, B97, B98.

In the late 1970s a management report observed that some of these growing pains have had a particular impact on the Civil Aviation Inspectors group. The earlier small number of clients allowed for a fairly loose organization with something of an old boy network operating in the group's relationships with industry (see B43, p. 2).

Considerable progress has been made in the reorganization of aviation safety regulation since the late 1970s. Transport Canada has taken great strides,²⁶ with the help of a Royal Commission (see B15) and other studies (see, e.g., B89, 1985, par. 13.1ff), to improve aviation safety regulation, including inspection. This culminated in 1985 with the proclamation of a revamped *Aeronautics Act* (C2). The initiative continues with consolidation and rationalization of subordinate legislation and continuous renewal of the administration. In this connection, Transport Canada has taken many measures to improve the deployment and control of its inspectorate and of private parties who are authorized to perform inspection functions. This has been taking place in the context of a better understanding of the duality of government work, namely supervision and service.

Inspectors are empowered to carry out supervisory tasks by virtue of their powers to enter places and aircraft for inspection purposes, to obtain warrants to seize evidence of legal violations and to ground unfit aircraft. These and other supervisory activities are probably better understood as inspectors' *modus operandi*. However, the service aspects of inspection are less well understood, in both common parlance and in law. For instance, the inspector approves, advises and performs a range of communicative duties. These duties take up much of the inspectors' time and are justified on the basis that they contribute to aviation safety. The inspector is not a police officer in the sense of that word commonly understood in Canada. Enforcement is only one aspect of the aviation safety inspector's work. This is recognized, for example, in the percentages assigned to benchmark positions established by Treasury Board in its classification standard for the Aircraft Operations Group (see B106, B107).

The present paper exposes the range of parties involved in aviation safety inspection and explains the nature of inspection itself. It was felt necessary to do this to establish a basis for developing options for the participation of public servants and private parties in inspection. When these matters are better understood, government might be able to make more expert reform choices.

C. Objectives for Field Research

Who are the inspectors? What are their powers and responsibilities? What is the actual nature of inspection and what legal regime ought to govern inspectorate practices? These are the basic questions which ought to be addressed before the law in this area can be reformed. However, to address these questions, it is not enough to

26. Transport Canada made use of a Task Force on Aviation Safety to help bring about changes in legislation and in the internal organization of its inspectorates. The Task Force prepared a number of concept papers which it used for purposes of consultations. Several of these papers directly treated legal problems associated with inspection; see, e.g., B50.

examine the legislation and cases. Therefore, research in the field was undertaken for the following reasons:

- (1) to observe the "law in action;"
- (2) to ascertain patterns of enforcement;
- (3) to try to relate the formal legal regime to field level practices;
- (4) to learn more about the limits of inspector activities;
- (5) to discover reasons for regional variations in enforcement and compliance;
- (6) to gather anecdotal information about inspection strengths and weaknesses;
- (7) to explore the effect of the *Canadian Charter of Rights and Freedoms* on inspectorate operations;
- (8) to examine the use of formal procedures to control official exercises of discretion;
- (9) to examine processes used to judge violators;
- (10) to flesh out knowledge about relationships with *administrés*;
- (11) to inquire about the uses of sanctions and threats;
- (12) to inquire about the influences of professional ideologies and values on enforcement outcomes and inspectorate practices;
- (13) to establish a basis for analysis of proactive enforcement strategies; and
- (14) to gather information to support other work of the Administrative Law Project.

While consistent with the themes explored in Working Paper 51, these objectives were limited by certain preconceptions about inspectors and about inspection. It was therefore felt that full accounts of field research were important as transitional points of reference.²⁷ The objectives for research have been constrained by other fundamental unresolved problems. Paramount among these are the issues associated with the legal position of private inspectors, or middle persons, and problems associated with internal ordering, such as delegation of authority and articulation of internal instructions. Without field research, these issues may not have been given sufficient priority and are illustrative of how research objectives can be modified. Findings made pursuant to the stated objectives were steps taken to better understand inspectors and the nature of inspection. In the end, these findings have probably become more important for law reform than the stated objectives for field research.²⁸

27. The author prepared full accounts and subsequent versions which omit identities of individuals and locations. Abbreviated accounts of field research are set out below as "The Actual Nature of Aviation Inspection."

28. Officials from Transport Canada have been fully apprised throughout, including planning, field research and analysis.

II. Inspection: Its Nature and Execution

This part treats two aspects of aviation safety inspection: written standards and the actual nature of aviation safety inspection. The theme of duality of inspection is explored by exposing the inspector's responsibilities for both legal ordering and provision of service, and by demonstrating through field observation that much of government inspection consists in verifying the work of private inspectors.

A. Actual Nature of Aviation Safety Inspection

This part is based on field observations, and works towards an analysis of the nature of inspection. Given the limits on resources for this research, this account cannot be comprehensive. The observations are "slices of life." Routine inspection tasks and impromptu comments are presented as representative.

1. Field Observations

Field study consisted in visits to four regions to observe inspection activities. In three of these, the author attended one surveillance mission each; in one region, a surveillance mission was followed by a second visit on invitation of the Regional AME Association to observe routine inspection activities in the district. The observations set out below were taken from lengthy field notes. Identities of inspectors and regions have been obscured.

Field study was undertaken to obtain an appreciation of the actual nature of inspection, its purposes, strengths and problems. It was felt necessary to inform subsequent research with such perspectives so that real problems could be addressed without undue dominance of lawyers' prescriptions. Still, as law reform research, the field study had to take account of ways in which law might improve government inspection. The field trips also allowed the author to initially address questions about the positions of private inspectors: this was not apparent before research began, and may otherwise have been missed.

The organization of TCAG's several branches is more fully set out later in the present paper, under "Branching". For the present part, it is noted that on each surveillance mission observed by the author, representatives from the Enforcement Branch (namely, "enforcement specialists") were present. As well, each mission included inspectors from other branches such as Airworthiness and Air Carrier. On one mission an inspector from the Canadian Transport Commission (CTC) was present, while another mission included an inspector from Transport Canada's Airports Authority Group.

In this part, field observations are summarized under the following headings: Surveillance and Enforcement, Supervision and Service, and Relations.

(a) *Surveillance and Enforcement*

The author travelled with inspectors on three "Regional Master Surveillance Plan" missions. Despite the scheduled arrangements, the teams did not always include senior representatives from branches of the safety inspectorate other than enforcement. This weakened the potential of surveillance which was already low because of long hours of flying. Poor composition of crew was explained by one enforcement manager as a scheduling difficulty.

On field trips, the author became acquainted with the inspectors' understanding of "surveillance." Inspectors from several TCAG branches fly government airplanes to remote parts of their respective regions to make unannounced inspection visits. The ways in which surveillance is actually conducted, varied from trip to trip.

On at least one field trip, the inspectors actually did very little inspection. This was true even though many aircraft and operators could have been checked out.

Some enforcement specialists (see *infra* p. 63) stated that the purpose of surveillance was "showing the flag." Other crews thought it sufficient to establish a presence, by landing in the area, without checking airplanes or operators. Some believed that surveillance was accomplished by such presence. In some respects, the idea that presence is sufficient for surveillance is valid. In particular, inspection is accomplished within a context of relationships between inspectors and private actors. This will be further discussed below.

At a management meeting in one region, the author was introduced to that region's particular focus and operational statistics, and to peculiarities associated with commuter aviation which partially explain that region's understanding of surveillance. Before the mission in this region, enforcement officers discussed the uncertainties which arise from overweight flying and the defence of necessity in emergency evacuation situations. The enforcement specialists on this particular mission excused themselves from direct surveillance work (checking, asking questions, and so on) on the basis of a belief that their duties are mainly in the nature of public relations: they felt that they should not be "harassing" the private operators. Given that the officers from the Airworthiness and Airports Authority branches on this mission were quite junior, the crew was dominated by two enforcement specialists, who were former Royal Canadian Mounted Police members. At most stops on this mission the enforcement specialists contacted representatives of the local RCMP detachments, and spent most of their working time on the ground with those members, reviewing files and sharing information.

From the field trips it became obvious that there are often clear links between aviation safety problems and other offences in the wilderness, such as poaching, arson and so on. This gives rise to natural links among police and other enforcement and inspectorate personnel. In view of the vast area to be covered, long hours spent flying great distances for inspection purposes, and other material limits on TCAG resources, the assistance of the police is of obvious value.

During a visit to one community, inspectors and other TCAG staff expressed disagreement among themselves about enforcement of regulations. A representative from Ottawa was adamant that rule violators ought to be treated by the book, but at

least one enforcement specialist disagreed and stated that petty contraventions did not merit stern treatment.

The inspectors have, by and large, identified the good and bad actors, and accordingly have adjusted their targets for unannounced inspection visits. The author observed planned surveillance when the inspectors placed themselves in a remote mining town which was home base to a known "bad actor." A full day in that place was rich in examples of means used by inspectors to obtain, through the grapevine, information from competitors and other sources. This visit highlighted the difficulties in obtaining reliable information and in supervising and making decisions in the face of belligerent arguments. The tenacity and resistance of the "bad actor" was partially displayed in discussions about uncertainties which arise from constant regulatory changes. Long discussions and occasional heated exchanges, mainly about documentation and maintenance requirements, provided a flavour of some of the more difficult duties facing inspectors. Taking corrective measures against a known violator is not a simple task. During this visit, nothing more than minor documentation irregularities were detected: these irregularities were insufficient to warrant discontinuance of air service provided by the "bad actor."

An enforcement specialist expressed several opinions about proper conduct of inspection and the lack of sufficient resources to meet regional requirements. As well, he shared details and anecdotes about ways in which he "cleared" cases, and about serious problems encountered by TCAG inspectors when they required legal advice and prosecutorial services from Department of Justice lawyers. In particular, it was claimed that counsel are not available for advice on an ongoing basis and do not give high priority to aviation safety violations.

When confronted with possible violations, such as overweight flying, airworthiness, licensing and enforcement, inspectors must agree quickly about courses of action. Several situations required on-the-spot decisions. These situations exposed the attitudes of inspectors towards suspected offenders. For example, inspectors are reluctant to impose sanctions except when offences were "deliberate", or repeated. Field observations underlined the importance of decisions taken on the spot; a decision to check up on a rumour, issue a notice or look deeply into documentation could prevent an accident. It became clear that experience and good judgement are needed for good inspection.

(b) *Supervision and Service*

Inspectors supervise and give service within their areas of expertise. In some respects these aspects overlap, but they are usually distinguishable. Even though the inspector has authority to take preventive or corrective measures, this is not usually the inspector's approach when encountering an inspected party. The inspector's mere presence is supervisory in nature, but the actual activities of the inspector are service oriented. For example, the inspector educates, gives advice, grants permission, and keeps records. As a second check on the work of private parties, the inspector provides a valuable service among the community of interests in aviation safety.

The tension between supervision and service is basic to the inspection conundrum. Some government managers do not recognize the dual responsibilities. For example,

one airport manager felt his staff should provide service but not supervision, claiming that members of his staff were not "stool pigeons," or police, and were not required to participate in the overall departmental surveillance effort.

Enforcement specialists mainly react to, or follow up on reports, while inspectors from other branches, on the basis of constant observation and interaction with private parties, try to make things work. There are exceptions. For example, the author attended an evening lecture entitled "Fair but Firm," given by enforcement officers. The lecture was condensed from the TCAG official position on enforcement. The author wondered whether enforcement staff should be performing this function. Later, the crew's remarks about the uninterested audience reinforced the author's opinion.

One field trip provided more examples of the differences in the approaches taken by the enforcement specialists and the inspectors in other branches. The enforcement specialists were very candid about their opinions. For example, some felt that the field/office time ratio was disproportionate (namely one week and three weeks respectively). As well, they were of the view that the enforcement and inspection functions were incompatible. They purported to hold this view even though they see surveillance as "public relations." They viewed their most important functions while on surveillance to be the establishment of presence, together with follow-up on ongoing investigations. As well, they said that the maintenance of relations with RCMP members is critical to the effectiveness of the overall inspection effort. Finally, they had serious complaints about lack of resources, both in personnel and aircraft, for satisfactory enforcement.

During another field trip, steps normally taken by the airworthiness inspector in the field set the pace for the surveillance crew. The inspector checked aircraft logs and issued notices of aircraft condition and inspection. An image of the "good inspector" was conjured by the actions of the airworthiness inspector who performed thorough routine checks of aircraft and documentation at every opportunity.

The author observed an inspector examining an overhauled helicopter engine destined for export, and listened to discussions with maintenance managers about resolving problems associated with a defective engine component. This kind of work provided further examples of the inspectors' *modus operandi* which is making sure that documentation is in order and working with private parties in a common search for solutions. This example of congenial help and advice illustrates the service aspect of inspection.

Inspectors' opinions about their responsibilities varied from pure enforcement or supervision to pure service. Some saw their responsibilities as including both. There may be many correct positions for officers within several branches. The correct positions might be discerned from an examination of law and TCAG's internal instructions. This is addressed below.

In view of the stated positions of enforcement specialists and airport personnel about incompatibility of enforcement and service functions, the author was provoked to try to develop a theory of inspection and to think about what kinds of functions can be effectively combined to be performed by government's inspectors.

(c) *Relations*

The author accompanied airworthiness inspectors during routine inspections of aircraft and conversations with air crew. One inspector constantly stressed the importance of relations with airline staff, and underlined the fact that airworthiness inspectors are mainly interested in getting things corrected. This is accomplished by maintaining a strong network of contacts in the industry, checking with manuals, and generally using every available source of information. The airworthiness inspector performed gracefully while dealing with a tough customer, and noted that many problems followed from the use of incomplete reports. Additionally, the airworthiness inspector expressed his difference of opinion respecting enforcement: specifically, he did not think it was always appropriate to follow up with enforcement measures when, for example, "snags" were reported by AMEs. He outlined their responsibilities, and noted the importance of interpersonal relations and shared backgrounds.

Airworthiness inspectors noted that enforcement styles have changed in recent years and that the approach taken by TCAG inspectors is now less direct. Still, private operators avoid inspectors. In some instances, inspectors must play a "cat and mouse game." For example, inspectors visited an operator which had had constant problems with maintenance, including staff continuity, and control and management of the maintenance function. The airworthiness inspectors expressed the view that during rough economic times maintenance is the first item to be cut back.

The airworthiness inspectors indicated that relations with the AMEs were very important because information about maintenance problems was typically passed on in confidence to the airworthiness inspector. As well, remote sources of problems were discussed. For example, manufacturers have sometimes abused their prerogative to impose service requirements.

