Correspondence

Loyalty Tests and the United Nations Secretariat

TO THE EDITOR:

It is likely that the opinion of the three jurists whom Mr. Trygvie Lie asked in November 1952 to consider the position of members of the United Nations Secretariat subjected to various loyalty proceedings in the United States has not been widely read. Yet it is a document of great importance to the future of international institutions. The fact that the opinion was made unanimously by an American, a British and a Belgian jurist may cause lawyers and non-lawyers alike to believe that its authority is unchallengeable. The undersigned, after a careful study of the opinion, strongly feel that it is open to serious objections.

The questions asked by the Secretariat were:

"(i) Is it compatible with the conduct required of a staff member for him to refuse to answer a question asked by an authorized organ of his government