The author witnessed inspection of a municipally managed airport. In this connection, the inspector displayed a degree of courtesy which was conducive to constructive ongoing relations with the airport manager.

The author attended a monthly meeting of a regional AMEs Association, where a range of opinions were expressed about inspection, Transport Canada, and so on. For example, the AMEs felt they should have authority to extend time before overhaul. Generally speaking, some AMEs felt they were better qualified than the government inspectors who looked over their shoulders. The AMEs said that government inspection practices were uneven and often less than frank; this supported their view that there was poor communication between the AMEs and government inspectors. Also expressed were the growing fears among AMEs about liability and about correct ethical practices.²⁹ These views provided insights into the relationships between the private inspector or middle person (the AME), and the airworthiness inspector from TCAG, and their respective responsibilities. In fact, when viewed as a private inspector, the position of the AME gives rise to a range of legal issues which changes the otherwise simple paradigm of government inspectors and private parties.

In summary, field work was undertaken to give shape to a study of inspectors and inspection and this approach provided opportunities to reflect on the actual nature of

29. See *infra*, note 48, and accompanying text.

them both. In particular, inspectors are at once private and public actors: their powers, duties and responsibilities must therefore be viewed in terms of their specific assignments. Similarly, inspection includes many functions which are not well understood: services, such as certification, education and passing information, may actually predominate, even though supervision and enforcement may seem to many to be the most important aspects of inspection. It was the author's observation that, at its best, inspection is aimed at providing a second check on safety, the primary responsibility for which remains in the private sector.

Inspection is actually performed by a variety of experts. Government's inspectors are recruited from many fields of expertise, including engineering, maintenance, flight crew, police, military, and so on. Many private sector actors from these several fields are also delegated governmental authority to do "inspection" tasks for government. This became obvious to the author during the field study, and led later to an examination of Transport Canada's systems of delegation and internal instructions and other controls of its inspection function. Management of several disciplines within one regulated sector poses considerable logistic problems for both public administration and law.

Furthermore, field study provided a basis for reflection about inspectors' authority to make decisions affecting private rights: What is the specific nature of delegated authority? This aspect and the specific instructions provided by Transport Canada for decision making seemed relevant to the present inquiry. This is approached below within an understanding about the nature of inspection and the identities of inspectors, which were initially observed during field study.

2. The Duality of Inspection

Numbers of detections, investigations and dispositions³⁰ are convenient devices available to management for determining productivity and other aspects of inspectors' work. Unfortunately, these indicia may be misleading as to the real outputs of an inspectorate. Such data captures some aspects of inspectors' contributions to enforcement, but the numbers omit information about the services rendered by inspectors.

It is estimated that few violations of aviation safety law are actually detected. Roughly one third of the violations are detected by TCAG inspectors (see B61). If the investigation of such violations were controlled by the RCMP, TCAG could be reduced to a supporting role. However, this ignores the fact that most of the TCAG inspectors in the field do little investigative work. Without the detail of daily communications among government inspectors and private parties, the Canadian public would be left to rely on the good intentions of the private sector and on police to find fault after harm has occurred. Clearly the services of inspectors, such as advising and educating,

30. See, e.g., B61. The Department produces numeric approximations of real inspection outputs; for example in a review of the frequency of regulatory inspections conducted in July 1984 the Department identified 224 types of "audits", "inspections", and "surveillance." On the basis of an aggregation of these types factored by the numbers of inspectees and assigned frequencies of inspections (from random and semi-monthly to triennial) the Department established a quantitative basis for inspection resources.

permission granting, warning and record keeping, frame inspection as more than enforcement. The inspector is a front-line representative of government and must keep in mind his or her responsibilities for both supervision and service.

On the face of the formal written regime it would appear that inspectors' work should consist in detection of non-compliance and imposing sanctions. Even though sanctions are available and occasionally imposed, persuasion prevails. This is not to be viewed as perversion of good intentions; on the contrary, it is to be recognized that in the real world of aviation, achieving safety is a pre-eminent concern for inspectors and inspected. It is therefore no surprise that inspectors' work is directed to that end, through communications which usually fall short of imposing sanctions. Even so, inspectors may insist that they do enforcement exclusively and are not responsible for giving service or maintaining relations with private parties. Other personnel claim they have no responsibility for enforcement. In truth, the inspector's role is a hybrid one, part supervisory and part service, depending on the orientation of the branch to which the inspector is attached. From the point of view of Transport Canada, a correct orientation can be discerned on the basis of the formal framework of law and internal ordering. These sources are explored below.

Duality of inspection is of a different order in the case of private inspectors: at the same time they must serve government by reporting the results of supervising the affairs of other private actors. As private parties performing public functions, the private inspectors are caught between two loyalties. This duality and potential for conflicts should be taken into account in an assessment of inspection law and practice.

B. The Formal Framework: Written Standards

1. International Agreements

There are a variety of international agreements which indirectly affect aviation safety in matters such as liability for damage. However, one agreement and its annexes form the central instrument guiding aviation safety inspection.

By virtue of an agreement reached by fifty-two countries meeting in Chicago in 1944, the International Civil Aviation Organization (ICAO) was created to take responsibility for development of law to ensure the orderly development of civil aviation.³¹ It is noted that the ICAO has enabled standardization in the industry through agreements. This has been accomplished through annexes which are adopted and revised from time to time by more than 150 country members.

The annexes, known as International Standards and Recommended Practices (SARP), are very detailed: no attempt is made here to summarize. By way of examples pertinent to the focus of the present study on airworthiness inspection by private and government inspection, two of the annexes are mentioned below.

The SARP contained in Annex 1, Personnel Licensing, pertains to licensing of flight crews, air traffic controllers and maintenance technicians. The latter group

31. A consolidated version of the *Convention on International Civil Aviation* is reproduced in B60, p. 508ff.

includes the AMEs. Some appreciation of the complexity and ongoing changes in this area can be taken from the fact that the annex is now in its seventh edition. The annex recognizes the importance of training for licensing. ICAO training manuals provide models which further encourage standardization of practices by member states.

In Annex 8, the ICAO establishes a basis for exchange of aircraft and for facilitating international air transportation. This is outlined in definitions, in technical requirements for certification and administrative procedures for issuance of certificates of airworthiness. The broad standards contained in the annex are supplemented by an Airworthiness Technical Manual; in turn, these provide a basis for national airworthiness standards of member states. In recognition of ongoing technical changes and innovations, the ICAO is advised by a Standing Airworthiness Committee which is representative of industry interests.

Standard setting will continue as a critical, ongoing concern of the ICAO. However, the ICAO itself now recognizes that:

With all the essential technical rules and procedures now in place, ICAO's major task is to improve their implementation through guidance material and training seminars, particularly in the areas of operations and maintenance certification and inspection, airworthiness, all weather operations, accident prevention and the safe transport of dangerous goods (B111, p. 4).

The ICAO does not involve itself in the details of national operations. However, it does provide experts, seminars, manuals and other guidance to help countries establish internal controls and supervision. Given the problems among many countries in the political sphere, the job for the ICAO is daunting.

2. Domestic Legislation

Part I of the *Aeronautics Act* applies to all persons engaged in aeronautics and to aeronautical products and things in Canada and to persons outside Canada who hold Canadian aviation documents and all Canadian aircraft outside Canada (subs. 3(1)). To that end the Minister of Transport is made "responsible for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics ..." (s. 3.2). These powers are conferred pursuant to the jurisdiction of Parliament as confirmed by the Supreme Court of Canada in the *Reference re Regulations and Control of Aeronautics in Canada* (D188).

The Minister's responsibilities are wide-ranging and include promotion, ownership, dissemination of information research, control of equipment, establishment of aerial routes, collaboration with other officers of Her Majesty, to take measures to secure international rights of Canada in air traffic, to provide financial aid, to provide weather services, to investigate matters concerning aviation safety, and so on. Clearly, these responsibilities give a wide meaning to "supervision". It is suggested that much of this

supervision is in fact *service*.³² The Minister delegates many of these responsibilities to positions occupied by the aviation safety inspectors.

In 1985, amendments to the *Aeronautics Act* were passed which placed powers and controls of aviation safety inspection on a better legal footing. Still outstanding is the massive job of consolidating the subordinate legislation, the *Air Regulations* and Air Navigation orders, into a new series of air regulations.

Several changes in the *Act* were made to take account of recommendations made by the Royal Commission of Inquiry into Aviation Safety. Specifically, section 3.3 explicitly empowers the Minister of Transport to delegate authority:

3.3 (1) The Minister may authorize members of the Royal Canadian Mounted Police or any other person to exercise or perform, subject to such restrictions or limitations as the Minister may specify, any of the powers, duties or functions of the Minister under this Part except, subject to subsection (3), any power conferred on the Minister by the Governor in Council to make regulations or orders.

This section, which treats delegation generally, enabled Transport Canada to reorganize enforcement along lines recommended by the Royal Commission (see B15, recs. 65, 76, 80 and 102). Furthermore, the *Act* gives additional authority to make regulations respecting private delegates, whether by licensing or by "accreditation".³³

The *Act* makes powers available to the Minister for delegation to inspectors. These powers may be classed as interference with property, imposition of penalties and licensing. Taking "interference with property" first, the Minister is empowered by subsection 7.6(1) to enter aircraft and premises for purposes of inspection, for investigation of matters concerning aviation safety, to seize evidence and detain aircraft; subsection (2) imports the search warrant provisions of the *Criminal Code* (ss. 443 to 447) for circumstances where, for example, entry cannot be obtained by consent, and for occasions where offences have been committed or are suspected to have been committed. Before amendment to the *Act*, these powers were contained in *Air Regulations* (ss. 219, 310, 706, 807 and 813). Furthermore, subsections 7.6(4) and (5) provide authority to a Justice of the Peace to issue a warrant to search a dwelling house. Additionally, special provisions apply to aeronautics security (s. 3.7-3.8): these measures are not canvassed here.

Inspectors have important parts to play in processes used for imposition of penalties. These are of three types: hybrid offences (subs. 6.3(1), (2)); summary conviction

32. In fact, the 1985 amendments to the *Aeronautics Act* specify several kinds of services (paras. 3.2(b)), (c), (e), (g), (m)) which may be discharged by the Minister pursuant to his responsibility for the "development and regulation of aeronautics and the supervision of all matters connected with aeronautics ..."

33. S. 3.9 The Governor in Council may make regulations respecting aeronautics and, without restricting the generality of the foregoing, may make regulations respecting

(a) the accreditation or licensing of

(i) flight crew members, air traffic controllers, operators of equipment used to provide services relating to aeronautics and other persons providing services relating to aeronautics, and

(ii) persons engaged in the design, manufacture, distribution, maintenance, approval, certification or installation of aeronautical products and the installation, maintenance, approval and certification of equipment used to provide services relating to aeronautics.

offences (subs. 6.3(3), (4), (5)); and, monetary or "administratively imposed" penalties (subs. 6.6(1)). While none of these processes are completed by inspectors at the field level, they all depend on information provided by government inspectors, RCMP and private delegates. In such matters, inspectors frequently serve as witnesses and must demonstrate that correct steps were taken to obtain evidence of offences, sufficient to satisfy the courts, CAT or the inspector's superior officer, as the case may be.

It is in licensing where the inspectors have significant powers over aeronautical matters. Strictly speaking, the *Act* uses the phrase "Canadian aviation document;" this term includes:

any licence, permit, accreditation, certificate or other document issued by the Minister under Part I to or with respect to any person or in respect of any aeronautical product, aerodrome, facility or service; (subs. 2(1)).

This provision is modified by s. 5.6 which provides that: "In sections 5.7 to 6.2, 'Canadian aviation document' includes any privilege accorded by a Canadian aviation document. In those sections (ss. 5.7 to 6.2) the *Act* sets out grounds for suspensions, such as immediate threat to aviation safety (subs. 6(1), (2)) and for incompetence or medical reasons (s. 6.1). Decisions about suspension are in fact taken by inspectors and other delegates of the Minister, and are reviewable by CAT (ss. 6.1, 6.2).

The details of aviation safety regulatory requirements are specified in subordinate legislation governing personnel licensing or accreditation, aeronautical products, air navigation equipment or facilities, flight training equipment, aerodromes, noise, certification of air carrier, conditions of transport, enforcement of laws, keeping and preservation of records, and so on (s. 3.9).

Subordinate legislation for regulation of aviation safety is being consolidated to give better order to the regulations. Thus far, new versions of regulations have been issued to cover: notices of suspension, cancellation or refusal to renew (Series 1, No. 2); *Designated Provisions Regulations* (namely, the contravention of which may merit imposition of monetary penalty) (Series 1, No. 3); and the *Aerodrome Security Regulations* (Series VIII, No. 2).

3. Canadian Standards for Fair Inspection

The *Canadian Charter of Rights and Freedoms* (C29) provides constitutional guarantees for "fundamental justice" (s. 7), including "the right to be secure against unreasonable search and seizure" (s. 8). In fact, evidence will be excluded if it is established that it has been obtained in circumstances the admission of which "would bring the administration of justice into disrepute" (s. 24).

While these overriding legal standards, confirmed by the *Charter*, provide authoritative guidance for inspection and other activities of government, the *Charter* is not a principal focus for the present paper.

In ordinary circumstances the aviation safety inspector has no difficulty gaining entry to aircraft or premises or to gain access to records. Such intrusions are generally accepted as part of doing business: governmental permission is conditional on openness to inspection. The real difficulties arise when inspectors must take part in

investigations.³⁴ For these purposes TCAG has developed training programs and internal instructions which attempt to preserve public safety while respecting rights of private parties.

4. Internal Instructions: Detailed Guidance from Transport Canada

TCAG has produced a variety of materials which communicate Transport Canada's internal instructions.³⁵ The legal status of these materials is not clear. What is clear is that these materials contain the detail, not readily available from legal sources, about how and when legal powers are exercised by inspectors.

Most internal instructions are produced at the centre by TCAG headquarters. However, not to be forgotten are the materials developed by regional offices and by individual inspectors. Below, some examples from these materials are exposed to convey a sense of subject matters covered, at the various levels, within the general class of "operational instructions."

First issued in 1982, the *Enforcement Manual* (B55) was in its second edition in June 1986. Although initially restricted to departmental personnel, it is now available to the general public. The new edition reflects changes made by amendments to the *Aeronautics Act*, and is an ongoing articulation of operational policy. The document serves to inform inspectors in all branches of TCAG about administration and enforcement operations. It is significant that in the forewords to both editions, ministers of Transport have assured inspectors that if their enforcement decisions and actions are consistent, objective and equitable, they will receive the Minister's full support; as well, the ministers have emphasized that inspectors' actions "must reflect a paramount concern for air safety at all times."³⁶ Given this direct indication of support, inspectors should be expected to perform their tasks to meet the expressed ideal. Again, the purpose of TCAG is expressed in a manual whereas legislation is silent about purpose.

There are several features about the *Enforcement Manual* which merit some discussion for purposes of the present paper. In particular, the manual outlines inspector activities in the Enforcement program, Transport Canada's meaning of "deterrent action" and a table of sanctions.

In a nutshell, the enforcement program of TCAG involves *activities* which the manual classes as "prevention," "detection," "investigation" and "deterrent action." A flow chart from the manual, reproduced here as Table II, illustrates the interrelationships of these activities. This part of the manual gives a definition of inspection and guidelines for inspection which are consistent with TCAG's express policy of "fair-but-firm" enforcement. Also of interest to students of appropriate

34. In Canada there is a growing body of case-law and literature on the matters of administrative search and seizure; many items are listed under those topical headings in Part Three, "Selected References."

35. See B55. In D103, the Manitoba Provincial Court found that the Minister's authority to cause to be published manuals containing airworthiness standards was properly delegated to an official pursuant to air regulations.

36. See B55, p. v. The wordings of ministerial endorsements are substantially the same for both first and second editions of the *Enforcement Manual*.

criteria for exercise of enforcement discretion, are the elaborations of priority levels and criteria for deciding what cases to investigate: these are classed as "emergency," "urgent," "normal" and "low". Good administration requires that criteria be developed for making choices; however, it is not always easy to decide about relative seriousness of detected offences.

In addition to the duties normally associated with enforcement, the manual also presents activities which it classifies as "Prevention": these are "intended to avoid violations and promote voluntary compliance." Strictly speaking the activities, grouped under "Prevention — Education," fairly describe the kinds of service provided by the Enforcement Branch: training, examination, seminars, educational presentations and counselling.

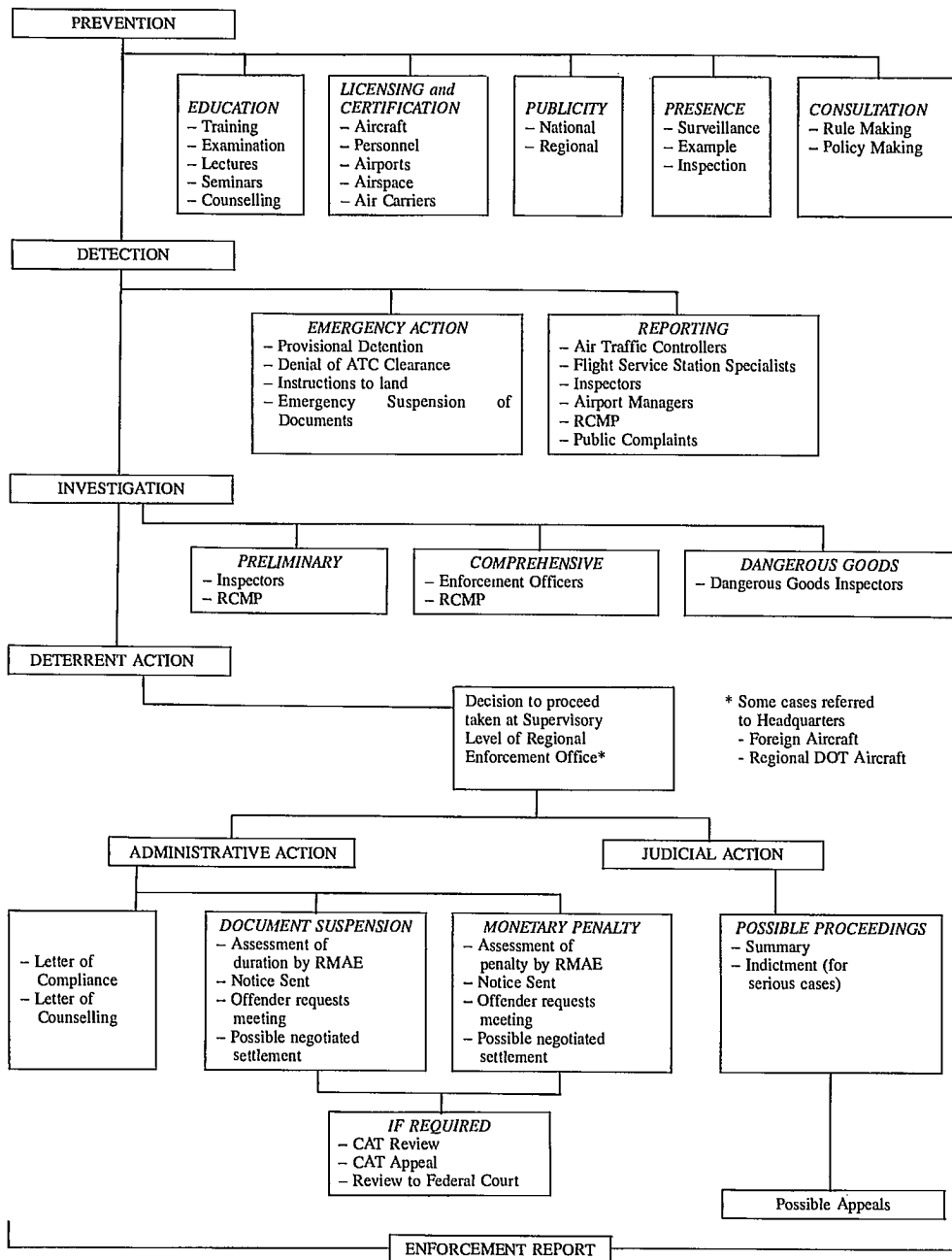
Within the manual description of Enforcement Operations, "Deterrent Action" is a rubric which comprises the full range of coercive procedures which the inspectors bring to bear when they detect non-compliance. Here the inspectors are counseled on the legal pitfalls associated with the requirements for fair treatment: the stated objective of this part of the manual is to promote uniformity in deterrent action. Inspectors are instructed to take "administrative action" in most cases. It is noted that suspension of aviation documents and administrative monetary penalties are at present the only classes of administrative action and that since late 1986, "letters of warning" are no longer included by the branch within "administrative actions." This change is significant because an otherwise innocuous letter carried consequences of record: in particular, detections of repeated offences could give rise to imposition of more serious penalties (or "sanctions") if TCAG strictly followed its table of sanctions. When this change was announced at TCAG's annual enforcement seminar,³⁷ an industry representative indicated that the manner used for communicating a warning was important, because carelessness could give rise to wrong impressions. Imperiousness might convey the serious nature of the warning but could unduly threaten as well. A "letter" is probably too informal and difficult to control to merit a place within a hierarchy of sanctions.

The *Enforcement Manual* outlines a "table of sanctions" which is prefaced by a list of general factors affecting the choice of sanctions. In summary, the factors include: facts, gravity, deliberateness and attitude, personal characteristics, offender's record, available punishment, public safety, deterrence, and rehabilitation. Several of these factors merit exploration as to their suitability for making decisions about imposing penalties. For instance from a legal point of view, what place should premeditation, deliberateness or offender attitude have on selection of sanction whether in the procedural stream for court or agency disposition, either for "judicial action," or "administrative action"? Such questions are not pursued here. Obviously, the inspectors are in need of guidance on these matters, but any attempt to structure bureaucrats' decision making about imposing penalties poses legal difficulties.

Except for emergency circumstances which require immediate decisions about suspension of documents, the field-level inspector is not responsible for deciding what routes to follow and what penalties to impose. The *Enforcement Manual* contains a table of sanctions which prescribes recommended sanctions for first, second and

37. These seminars are attended by representatives of the aviation industry and personnel associations, senior departmental officials and regional enforcement managers. The author was present at seminars convened in 1985 and 1986.

Table II: The Aviation Group Enforcement Program (B55, p. 3-12)



subsequent offences, in case of contraventions of designated provisions (namely, where penalties may be imposed administratively), for summary conviction offences and for offences which merit suspension of an air carrier's operating certificate.

Decisions about what inspectors do are within the purview of headquarters; however, timing of activities is within the discretion of the six regional administrations. To that end, the regions have begun the practice of developing Regional Master Surveillance Plans.³⁸ In these materials, which are developed annually, the regional offices articulate the surveillance emphases to direct the deployment of inspectors during the year. These plans have been made available to Headquarters, RCMP and the CTC as well as site officials within the region. Activities of each branch are described in terms of overall functional responsibilities, including principal and secondary areas of surveillance. By communicating these plans to headquarters and other institutions, the regions are open to comment about any diversion from national policy. As such, they are excellent means for ensuring relatively uniform deployment of inspectors. While actual regional peculiarities may get lost in formal plans, articulation of plans tends to support the goal of national uniformity.

Finally, inspectors establish their day-to-day priorities on the basis of sources of information, interpersonal dynamics, local circumstances, available time and resources, as well as the formal plans of regional managers, internal instructions from headquarters, and the legal regime. Getting the job done is aided by informal guides for performance of critical tasks: such measures are to be expected in the face of difficult work and great expectations.

5. Limits Imposed by Collective Agreement

The agreement (see B104), governing labour relations between the federal government and aviation safety inspectors, recognizes the nature of actual inspection tasks and confirms certain limits on those tasks. In fact, the agreement confirms substantial material limits on inspectors' time to do actual inspection. In particular, the agreement provides that inspectors be allowed to maintain flying skills and imposes limits on inspection work on the basis of hours flown in a working day. These provisions have obvious effects on the inspector's capacity to do actual inspection work.

III. Inspectors: Types and Organization

Government employees and private parties do the work of aviation safety inspection. An outline of the responsibilities of these parties is given to support a thesis about the duality of inspection. This duality is also apparent in the divided loyalties of private inspectors and in the fact that inspectors are also inspected.

38. The contents of these plans were somewhat uneven. This must be the case if the plans are to reflect actual operations within the regions.

A. The Organization of Inspectors Within Transport Canada

1. Branching

With the growing complexity, diversity, and size of the aviation industry, government has created branches of inspectors dedicated to special aspects of aviation. While branching improves the department's ability to respond to specific needs, it increases the difficulties in maintaining overall coherence of aviation safety inspection.

(a) *TCAG's Regulation Directorate*

Transport Canada is responsible for administration of legislation governing the safe and efficient operation of the national air transportation system, under Part I of the *Aeronautics Act*. The department provides regulatory, airport and air navigation services and advises the Minister of Transport on related matters. This is accomplished with staff of over 13,000 employees and an annual budget exceeding \$1.1 billion (see B51, p. 4).

When the author was doing field research in 1985 the department's responsibilities for aviation were still centralized in a single administration (CATA — Canadian Air Transportation Administration) and the Regulation Directorate was responsible for eight programs, six of which made use of inspectorates. Late in 1986, the department divided its administration of Aviation into two groups: TCAG and the Airports Authority Group. Six regional administrations continue to exist for TCAG, as they did with CATA: Atlantic, Quebec, Ontario, Central, Western and Pacific. The description of branches, below, reflects the organization of aviation inspection before the 1986 reorganization.

(i) *Airworthiness*

This program has many responsibilities for supervising the work of maintenance personnel and for development and operation of aviation equipment. It is responsible for standards and procedures for approval of civil aircraft, engines, and other aeronautical products designed and manufactured in Canada or imported into Canada. Additionally, the program's clearance functions extend to the issuances of certificates of airworthiness, flight permits, other flight authorities and export airworthiness certificates. Airworthiness is responsible in matters of procedures for approval and licensing of persons engaged in manufacturing, distributing and maintaining aeronautical products. The program supervises private personnel to the extent that it accredits persons who exercise design approval or export airworthiness certification on behalf of the Minister of Transport and accredits aircraft maintenance training programs. Airworthiness personnel perform service difficulty reporting investigations and issue airworthiness directives and other airworthiness information. Finally, the program develops and implements airworthiness agreements with foreign airworthiness authorities for the acceptance of aeronautical products and type designs.

In 1983-84, Transport Canada employed 196 airworthiness professionals in its inspection function. This complement has been examined against inspection needs and may be increased, within internal resources of the department.

(ii) Aviation Enforcement

This branch was created pursuant to recommendations of the Royal Commission of Inquiry Into Aviation Safety. The author accompanied enforcement specialists on surveillance missions in four regions. In 1983-84, a total of less than sixty staff, including support, were engaged in enforcement, legislation development, consultation and review. Plans for phasing in staff increases reflect a growing preoccupation with the enforcement function within TCAG.

The objective of this program is to deter violations of civil aviation legislation. This is achieved through prevention and surveillance of aeronautical activities and by enforcement.

"Prevention" consists of seminars given to aviation groups, publicity, surveillance and inspection of airports and aerodromes. "Enforcement" includes detection, reporting and investigation of aviation violations and the initiation of either administrative sanctions or judicial penalties against responsible parties. In support of this process, the Aviation Enforcement Program also devotes a portion of its resources to such activities as training and policy development.

(iii) Legislation Development, Consultation and Review

In this program technical standards and requirements are developed. These form the basis of civil aviation legislation. The program is also responsible for translating technical standards into legislative form, consultation and continuing review. The old subordinate legislation, including *Air Regulations* and Air Navigation orders, is being gradually replaced by a new series of regulations.

Part of the consultation process includes meetings with industry associations, arranged by the Enforcement Branch. This provides opportunities for early warning about planned initiatives, questions about practices and other multilateral inquiries.

Departmental experts develop technical standards and requirements in several areas. These include: aircraft registration, aircraft airworthiness, aerodromes, personnel licensing, rules of the air, air traffic control and commercial air service operations.

In the earlier stages of standards development, informal consultations are usually arranged among the aviation community likely to be affected. Later, formal consultations are conducted before the proposal is given the force of law. After enactment the standards and requirements are reviewed to ensure that they continue to meet the needs of the national civil air transportation system.

(iv) *Civil Aviation Security*³⁹

This program ensures that the appropriate level of aviation security is provided for persons using Canadian air carriers, Canadian airports, foreign air carriers operating in Canada and foreign airports being used by carriers coming into Canada. Its goal is to ensure that the Canadian security system meets international requirements and obligations.

(v) *Aviation Licensing*

The licensing program processes licences and issues them to several types of pilots, flight navigators and airports. As well, it issues licences to AMEs and air traffic controllers, registers aircraft, maintains the Civil Aircraft Register, prepares and administers flight personnel examinations, prepares and communicates aviation education material, flight tests private and commercial pilots and Designated Flight Test Examiners (DFTEs), flight tests pilots for multi-engine endorsements, conducts pilot proficiency checks and approves portions of operations manuals.⁴⁰

(vi) *Aviation Certification*

The aviation certification program issues operating certificates, operations specifications and checks pilot authorities. These are provided to operators who operate commercial air services. Additionally, the program conducts surveillance of commercial air service operations through audits, inspections, pilot proficiency checks, enroute checks including passenger safety, dangerous goods, and so on. Finally, the program verifies and approves company operations manuals.

(vii) *Aviation Safety Promotion, Research and Analysis*⁴¹

This program promotes aviation safety by developing information and educational programs for the aviation community. By providing information about aircraft operations, the program seeks to increase awareness of aviation safety considerations. It is felt that some aircraft accidents can be prevented through the production and dissemination of safety information. This is achieved with publications, audio-visual presentations, posters and displays, and through briefings and presentations to aviation organizations.

Research on aviation safety is accomplished by this program through contracts and external agencies. The program also co-ordinates research and development activities throughout the Aviation Regulation Directorate, and manages a system which distributes formal aviation safety recommendations from the Canadian Aviation Safety Board

39. Security is no longer within the TCAG administration; it has been transferred to the Airports Authority Group.

40. This is required by *Air Navigation Order*, Series I, No. 2.

41. These functions are no longer within the Aviation Regulation Organization at headquarters.

(CASB) and from Transport Canada and other sources. This is done for the purpose of planning action within TCAG and preparing formal technical replies on behalf of the Minister of Transport.

Among the program's sources of information are its own analyses of accidents and incident investigation reports. These are used for identifying deficiencies in the aviation safety systems over which Transport Canada exercises control and for the purpose of advising senior management on problem areas within the aviation system.

These endeavours support the ongoing development of strategic and operational policies within TCAG, all of which are aimed at improving accident prevention.

(b) *Merits of Branching*

Given the range of matters which are regulated by aviation law, it stands to reason that TCAG has created several specialty inspectorate branches. Co-ordination within the particular branch may be easier if the unit is small. Some argue that specialized inspectorates are unnecessary, and lead to multiple inspection visits, when a single inspection would suffice. In view of the high degree of specialized knowledge which is necessary to prepare an inspector for examining work of private specialists, it seems impossible that single individuals could serve as inspectors for all aeronautics legislation. TCAG's branches have sprung up over time, one at a time. Given the compelling arguments for the use of branches, and their associated sub-inspectorates, there nonetheless remain very serious ongoing problems associated with the maintenance of internal cohesion, possibilities of duplication of inspection visits, and difficulties in assigning staff.

Internal cohesion among departmental personnel is necessary for the improvement of implementation. Each branch has its own emphasis, but the demands of case-load work against the kinds of communications which are necessary for cohesion. TCAG has addressed the need for internal cohesion in many ways. The creation of an Enforcement Branch is, in itself, a significant means for improving communications. Enforcement cuts across all areas of aviation law. Offences could arise out of operations and conduct by all personnel involved in civil aviation. So, the various branches which are responsible for the supervision of aviation must take enforcement into account. The Enforcement Branch has authority to do enforcement investigation in all areas of aviation regulation; the horizontal nature of this function has drawn the Enforcement Branch into communications across all branches. Similarly, the persuasion, promotion and education functions are common to all branches, but these activities have been focussed recently in the Aviation Safety Branch. The programs of this branch, such as the Service Deficiency Alert System,⁴² bring concerns, and hence communication, across the various branches. This is important for internal cohesion within the administration, not to mention the importance of effective communication with affected parties.

42. This program enlists all sectors of the aviation community to contribute information, about possible hazards, for rapid dissemination.

2. Delegation of Powers by the Minister

Strictly speaking, authority to delegate should be expressed in legislation. This is recognized in the new provisions of the *Aeronautics Act* (s. 3.3, discussed below). The government's practice of delegating powers to inspectors and other administrators is generally countenanced in view of the obvious impossibility for the Minister to attend to every detail. Such delegations are legally valid, provided that the administration is able to demonstrate satisfactory control over the activities performed by delegates. Some of these internal controls of delegation are discussed below, in the context of the specific powers delegated to inspectors in the Airworthiness and Enforcement branches.

(a) *Prior to Delegation: Recruitment and Certification*

Obtaining and maintaining a competent corps of inspectors is a perennial concern at TCAG. Recruitment entails examinations of candidates' backgrounds; further training is usually required to complement a candidate's technical and enforcement skills and to ensure ongoing competence. Given that inspectors must make decisions affecting rights of private parties, to what extent should competence be formalized through certification? Should government or professional associations certify and otherwise supervise inspectors as to their competence? These issues have preoccupied TCAG because rapid deployment of qualified staff is fundamental for effective inspection, and for policy implementation.

What background and training are actually required by TCAG for the performance of inspection functions within the various TCAG branches? In the past, many aviation safety inspectors have been recruited from the ranks of retiring National Defence personnel. With the creation of the Enforcement Branch, many police officers with flying experience have been hired as enforcement specialists. While such background ensures competence for some inspection work, private sector orientations are not always well understood by police and military airmen. In the Airworthiness and Air Carrier branches, the need for technical competence is obvious where inspectors must face their counterparts in the private sector. Experience and knowledge about aircraft and components are needed to support field duties. This was made apparent to the author when he observed airworthiness inspectors supervising the work and training of AMEs.

Training of inspectors in enforcement procedures has become a growing preoccupation for TCAG. The particular requirements of aviation enforcement practices are communicated in special courses, for specialists and for members of other branches. TCAG is in the process of developing substantial courses for the specialist concerns of the other branches. While there exists no requirement for certification of government's inspectors, enforcement managers do not authorize new inspectors to exercise delegated enforcement powers until they are satisfied about individual competence, after training has been completed and a probationary period has been served.

(b) *Scope and Structure of Delegated Powers*

Each aviation safety inspector fits within a branch hierarchy. The hierarchies are established by ministerial authorization, which assigns specific powers to persons employed in scheduled positions.

The most incisive way to understand inspectors may be in examining their powers. What are they lawfully empowered to do? While such inquiry alone cannot reveal what they actually do, it helps frame the analysis.

Aviation safety inspectors are decision makers. At least they have authority to make decisions. In fact, the range of decision making powers delegated to these inspectors is comprehensive.

The *Aeronautics Act* is explicit about the authority of the Minister of Transport to delegate to others his powers, duties and functions under the *Act*.⁴³ This authority was not explicit in the statute before amendments were made in 1985. Nonetheless, Transport Canada's practice of delegation preceded the amendments. By making explicit in legislation the Minister's authority to delegate, potential challenges against the authority of delegates may have been thereby pre-empted.

The document which contains the details of delegated powers is important for several reasons. First, it recites the purposes for which powers are to be exercised, namely, "flight safety and the protection of persons or property ..." (B59, p. 1) This reflects a wide meaning of police power of the State. In this sense, the authorization document is highly instructive for the aviation safety inspectorate, especially since such purposes are not set out in the *Act*.

Second, the document establishes the hierarchies within the various branches of the inspectorate. This facilitates management, to the extent that inspectors are empowered to make decisions within clearly established limits. However, hierarchies by their nature limit the actual powers of inspectors to make decisions.

Third, the authorization is a positive link between the Minister and inspectors exercising the "powers, duties or functions" described in the schedules. Given the importance in Canada of ministerial responsibility for administrative action, this link is a significant means for making tangible an otherwise obscure doctrine.

In the delegation document which was in force prior to the 1985 *Aeronautics Act* amendments, the Minister of Transport addressed the air administrator in the following style:

Pursuant to section 838 of the Air Regulations, I hereby authorize the persons employed in the positions set out in Schedules 1 to 48 attached hereto, the right to exercise the powers, duties or functions described in the Schedules, as amended from time to time subject always to any conditions deemed necessary for flight safety and the protection of persons or property on the ground or water and to any other limitations imposed by their superior officers consistent with their responsibilities, knowledge, training and experience (B59, p. 1).

43. S. 3.3. This is discussed above under "Domestic Legislation," p. 20.

This paragraph is followed by forty-eight schedules in which specific powers, duties or functions are fully set out. In this way, groups of powers are assigned to persons employed in specific positions. In fact, the authorization document is lengthy and detailed, but it is important to give some indication of the nature of powers conferred. These are mainly in connection with permissions or entitlements. For example, pursuant to Air Regulations, airworthiness inspectors are authorized:

To issue a certificate of airworthiness in respect of an aircraft when satisfied that that aircraft conforms to the applicable standards of airworthiness or is of a design in respect of which a type approval has been issued and is still current; [and]

Where he has reason to believe that an aircraft is unsafe for flying, to suspend the certificate of airworthiness or flight permit issued in respect of that aircraft (B59, pp. 78-79).

These powers are significant and are typical of the kinds of powers granted by the ministerial authorization. There are many other powers granted within the lengthy (ninety-nine pages) authorization document. A sampling of operative words illustrates the variety:

- to exempt,
- to cancel a licence,
- to authorize a person to fly,
- to authorize a person to cause any aircraft to take off,
- to authorize an IFR flight,
- to grant special permission,
- to cancel or suspend an operating certificate,
- to withhold issuance of a licence,
- to specify alternate weather minima,
- to prescribe the form,
- to authorize entry,
- to prescribe conditions,
- to approve,
- to send a notice advising that registration will be cancelled,
- to prescribe the returns or particulars to be made,
- to authorize carriage of explosives,
- to inspect,
- to demand (production of licence) for inspection,
- to designate,
- to grant type approval,
- to withhold issue of certificate of airworthiness,
- to issue a certificate of noise compliance,
- to cause to be published,
- to require an operator to permit him to have access and inspect,
- to enter an endorsement extending privilege,
- to assign,
- to grant written authorization,
- to certify as airworthy,
- to issue a flight permit,
- to require,
- to demand,

- to make such directions and to take such action by way of provisional detention ... as he deems necessary,
- to give notice,
- to establish conditions (see B59).

Most of the delegated powers allow inspectors to make decisions about permissions, or "entitlements". Actual exercises of powers interfere with permissions, and are therefore ripe with possibilities for abuse, and judicial review.

There are a great number of permissions granted by government in the aviation sector,⁴⁴ and decisions affecting the day-to-day management of entitlement holders must usually be made without delays. Delays can prejudice aviation safety. Furthermore, primary decisions affecting entitlements could not be made efficiently if procedural trappings were required. For example, the panoply of due process characteristic of judicial decision making is costly and slow. Notwithstanding the lack of trappings in primary decision making, opportunities for review are available; some discussion of review is taken up below. As well, Transport Canada has taken steps within its training programs to introduce legal notions of natural justice and fairness to inform inspectors about steps to be taken to ensure lawful exercise of their decision-making authority.

In fact, decision making is arranged within the hierarchies of each branch, as established by the authorization document. Take, for example, the hierarchies of inspectors within two branches: Airworthiness and Enforcement; these are illustrated on Tables III and IV.

The powers conferred by ministerial authorization are further controlled by the written regime (discussed below) and by management. Managers in several regions indicated that they do not permit new or junior inspectors to exercise powers under the applicable schedule, until the inspector has completed training in enforcement and other functional specialities.

Finally, the powers of aviation safety inspectors are made reasonably apparent through the departmental practice of issuing identification cards which refer to authorized powers. The inspectors are usually well known in the aviation community; and, even though the community may not be familiar with the distribution of delegated

44. Amendments made to the *Aeronautics Act* in 1985 reflected this diversity (see discussion above "Domestic Legislation").

45. Tables III and IV are based on information taken from B59. Here is a list of the abbreviations used in these tables.

ABE/L: Chief Engineering
 ABM/L: Chief Airworthiness Inspection
 ABS/L: Chief Airworthiness Standards
 AEO/PM: Aeronautical Enforcement Officers
 AIO/PM: Airworthiness Inspectors
 CAI: Civil Aviation Inspectors
 DAB/L: Director Airworthiness
 DEL: Director Enforcement and Legislation
 ELE: Chief Aviation Regulatory Enforcement
 ELEO: Superintendent Enforcement Operations
 ELEP: Superintendent Enforcement Programs
 RAE: Airworthiness Engineers, Regional
 RMA: Regional Manager Airworthiness
 RMAE: Regional Manager Aviation Enforcement

Table III: TCAG Airworthiness Inspectorate: Distribution of Legal Authority⁴⁵

Schedule Office	Sch. 17 DAB/L	Sch. 18 ABE/L	Sch. 19 ABM/L	Sch. 20 ABS/L	Sch. 30 RMA	Sch. 31 RAE	Sch. 42 AIO/PM
Legal Authority							
reg. 211(3)	X						
reg. 211(4)	X	X	X	X	X		X
reg. 211(5)	X	X	X	X	X		X
reg. 211(6)	X	X	X	X	X		X
reg. 213	X						
reg. 214(1)	X						
reg. 214.1	X						
reg. 810	X						
ANO Series II,							
No. 3	X						
No. 4	X		X				
No. 15	X						
No. 21	X						
No. 6	X	X			X	X	
No. 14	X	X					
No. 16	X	X					
No. 18	X	X					
No. 19	X	X			X	X	
ANO Series V,							
No. 22	X	X					
ANO Series VIII,							
No. 3	X		X				
reg. 211(1.2)	X			X			
reg. 214(3)	X			X			
reg. 213(b)							
et (c)	X				X		
reg. 214	X				X		
reg. 219	X	X	X	X	X	X	X
reg. 510	X					X	
reg. 807	X	X	X	X	X	X	X
ANO Series VII,							
No. 4						X	
reg. 211(2)	X	X	X	X	X		X
reg. 211(2.1)	X	X	X	X	X		X
reg. 211(2.2)	X	X	X	X	X		X
reg. 211(7)	X	X	X	X	X		X
reg. 212	X	X	X	X	X		X
reg. 404(a)	X	X	X	X	X		X
reg. 404(c)	X	X	X	X	X		X
reg. 706	X	X	X	X	X		X
reg. 806	X	X	X	X	X		X
reg. 808(d)	X	X	X	X	X		X
reg. 808(e)	X	X	X	X	X		X
reg. 813	X	X	X	X	X		X

Table IV: TCAG Enforcement Branch: Distribution of Legal Authority (see *supra*; note 45)

Schedule Office	Sch. 21 DEL	Sch. 22 ELE	Sch. 23 ELEO	Sch. 24 ELEP	Sch. 28 RMAE	Sch. 44 AEO/PM	Sch. 46 CAI
Legal Authority							
reg. 211(1)	X						
reg. 304	X						
reg. 407(a)	X	X	X		X		
reg. 704(c)	X						
reg. 211(7)	X	X	X	X	X	X	X
reg. 219	X	X	X	X	X	X	X
reg. 310	X	X	X	X	X	X	X
reg. 706	X	X	X	X	X	X	X
reg. 806	X	X	X	X	X	X	
reg. 807	X	X	X	X	X	X	
reg. 808(d)	X	X	X	X	X	X	
reg. 808(e)	X	X	X	X	X	X	
reg. 813	X	X	X	X	X	X	
reg. 805	X	X	X	X	X		X
ANO Series V							
No. 31 s. 7	X	X	X	X	X		X

powers, there is no doubt about the ability of inspectors to take corrective measures on detection of non-compliance with legal requirements. It is clear that the inspectors can exercise police power on behalf of the state.

B. Inspectors From Other Government Institutions

Representatives of Transport Canada have endorsed Memoranda of Understanding (MOU) with the RCMP (see B68) and the CTC (see B67). These arrangements outline the respective responsibilities of institutions for aviation safety inspection. TCAG's arrangements with other institutions are not as regularized as those which prevail under MOUs.

The MOU between Transport Canada and the RCMP provides for annual discussions about enforcement policy and needed legislative changes as well as reciprocal arrangements for training. In an annex, the parties confirm details of operational interchanges, including delegation of authority, detection, investigation, procedures for deterrent action, liaison, transmission of operational materials and undertakings to reflect the agreement in their respective manuals.

In the field, the importance of the RCMP is obvious. They are present in many communities seldom visited by TCAG inspectors. Given that the average RCMP member has limited knowledge of technical aspects of aviation, the RCMP is chiefly involved in investigation work, in simple checks of documents and inspection collateral to other law enforcement work. In TCAG's Enforcement Branch, liaison is facilitated by the fact that many enforcement specialists are former RCMP members. The roles of

the RCMP in all government inspections, including the force's work for TCAG, is the subject of a major ongoing study (see B48).

The MOU between TCAG and the CTC recites their responsibilities for administration of Parts I and II of the *Aeronautics Act* (namely, safety and economic matters, respectively) and contains undertakings to refer matters to one another, to conduct joint surveillance and investigations, to meet for discussions about legislative amendments and to reciprocate with training as deemed necessary. In practice CTC officials have accompanied TCAG inspectors in airplanes on surveillance missions; as well, representatives of these institutions are able to extend their monitoring networks by maintaining liaison with their counterparts.⁴⁶

The Royal Commission of Inquiry into Aviation Safety recommended that the Department of Justice ought to dedicate a lawyer in each of TCAG's six regions "to assist the enforcement organization on a full-time basis" (B15, p. 1049, rec. 82). This has not yet been done. Decisions about assignments of counsel are left to regional managers, and aviation concerns are not given the priority which the Royal Commission envisaged. Given the demands made by many government institutions for legal services, it is understandable that the Department of Justice may not be able to deliver what TCAG needs. In particular, advice during the course of investigation, case preparation and presentation are the main TCAG needs for legal services. Without adequate services to support regulatory offence prosecutions, detected non-compliance is mainly addressed through "administrative actions." In these ways TCAG may be able to control the dispositions of cases.

TCAG maintains its relationships with other institutions by encouraging its personnel to liaise with field representatives of provincial and federal government institutions. These links are of obvious importance because they multiply the eyes and ears of aviation safety inspection.

C. Private Inspectors

Although they are not usually designated as such, several classes of private parties are licensed or otherwise delegated to inspect other private parties regarding aspects of aviation safety, on behalf of government. The classes of private parties in aviation safety inspection, and their duties are summarized below.

1. Classes of Private Inspectors

Through an authorized departmental employee, the Minister of Transport delegates inspection authority to persons within ten classes. This is done in writing pursuant to section 3.3 of the *Act* (C2).

46. Economic deregulation of the Canadian airline industry was announced in Canada by the Minister of Transport in *Freedom to Move* (Ottawa, 1985). This was eventually confirmed in a new statute, the *National Transportation Act, 1987* (C106). The CTC began to reduce personnel and services in 1985. Given these circumstances, TCAG will obtain less assistance with surveillance and other exchanges than were contemplated by the MOU between these institutions.

Private delegates perform various aviation safety inspection tasks. Many of these tasks inevitably require the exercise of some discretion. Accordingly the department's practice of delegation to the private sector is an example of government practice, which gives rise to difficult questions about matters such as legal status and liability. This is not to suggest that the private delegates in aviation inspection are performing badly or that departmental supervision is inadequate. Rather, a short exposition of the classes of private delegates and outlines of their functions point to a need for a better legal regime to govern private parties performing public functions.

Although no single document exists in which all classes of private delegates and powers are set out, departmental officials prepared a summary⁴⁷ explaining amendments to the *Aeronautics Act* in 1985. In those notes, explanations were given for the new provisions in subsection 3.3(1) whereby the Minister was given explicit authority to delegate powers, duties or functions. At the time of the briefing note, the department had delegated to more than 8,000 persons and companies in ten classes external to Transport Canada without express statutory authority to do so. This was cured by the 1985 amendments. A summary of the classes of private delegates and their respective authorities is given below. It is suggested that many functions of delegates in each class are in the nature of inspection. In any event the classes illustrate the significance and complexity of the public functions performed by private parties in aviation safety inspection.

Seven categories of licences are issued among approximately sixty three hundred AMEs. In general, AMEs have authority to certify various types of aircraft or engines as airworthy after manufacture or repair or before flight. AMEs are the only class of private inspectors delegated by the department through a licensing system. As with the other classes of private delegates there was not clear statutory basis for delegation of ministerial powers to AMEs before the *Aeronautics Act* was amended. This group is discussed below, because the experiences of these parties illustrate well the problems faced by private parties doing the work of government.

Forty-seven DFTes were authorized to grant private, commercial and multi-engine endorsements after conducting flight tests. Before 1985, this was done without any express statutory guidelines.

More than six hundred check pilots were authorized to conduct checks in accordance with *Air Navigation Order VII*, Nos. 2-3-6. Several sub-categories of check pilots have been designated, for large aeroplanes, small aeroplanes and helicopters. These have been organized as company check pilots and air carrier check pilots. The former conduct flight tests for renewal of instrument ratings of company pilots, while the latter enjoy additional authority to conduct other pilot proficiency checks. Two Air Carrier Designated Examiners (ACDEs) also act in accordance with ANO VII and are authorized to conduct initial and recurrent pilot proficiency tests, as well as to conduct tests for upgrading and to endorse instrument rating.

In 1985, seven hundred Designated Civil Aviation medical examiners were authorized to conduct medical examinations to assess the physical condition of applicants for issuance or renewal of pilot licences.

47. See Department of Transport, Bill C-36, *An Act to Amend the Aeronautics Act: Briefing Book* (Ottawa, 1985). [Unpublished]

Approximately six hundred "authorized persons" in flying schools and flying clubs certify student pilot permits and endorse licences for additional privileges. Endorsements are also made after verifying that all licensing requirements have been met; such verification consists in checking that necessary documents are in order.

Written examinations pertaining to licensing are normally overseen by departmental staff. Occasionally, RCMP in remote areas of Canada, External Affairs officers abroad and Canadian Armed Forces — NORAD act as "invigilators" on behalf of the department during written licensing examinations.

Approximately sixty Design Approval Representatives (DARs) are authorized in seven categories to determine whether aircraft engines and aircraft component designs comply with airworthiness requirements, and to certify that such requirements have been met. Many of the DARs decisions depend on the exercise of good judgement, even though the department supplies internal instructions to guide the exercise of discretion.

Nearly five hundred companies have been approved by the department to assume full responsibility for airworthiness of products which the companies manufacture, convert, overhaul, maintain and service. This authorization is granted on the basis of certifications given by company representatives and on the basis of the quality control systems established and maintained to the satisfaction of the department's chief airworthiness inspector.

Finally, about thirty-five Service Representatives are authorized by the department to certify as airworthy, on behalf of their employers items which the SR has serviced, where the employer is not an approved company.

From the foregoing it is clear that great numbers of private parties are engaged in a variety of tasks touching on aviation safety inspection. Indeed in the aviation sector many more private parties than government inspectors are involved in the work of inspection. These facts are not generally well known, so it is hoped that the present introduction will raise the level of interest in the legal regime governing performance of public inspection functions by private parties.

2. Means for Delegation of Powers to Private Inspectors

The largest group of private aviation inspectors (the AMEs) are authorized and controlled by Transport Canada through a licensing system. The other classes of private inspectors are authorized by *ad hoc* means unlike the authorization documents used for delegating authority of departmental officials.

AMEs are licensed by government inspectors in the Licensing Branch, but actual supervision of their certification, training and performance is done by the inspectors within the Airworthiness Branch. This is appropriate, given that the AMEs principal functions are in certifying airworthiness. In fact, the AMEs do the "real" inspection — looking for problems and solutions, executing repairs and certifying airworthiness on logs. It remains for the airworthiness inspector to check the logs to see that certification has been signified, and thereby to determine whether the steps taken were appropriate to correct the identified "snag"

3. The Issue of Private Inspectors' Divided Loyalties⁴⁸

Many private aviation inspectors are often in a position compromised by legal obligations to government and by their private employment relationship. Take the case of the AME.

The AME performs inspection functions to satisfy the needs of both private operators and government. When the AME certifies that aircraft or parts are airworthy, he or she thereby signifies that he or she has performed the actual physical maintenance and inspection of the materials concerned. The work of AMEs is checked by TCAG's airworthiness inspectors but this is done mainly by verifying to see that the requisite log entries have been made. Obviously, it is impossible for TCAG to have airworthiness inspectors present to watch all maintenance being performed. As well, one could never expect the inspector to tear down all AME work to see whether the recorded maintenance has actually been performed. In the result, the government inspector must trust the AME, by accepting the AME log entries at face value.

So, the AME performs an inspection function which is pivotal for implementation of government's aviation safety policy. And yet, many AMEs work in difficult circumstances. For example, the AME may be prevented from doing necessary maintenance because of economic and other constraints on owners. The AME's loyalties may often be divided among self-interest (income), aircraft owners interest (minimum costs for maintenance) and the public interest (strict adherence to law governing aviation safety).

Although most would agree that aviation safety should not be compromised by narrow short-term interests, AMEs and other private delegates are often caught between a rock and a hard place. It is suggested that there is need for development of a better balance of public and private responsibilities among AMEs and government.

IV. Controls of Aviation Safety Inspection

A. External Controls

Decisions of TCAG inspectors are subject to various external reviews by the Minister, the courts, CAT and by other government institutions. As well, private delegates are subject to external control by TCAG inspectors through the device of licensing, for example. Below, the control functions of the CAT and other government institutions are briefly outlined.

CAT was established under authority of the 1985 amendments to the *Aeronautics Act* for purposes of hearing appeals and reviews of some classes of decisions taken by TCAG administrators. There have been too few decisions of CAT to assess the effects

48. This part is taken substantially from A63.

of this institution as a control on aviation safety inspection. The tables (V, VI, VII) illustrate the points at which review by CAT is available.

Canada's federal government has used a variety of institutions to study, perform audits and evaluate the operations of TCAG. These studies⁴⁹ are conducted for a variety of purposes, and it is suggested that they contribute to the renewal of institutions, and generally help to improve their effectiveness in providing service to the public. Some of the reviews of the TCAG's inspectorate will illustrate.

The work of the Royal Commission of Inquiry into Aviation Safety has been the most important study of TCAG's inspectorate. Inspection was one of several aspects studied and many of the changes made in legislation and administration within TCAG are directly attributable to the Royal Commission's recommendations.

In 1984, Transport Canada, with the help of Treasury Board, conducted an A-Base Review (see B63) to try to improve efficiency of operations of the work of TCAG. This was done on the basis of a study which broke down TCAG work, including inspection, into tasks. The study then estimated the time required to complete each type of task and determined the annual frequency for each task. The study became the blueprint for reorganizing the inspection function within TCAG. This is so, notwithstanding the fact that TCAG was subsequently advised to meet recommended staffing increases from internal resources.

In 1979, largely in response to labour-relations based problems, the Bureau of Management Consulting, conducted an occupational study of the Aircraft Operations Group (see B43). This study identified needs in areas of training, staffing, career development and work environment. The recommendations from this study have supported several initiatives taken by TCAG to improve the recruitment, training, management and development of inspectors.

Not to be forgotten are the studies of TCAG's inspectorate conducted by the Office of the Auditor General (see B89). These have been undertaken, through performance measurement and program evaluation to measure effectiveness and efficiency.

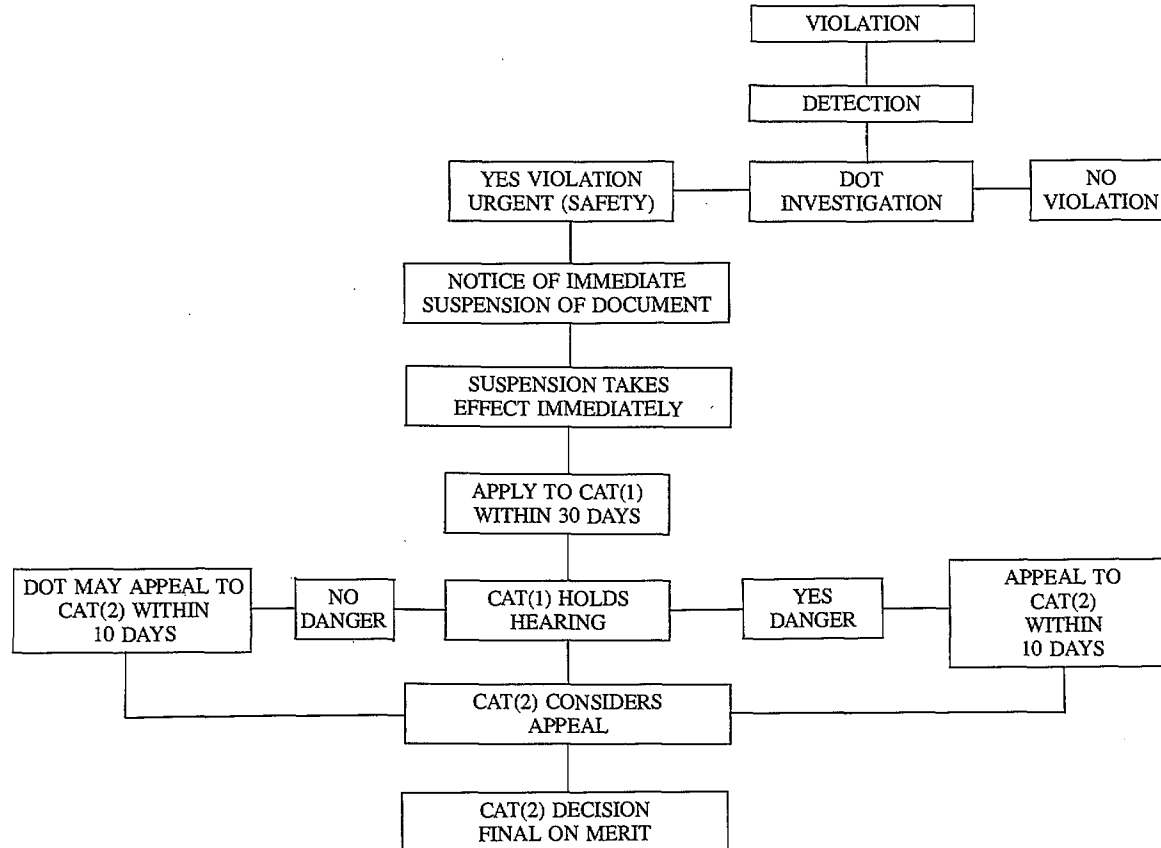
At best an audit gives a rough measurement of performance, on the basis of various reviews of operations and management practices. It is worth mentioning however, that such reviews being of wide scope, can address problems and propose solutions in ways which cannot be matched by *ad hoc* reviews of individual cases.

The distinction is often drawn between legal and management reviews: this is valid, but it is suggested that both have important effects on the ways in which legal processes are subsequently conducted by the reviewed institution.

49. See B15, B43, B48, B89, B106, B107.

Table V: External Control of TCAG Decision Making (see *supra*, note 47)

s. 6: Suspensions where there is an immediate threat to aviation safety

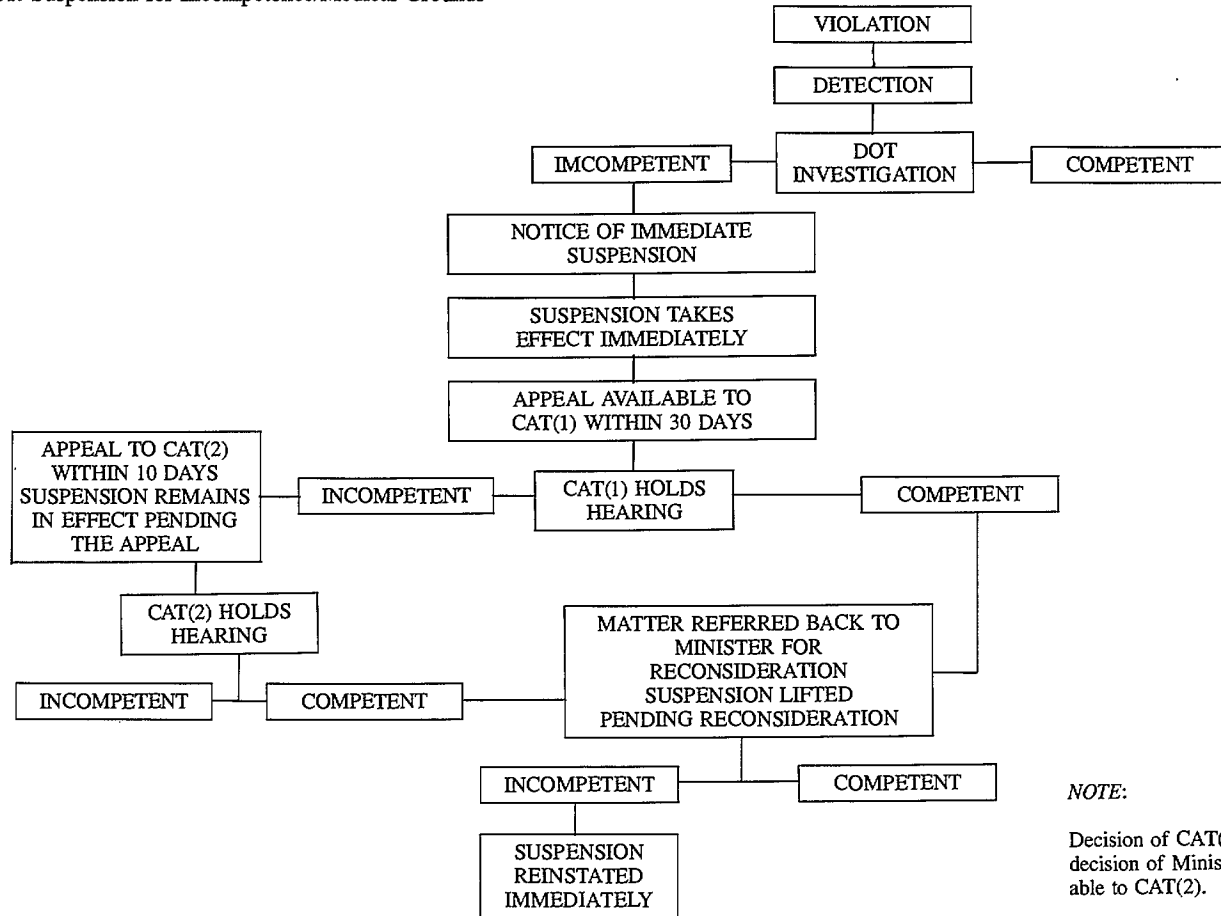
**NOTE:**

(1) Once the Minister issues the Notice of Suspension, the person affected may apply to CAT(1) for a hearing on the matter on an urgent basis. CAT(1) must give priority to such applications.

(2) After 30 days or CAT decision, the person affected may apply to Minister to determine whether threat continues to exist; if Minister decides threat continues, then may follow procedures for CAT review.

Table VI: External Control of TCAG Decision Making (see *supra*, note 47)

s. 6.1: Suspension for Incompetence/Medical Grounds

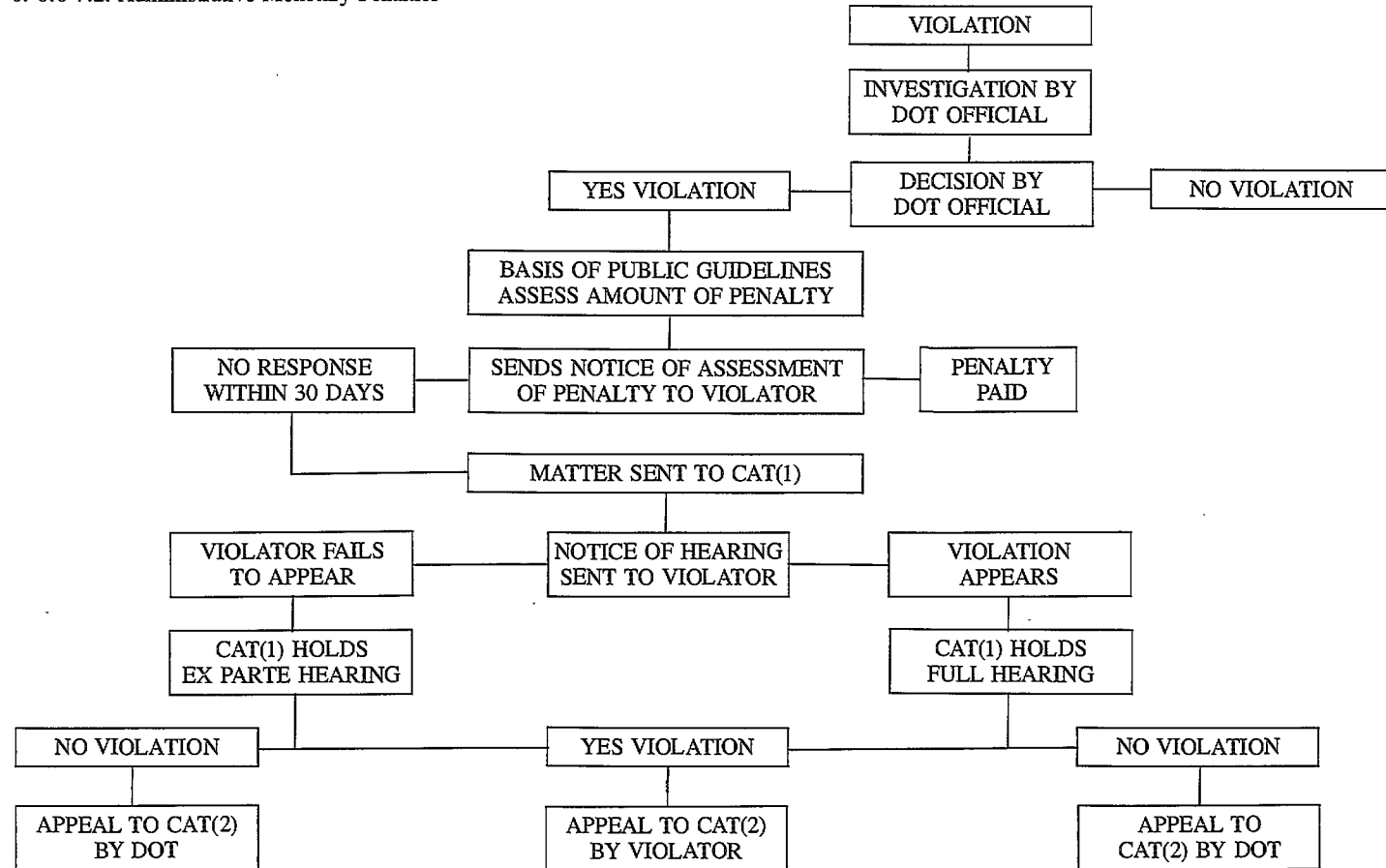


NOTE:

Decision of CAT(1) *confirming* decision of Minister is appealable to CAT(2).

Table VII: External Control of TCAG Decision Making (see *supra*, note 47)

s. 6.6-7.2: Administrative Monetary Penalties



B. Internal Controls

TCAG uses a standard array of measures to control the activities of its inspectors. Among these are: hierarchical organization within the government institution, specific delegation of decision-making authority, recruitment practices, training, provision of detailed internal instructions, and so on. Many of these are explored in other parts of the present paper.

V. Conclusions and Recommendations

A. Summary of Findings

The objectives for field research of aviation inspection were pitched widely to catch a variety of information which would in turn inform an approach to the study of federal inspection. Even though the stated objectives did not encompass all matters which were subsequently found to be important, they nonetheless provided points of departure. In this light, it is useful to recount in summary form the findings made pursuant to the stated objectives.

The federal government's aviation safety inspectorate has been a fruitful research subject. Transport Canada initiated several projects to improve deployment of inspectors (see B50). As well, several other government institutions have evaluated the aviation safety inspectorate.⁵⁰

All that work culminated in new legislation, creation of new institutions,⁵¹ and changes in internal ordering. Most of these great changes were in progress around the time the field research for this paper was commenced. This situation provided a basis for reflecting about questions such as: How much inspection is enough? How much inspection should be done by government and private sectors? How can law better accommodate the dual nature of inspection? And, what are the lawful means for delegation and control of inspection powers?

Aviation safety is a major concern of government and private parties. They address safety through ownership, service and supervision. Private and public sectors are thus responsible throughout their systems for safety and activities. The notion of inspection helps sort out the respective responsibilities for ensuring aviation safety. While this may be viewed as a problem for analysis by disciplines other than law, there is a need for better legal understanding of the arrangements which govern the deployment of both private and governmental personnel. It was the author's choice to work from field observations of actual inspection practices and problems. Legal theory and comparative

50 See B15, B43, B48, B89, B106, B107.

51. Including CASB and CAT.

analysis in matters such as police power⁵² and administrative police⁵³ should be taken up within more broadly based research.

Inspection, by its nature, involves looking into circumstances to determine their suitability, whether from the point of view of a prospective purchaser, an agent or a representative of government checking on compliance with law. But, as has been set out herein, inspection also entails provision of service. This aspect is not well known; neither is it well framed by administrative law.

When government's representatives inspect, they do so pursuant to public policy objectives; but, such justification supports intrusion into private affairs only if done with consent or following legal authorization. Many difficult questions associated with legal standards for administrative search⁵⁴ have not been treated directly in the present paper. Instead, an attempt has been made to elaborate the nature of inspection. This has been achieved by exposing the written regime, field observations and the responsibilities of inspectorate branches within both public and private sectors. Exploration of such questions actually exposes the internal means for controlling intrusive powers, such as search.

The paper has been organized using the idea of duality: in the nature of inspection, in the performance of inspection by public and private parties, in the divided loyalties of the private inspector and in the dual thrusts of policy implementation, namely, securing compliance and seeking bureaucratic co-operation (see A281). In turn, these ideas have given rise to general themes which could be pursued in research leading to law reform, in particular: internal instructions, internal ordering of government inspectors; delegation of authority to government inspectors, and assignment of inspection responsibility to private parties.

The prevalence and importance of written instructions,⁵⁵ other than legislation, became clear during research. This gives rise to questions about the uses and legality of such materials. Internal controls have real effects on the positions of private parties (namely, through the treatment of private parties by inspectors). The instructions, their availability, their consonance with other (legal) instructions, sometimes explain differences between legal regime and field practices. These and related issues were approached, through exposition of some internal instructions. Essentially, the legitimacy of such materials is not questioned here. In fact, one must recognize the necessity of having enforcement officials exercising discretion in resolving legal ambiguities in order to achieve intended policy results (see A233).

Internal instructions present special problems for law: what is their legal nature and what are their legal effects? Even though they do not emanate from authoritative sources such as Parliament and the courts, they are, nevertheless, binding internally on

52. i.e., the power of the State to act in the public interest. See, e.g., A147, A216.

53. The idea of administrative police is derivative from police power. While not in use in Canada, the term could include government administrators other than those who are responsible for the administration of criminal law. On administrative police in France, see A203, A241.

54. See *supra*, notes 19, 34.

55. See *supra*, note 35, and accompanying text. The LRC has commenced background research in this area; see A112.

administrators such as inspectors, and, by virtue of their use for guidance of inspectors and other bureaucrats in their relations with private parties, internal instructions often have real effects on private parties. Still, these materials are not well known to the private sector. Internal instructions convey normative values⁵⁶ especially where they articulate guidance about exercise of discretionary powers. This presents a legal impasse, at least in the sense that internal instructions modify law. Internal instructions are necessary to validate delegation of legal authority. As well, the inspector faces day-to-day communications with the private sector and must be able to balance dual obligations of supervision and service. For these purposes internal instructions are the inspector's most practical sources of guidance. In spite of these advantages no standards exist for contents and formats of these materials although this might improve openness of government.

Delegation of authority to aviation inspectors is enabled by recent amendments to the *Aeronautics Act*. It appears that changes were made on the basis of analysis conducted by Transport Canada (see B15, B53). This gives rise to the author's suspicions about delegation practices of other federal institutions. A body of jurisprudence exists in which validity of delegations have been tested. However, the common law may be too disparate to effectively guide public administration in practices of delegation. To remedy an analogous situation in New Zealand, a Law Reform Working Paper has recommended several options, including a generally applicable delegations statute, standards to govern individual delegation provisions, and certain administrative arrangements (see B115). The phenomenon, status and framework for delegation, both internal and external to government, are not well distinguished or elaborated in common law.

There has been no comprehensive analysis of delegation practices of Canada's federal government. This should be done with a view to discovering reasons for differences in legislation which enable delegation, the nature of powers delegated, the instruments used to accomplish delegation, specific terms and controls of delegated powers. Strictly speaking, many of the practices and issues are beyond the scope of a study of inspection. However, given the prevalence, diversity and scope of delegations of governmental authority to inspectors, study of inspection gives rise to important insights about delegation.

"Privatization" is a contemporary term used to indicate sale of government property or assignment of governmental functions to the private sector. But this practice is not new.⁵⁷ From the point of view of the private sector, use of private inspectors can help demonstrate due diligence in their efforts to comply with legal requirements, and can help ensure overall quality of operations.

There are a number of reasons why government assigns functions or sells economic interests to the private sector. Included in these are deficit reduction and political pressure. Sale of state-owned enterprise comes first to mind. Less well known and understood are the assignments of functions, such as inspection, to the private sector. The present paper demonstrates that most aviation safety inspection is accomplished by private inspectors, whose work is occasionally checked on by government inspectors.

56. See, generally, A226.

57. Law enforcement has many places for private parties. See, e.g., A125, A159, A168, A191.

Private parties performing inspection functions are not commonly known as "delegates" or "inspectors," although those designations have been used in the paper to be clear about the source of authority and the actual nature of the function. The practices of Transport Canada for delegating inspection authority to private sector is *ad hoc*, except for licensing of AMEs. Although the department attempts to limit discretionary aspects of their decision making, controls over external delegates are not well organized. It is not enough to say that decisions of external delegates are "administrative" in nature, and require little or no exercise of discretion. Clearly, potential exists for conflict of interest in every decision taken on behalf of the Minister by a private delegate. Such conflict can lead to compromises in favour of employers or government. In the event of errors or negligence, is the private delegate liable? Is the Crown liable for the private delegate? Should responsible ministers be empowered to delegate Crown status to private parties? These issues go beyond inspection. Given the availability of special status to some agents of the Crown, there is need to clarify the legal liabilities of inspectors. This is important for both government and private delegates.

Government enters into many kinds of arrangements with private parties to do the work of government.⁵⁸ There is a need for better comprehension of practices to help improve the legal basis for organizing the delegation to private parties of governmental functions, including inspection.

The author has noted some reasons for inevitable variations in enforcement and compliance. For example, the regions establish their own scheduling for inspections and can thereby influence effectiveness. Variations can be attributed to many factors such as the strength of the regional manager, reputations and networks of individual inspectors, links between inspectorate branches, and so on. As well, the degree of legal support provided by officers of the Department of Justice in any particular region is an important factor affecting enforcement.

The author did not obtain adequate explanations for variations in compliance. This is mainly a matter of detection; most violations are not detected. Most detected violations are detected by non-departmental personnel. Regional variations in inspectorate detections of compliance do not necessarily indicate regional variations in compliance.

The effects of the *Charter* on inspectorate operations are matters which merit thoughtful analysis. This can be attempted after making field observations. For example, the section 7 requirement for fundamental justice does not seem to have percolated into the administration of TCAG's inspectorates. However, TCAG training programs stress "natural justice" in a "fair-but-firm" policy of enforcement. The author asked several inspectors whether the *Charter* protection against unreasonable search and seizure has constrained operations. Section 8 has not yet been perceived as

58. There is in fact a poor demarcation of private and public functions; the state of Canadian administrative law reflects this situation. In Canada a much heralded policy on "make or buy" and "contracting out" was expected from Treasury Board in late 1987. This problem has been addressed in legal doctrine abroad. See, e.g., A228.

an obstacle⁵⁹ although it was noted that inspectors no longer verify inside unattended aircraft because they might be accused of theft or damage.

In his examination of processes used to judge violators, the author recognized that the administration cannot prosecute or impose sanctions for every detected violation. In this connection, it was found that for practical purposes, inspectors use standards for deciding who and when to punish. TCAG officials seem to universally favour imposition of sanctions against "deliberate and persistent" violators. As seems to be the case in many fields of regulation, the inspectors "know who the bad actors are" and the "bad actors" are often involved in law breaking in non-aviation matters. Thus, the inspectors sometimes try to catch known violators. This was also reflected in the ways in which inspectors give warnings, issue allegations, and "adjudicate"⁶⁰ in the administrative setting.

In his efforts to find out about the use of sanctions and threats, the author observed the use of warnings, "notice of condition," and negotiations in the contexts of detected violations. Licence sanctions are serious because of their effects on livelihoods of small operators. There are, of course, exceptions such as the operator who treated as incredible, the idea that an inspector could "drop out of the skies" without warning and interrupt legitimate business. For the ordinary (namely non-violating) operator, the presence of the inspector is a matter for concern; however, without deliberate or persistent violations, the inspectors claimed that the complying operator has little to fear. Systematic survey of operators should be undertaken to check up on such claims.

As another express objective, the author wanted to find out about the influence of professional ideologies and values on enforcement outcomes and inspectorate practices. The study has partly achieved this by inquiry into backgrounds of particular inspectors and observing the same inspectors in the field. For example, several former RCMP officers, now aviation "enforcement specialists," tend to reconnoitre in the field with RCMP members. Like the RCMP, enforcement specialists tend sometimes to work in isolation from inspectors in the other branches. Former military personnel have often been given priority in TCAG's hiring practices. A person with military background may have little or no real appreciation for the problems particular to commercial aviation. Several inspectors indicated that some ex-military personnel look for income to bridge them into retirement. Without benefit of more comprehensive information, no general conclusions are drawn from these comments.

It was expected that field research could support analysis of preventive strategies. The field research shows how inspectors try to ensure safety. This is done by maintaining good relations among the aviation community, encouraging dialogue, helping with problem solving and generally providing service. The goodwill thus

59. It appears that s. 8 may become a real stumbling block for aviation inspection. For example, in *Haim Shavit v. Minister of Transport* (D67), the CAT found a search of aircraft to be improper, absent exigent circumstances and prior authorization. Evidence seized under such circumstances was found to be inadmissible.

60. By using the word, and through its practices, the Department recognizes that principles of natural justice and fairness must be respected in decisions affecting permissions and for imposition of administrative penalties. However, the Department's meaning of "adjudication" does not extend to decisions taken by inspectors in emergency circumstances.

created is an important product of aviation safety inspection. This gives rise to deep questions about the degrees to which inspection ought to be made up of supervision (enforcement) and service.

B. Basis for Study and Reform of Federal Inspection

There exists in Canada no current, public source of information about inspectors and inspection, their powers, activities, cases and problems. This is so notwithstanding the prevalence of inspectorates and the importance of inspection for the implementation of public policy. Fairness and efficiency⁶¹ of administration could be enhanced considerably by improving the rationality of delegated powers and control of inspectors.⁶² On the basis of the research done in aviation inspection, it is suggested that information ought to be collected to demonstrate the diversity of powers and of arrangements for internal and external controls.

It is recognized that important, if not the most important problems of modern federal governance are in matters of personnel. For this reason it may be difficult to discern the true nature of inspection in a particular institution, on the basis of answers to a survey. For example, one could not expect a prudent manager to deviate from official job descriptions. Nonetheless, there are several areas of interest to reform of inspection which could be brought out with a survey. Examples include: details of delegated powers, information about private delegates, identification and uses made of internal rules, means for ensuring assistance of other government institutions, approaches to problem solving, milestones which affected developments in inspectorates, and case disposition data. As a next step towards reform, it is suggested that a survey of federal inspectorates be undertaken to obtain data on the basis of which discussion could take place about merits of harmonization in several areas of law governing federal inspection.

In summary, the present part is really an introduction to the study of federal inspection law. As such, the author has placed the findings and analysis from field study of aviation safety inspection in a general perspective which is intended to inform study and reform of federal inspection law.

61. "Fairness" is a value which is manifest in procedural and substantive aspects; it has been adopted by Canadian courts as a standard for government decision making. There are limits to fairness, however; for example, there are real limits to government resources available for policy implementation. Hence "efficiency" generally circumscribes a countervailing value for government administration.

62. In 1986, the Public Accounts Committee found that the Public Service Commission had delegated 98% of its staffing functions to other government institutions and that no sufficient monitoring mechanisms existed for controlling these practices.

For inspectorates, this poses serious problems because inspection powers are probably delegated to officials in an *ad hoc* manner, from one institution to another. Although practices may be fully rationalized within an institution, temporal changes in circumstances, changes in law and other factors may give rise to vast differences in the ways in which powers are delegated and controlled across the federal administration. Clearly this is a basis for exploring possible avenues for harmonization of government practices in areas such as delegation of powers to inspectors and other actors.

PART TWO

A Framework for Understanding Inspection

This part synthesizes the Commission's research in progress, about inspection and inspectors in Canada's federal government. As of yet, no attempt has been made to be definitive. Parts One and Three of this paper reflect several themes which should be used to survey and study all the federal government's inspectorates. In particular, Part One works towards a theory of inspection, searches for unifying ideas about private and government inspectors in policy implementation, and explores examples of internal controls such as delegation and internal instructions. Part Three displays selected references with an index which reflects the themes of Part One, as well as numerous other topics which are relevant to inspection.

In this Part, the themes of Part One are recapitulated, with some recommendations. Finally a brief summary is given of systemic problems which the LRC is treating elsewhere in its ongoing work on administrative law.

I. A Theory of Inspection

The powers of inspectors, to do things on behalf of the State, are derivative from the police power of the State: this is the authority to protect and advance the public interest. The public interest is reflected in legislation and is protected and advanced by government's delegates, including institutions, government officials and private parties. This is the business of policy implementation, which is actually achieved through persuasion, incentives and coercion. Such measures are used by government and private inspectors to implement public policy, by securing private sector compliance and by securing bureaucratic co-operation.

Coercion, or the negative aspect of governing, is stressed as a basic foundation of the common law. This does not easily comprehend the positive, benefit or service-conferring function of government; nor does it admit the importance of persuasion. Field study of inspection has revealed that the preponderance of inspector's work is in providing service. This is clear from several observed classes of activities such as advice giving, communicating information and persuasion. In fact, service is the dominant stream of activity even for many inspectors who are dedicated to enforcement.

One is tempted to speculate about other fields of government intervention where inspectors are responsible mainly for grading, approving and so on. Even in aviation regulation, a review of delegated authorities indicates that most of the real powers are associated with benefits, permissions, licences and other entitlements. While it is true for some that such powers can be placed on a "scale of coercion," this limited view misses the reality of inspection.

The inspector is a front-line representative of government for both positive and negative aspects of governing. The positive aspect could be better represented in law. In other words, the model of "cops-and-robbers" is appropriate only in cases of the usually well-known core of "bad actors." It is not news that inspectors are mainly diplomats, acting in that mode. While this may represent atrophy or perversion for those who insist on a purely enforcement function for inspectors, it reflects the fact that inspectors must carry both positive and negative messages for government.

Inspectors' messages are most dramatically conveyed when they make decisions. Part One displayed some examples of the powers to make decisions which are delegated to inspectors. These powers are assigned by legislation and by ministerial authorization. Inspectors must decide who and where to inspect, when to search and seize, when to grant, amend, refuse or suspend permission and so on. Despite the importance of inspectors' decisions, some theorists would argue that theirs are not decisions in the legal sense, because they are predetermined by sources of legal control. Such denial ignores the substance of decision making. Must a legal decision be made only by a court or a legislature along established procedural lines? In any denial that legal decisions are taken by inspectors and other parties who are neither judges nor legislators, we miss possible routes for reform. The effects, on private parties, of inspectors' decisions are often as serious or weighty as decisions of courts. In recognition of that fact, we should be prepared to face difficult issues about decision making: what decisions can be made by inspectors and their superiors?

In our Canadian legal culture, decisions of administrators have been assigned to the crossroads where legal and political authorities meet. Possibilities for political intervention have been further limited by making government's institutions as independent as possible from Cabinet. However, the doctrine of ministerial responsibility operates to retain ministers in the thick of matters handled by institutions within their authority. This is especially true for departments where, for example, inspectors' decisions in grading of tinned tuna were overridden by a Minister. Similar political difficulties are faced in questions of aviation safety where, for example, a remote community depends on service provided by a party in breach of aviation safety law.

The particulars of style and organization of Canada's federal inspectorates must be fully appreciated in any attempt to reform federal law governing inspection. Practical adjustments in operations can result in vastly different kinds of inspection among institutions, notwithstanding similar legislation patterns. Particulars of such differences should be known so that coherent explanations for differences can be made out and so that ways might be devised for ensuring that style and organization of inspection reflect the needs of society as expressed by government.

II. Private Inspectors

The prevalence of private delegates, doing the work of government in aviation safety regulation, gives rise to deep questions about the respective responsibilities for policy implementation among private and public actors. Their dominance among inspectors (ten to one in aviation safety regulation) is not well known. This is partly a factor of nomenclature (many parties doing inspections are labeled otherwise); however, the problem is more than a matter of language.

Essentially, the root of legal problems faced by private inspectors is conflict of interest. How can a professional, employed by or contracted to a private party, thoroughly and objectively report about his or her principal's compliance with law, when acting under that principal's instructions and other influences? The private inspector is, in essence, a middle person, keeping abreast of matters for which he or she must report to government. There are many obvious examples of private delegates doing government's work. In banking regulation, for example, auditors perform much the same function for government as do the AMEs in aviation safety regulation. There are, however, important differences. For example, rights of private inspection may be created by class of parties, under legislation such as the *Bankruptcy Act*. Or, legislation may establish a licensing scheme for private inspectors, as is the case for aircraft maintenance engineers. Where the private parties have strong professional associations, as in the case of auditors for example, self governance may substantially replace government supervision.

Despite political rhetoric about needed privatization of public service, it is suspected that most government inspection is in fact performed by private delegates. This could be confirmed through research of federal inspection systems, and should be done in any serious attempt to reform inspection law.

III. Internal Controls

Two examples of internal control mechanisms were explored in Part One to convey a sense of their practical significance for inspection. While the external controls (exerted by Parliament and other institutions) should not be ignored, it is suggested that better legal elaboration of internal controls could improve the fairness and efficiency of government inspection. Examples chosen for exposition in this paper included delegation and internal instructions.

A. Internal Instructions

Internal instructions are manifestations of government which appear in many forms, such as circulars, manuals, directives, and so on. They guide inspectors and other government employees and private parties in the performance of their work. The

very existence of these materials is evidence of the fact that legislation cannot keep pace with changes in technology and other circumstances.

Internal instructions are produced by individual institutions and there appear to be no uniformly available systems for guidance, review, consultation or dissemination. Denial of their legal character is not sufficient reason to ignore these materials. They are binding internally and to the extent that they affect decision making, careful review should be made to determine whether they are candidates for statutory instruments. Internal instructions are also binding externally insofar as inspectors' decisions have indirect effects on private parties. In those circumstances where internal instructions are directly binding on private parties, they should probably be expressed as statutory instruments. Within the paradigm of policy implementation outlined above, internal instructions are important for the functioning of government in two respects. First, they are instruments which government uses to try to secure co-operation of bureaucrats, such as inspectors. Second, internal instructions are used to try to secure private sector compliance; for example, private delegates inform themselves about the priorities of government's inspection system from manuals and other internal instructions of inspectorates.

As a preliminary matter it is recommended that government recognize the need for, importance and legitimacy of internal instructions: in fact, they are demonstrations of administrative responsibility. However, government should be wary of converting internal instructions into statutory instruments. It is to be remembered that instruments need not be enshrined in legislation to be binding. In summary, internal instructions should be the subject of full study including their making, dissemination and use by government officials and private parties.

B. Delegation

Government delegates many kinds of discretionary decision-making powers to its institutions and officials and to private parties. Many of these powers are delegated to inspectors, and examples in this paper have given rise to legal questions about status, procedure and substance.

The substance of inspector powers are various: to inspect; to search and seize property; to decide to issue, amend, renew, deny or suspend licences, permissions and approvals; to impose monetary penalties; to provide advice; to grade as to quality, and so on. It is well accepted in law that a responsible Minister cannot reasonably be expected to execute all of the powers delegated to him or her, and that he or she must therefore authorize others to perform this work. The established practices of our federal government entail delegation to positions within an institutional hierarchy. Should delegation be made to an office or to an individual? How do superiors within an hierarchy ensure that subordinates are sufficiently qualified to exercise inspection powers, absent legal standards for many such tasks? Should government inspectors be given status of public officers or peace officers, to cloak them with protections accorded to such officials by the *Criminal Code*? Should government-wide standards be developed for delegating powers, such as those exercised by inspectors, to government officials? These and related questions should be addressed in any study of delegation of authority to federal government inspectors.

IV. Related Matters

Finally, some related problems are mentioned because they must also be faced when searching for ways to reform government inspection. For example, consider the legal nature of decision making, the administration of offences, search and seizure, and permissions and entitlements.

A. Decision Making

Decision making is being taken up in other work of the LRC. Some aspects of this problem were discussed above. Resolution is needed in this area because denial of the legal nature of decisions made by officials is not particularly helpful when those decisions are challenged for want of fair process.

B. Offence Administration

Offence administration at present is treated mainly as a matter of criminal law, adjudicated in provincial courts. In revenue matters, monetary penalties are imposed by officials. As well, 1985 amendments to the *Aeronautics Act* have enabled the aviation administration to experiment with a system for imposing monetary penalties.

However, these practices are exceptional. For most offences ("regulatory offences") cases are prepared for court as if they were criminal offences. The implications, for accumulation and production of evidence, are very substantial for officials, such as inspectors. The exacting processes of courts entail great expenditures of resources for preparation. The aura of criminal law tends to crowd into many areas of administration. As well, provincial court judges are not expert in the vast array of federal regulatory matters, and the Department of Justice is hard pressed to dedicate counsel to all topical areas in each regional administration for purposes of day-to-day advice and for prosecution. Also well known is the fact that the doctrine of strict liability in matters of proof of regulatory offences can be used to the advantage of the accused. These symptoms may illustrate a need for a separate system for administering regulatory offences. However, this area poses many difficulties. For example, for the economist, what is the optimum price, for each offence, which will produce deterrence? For the political scientist, how can government put a price on non-compliance?

In essence, there is need for information about practices used for imposition of administrative fines, and for some clear thinking about intermediate monetary penalties. This should include thinking about appropriate decision makers for such decisions, and about procedure, disposition, review and terminology.

C. Search and Seizure

Depending on the regime, inspection may be the only significant available power, or it may be secondary to powers over entitlements, or it may be so unnecessary that it is seldom if ever used. Nonetheless, guidance is needed by inspectors for use of authority to inspect, search or seize. This is especially important in view of the fact that openness to inspection is often a condition of permission to do business.

In all but egregious situations, authorization to search should be obtained from an independent authority. However, when does "inspection" become "search"? Is such distinction a fatuous exercise, given the continuing leverage of government through its power to refuse, amend or suspend permission? It seems clear that an inspector needs authorization to search if he anticipates finding something. But, doesn't the inspector usually expect to find something? Given the details of regulatory requirements, is it not true that the inspector could always find some non-compliance? This example highlights the fact that much "give-and-take" is necessary in relationships between inspectors and parties inspected.

D. Permissions (Licences, Approvals and Entitlements)

Express guidance is needed for inspectors who have authority to grant, suspend or alter permissions. Ideally, this should appear in legislation; as well, as we have seen, much of the actual guidance is conveyed in internal instructions.

The powers of inspectors in this area are not well known. Better exposure of this state of affairs could engender discussion of possible ways to homogenize law and practices. For example, circumstances in which inspectors may suspend permission are usually specified as emergency or exigent. In fact internal controls usually ensure that such steps are only taken within strict limits. However, there is much room for improvement, especially where an inspector imposes requirements which alter earlier conditions of a permission. How, for example, can a party demonstrate that appropriate steps have been taken to correct defects or to address non-compliance? Again, exposure of inspector practices in issuing, altering, refusing and suspending permissions should be confronted in any study leading to reform of federal inspection.

V. Summary

Sometimes problems of governing can be best addressed by using an inspectorate or by increasing the numbers of inspectors. However, better understanding of the identities and styles of existing inspectors and of the true nature, control and organization of inspection, could lead to more informed choices.

In preparation for a survey of federal inspectorates, leading to proposals for law reform, a number of issues have been unfolded for consideration and review. It is hoped that this work in progress will help others who confront the tangled web of legal and other problems facing inspectors.

PART THREE

Inspection: Selected References

I. Introduction

A. Purpose

The materials listed in this part support study and reform of law governing inspection. Lists of available materials are needed to encourage exploration and understanding of government's actual means used for delegation of power or authority, and for controlling persons exercising such powers.

As background to the Law Reform Commission's work in administrative law, this part helps to illustrate some themes which unify an approach to reform. In particular, the materials illuminate issues concerning ways and means, organization of government and controls. The ways and means, available to government for implementing policy, are partially in the hands of inspectors: they provide the eyes and ears which are so often vital to the success of programs. Internal organization of government in Canada is in need of exposure and study; this is necessary to maintain the integrity of administrative action, especially in view of the new imperatives posed by the *Charter*.

Beyond their topical distinctions such as food quality and aviation safety, inspectorates share common problems in areas such as deployment of scarce resources, development of enforcement strategies and ensuring for correct emergency responses. This should be done, ideally, within a framework of internal and external controls. The materials help to expose ideas about all these issues.

Thorough study of inspection should include a taking stock of what inspectors are actually doing. Part One has shown that inspectors perform both supervisory and service functions. In this connection, the law governing inspection, inspectors and inspectorates is not perfectly analogous to law governing police. Although it is arguable that police also provide service to the public, most police action is taken with at least implicit enforcement objectives. This is not so for inspectors who provide advice, consultation, opinion and even direct services such as grading of products. It is suggested that much field study and lengthy investigation would be necessary to determine the full scope of the nature of inspection in Canada. Even though little of such work has yet been done, much can be done to raise a collective effort for making inspection better. Publication of lists of materials about inspection is a contribution to this.

In addition to inspecting private parties, places and things, government also inspects itself. An institution may "audit" or "study" its programs and activities; as well, other institutions, such as the office of the Auditor General and Treasury Board Secretariat, carry out internal "inspection". This is necessary to ensure fairness, efficiency and honesty in the work of government institutions and their employees. However, given the scope of the audit and evaluation "industries" of government, no effort has been made to give a comprehensive account of such inspection studies.

Much of government's inspection of private parties places and things, is actually accomplished by private parties. Such parties may provide information about themselves or about other private parties. In some instances, authority to inspect or supervise on behalf of government is expressly delegated to private parties. Therefore, the means for delegating and controlling such authority are also comprehended by the listed materials.

Public service is in need of constant renewal and improvement. This renewal should include government decision making, whether collective decisions expressed through institutions, or individual decisions taken by bureaucrats such as inspectors. Because they perform mixed tasks of supervision (such as enforcement) and service (such as advice giving) inspectorates are promising candidates for further study, leading to proposals for reform. As well, government delegation of inspection to the private sector poses important issues for politics, policy and law reform.

In forthcoming research, the LRC plans to survey Canada's federal inspectorates, and to display findings and general recommendations in a research paper. The present part is a basis for ongoing work within the LRC and elsewhere.

The selections of available materials about inspectors, inspection and inspectorates are presented in four lists. Ideas about improving legal organization of Canada's federal inspectorates formed the basis for selection of index terms.

B. Scope

The lists are representative, not comprehensive. This is mainly because the field of inquiry crosses other topics and disciplines. This was felt necessary to illustrate the elastic meanings of inspection and the activities and powers associated with inspection. As well, since there are few published articles and books about inspection in Canada, literature about associated issues fills the gaps. For example, there is growing literature on the police, and much of it is of obvious relevance to inspectorates.

The present part has been produced as a contribution to general education. This is consistent with the role of the LRC in publishing materials of general interest. As well, the document can help bridge "gulfs" between various disciplines. As such, this part is consistent with the LRC's new vision about administrative law, which is expressed in the LRC's consultation document entitled *Towards a Modern Federal Administrative Law* (B79).

Selected materials are presented in four lists: articles and books, official documents, legislation, and cases. Although the focus for the document is on materials which reflect contemporary Canadian law, the lists also include many items from other disciplines, places and times.

Literature listed under "articles and books" is drawn from academic, government, professional and popular sources. The academic and professional items are rooted in history, political science, public administration and law. They come from Canada, England, France, the United States and other countries. It was thought necessary to present materials from other jurisdictions in view of the need to fundamentally reassess the use, organization and control of inspection by Canada's federal Government.

"Official documents" includes miscellaneous materials produced by government institutions. Most of these items are Canadian, although some interesting foreign items are included. "Official documents" is, for some items, a misnomer because several listed items are confidential: each of these has been marked with an asterisk (*). Most of the items are available on request from the particular institution or through Canada's Department of Supply and Services. In some respects, the list is very uneven because it includes published studies and Royal Commission reports, as well as obscure items such as operational manuals and other internal instructions, delegation documents and government studies of inspection. Nevertheless, this grouping was made to maintain clarity about sources of documents. Some of the items listed as "studies" have not been reviewed. Many of the inspection manuals and instructions of government are cited without dates, in the same manner as they are listed in the 1986 *Access Register*. The designation "manuals, instructions" is meant to include all manner of internal instructions, such as manuals, circulars, directives and so on.

The "legislation" is Canadian. The "statutes" include Canadian federal statutes which pronounce about government inspectors, inspection and inspectorates, as well as private rights of inspection. The "regulations" include a selection of Canadian regulations which cover matters such as delegation of authority, exemptions from investigation, and so on. A reading of the legislation above might leave one wondering what "inspection" is, what "inspectors" are doing. In fact, the legislation underlines the frailty of a single word such as inspection for conveying the specialized nature of government work. For example, the statutes allow search in many instances within limits for authorization and respect for legal rights to persons of various designations. These officers are variously described in statutes as: inspector or other officer; any person authorized by an administrator; an engineer; a protection officer; any person authorized by the minister; inspector or authorized representative of the inspector; officer as defined by the Act; game officer; contractor; and so on.

The statutes enable many separate government inspection regimes. While this recognizes the needs posed by the mandates of specialized institutions, it nonetheless places inspection on different legal footings. Since inspectors take many enforcement decisions which can come under scrutiny by the courts, legislation governing such decisions is an obvious focus for a law reform list of materials.

"Cases" include mainly Canadian items about government inspection. As well, cases from other jurisdictions shed light on problems which are shared by other governments. Examples of matters considered by courts are issues about the nature of administrative functions and decision making by administrators.

C. User's Guide

The topical index at the end of this part contains references to the lists of materials. Each entry in the index is followed by reference numbers. Each number corresponds to an item in one of the lists, as follows:

All items in the list of "Articles and Books" are given designations beginning with the letter "A". Each item is also given a number, based on its alphabetic position, by author.

All items in the list of "Official Documents" are given designations beginning with the letter "B". Each item is also given a number, based on its alphabetic position, by country and then by source (usually an institution of government).

All items in the two sub-lists of "Legislation" are given designations beginning with the letter "C". Each item is also given a number, based on its alphabetic position, by name of act or regulations. "C" includes two sub-lists (namely, "Acts" and "Regulations"). Numbering of items on the second sub-list (namely, "Regulations") follows on the sequence of the sub-list of "Acts".

All items in the list of "Cases" are given designations beginning with the letter "D". Each item is also given a number, based on its alphabetic position, by name of party.

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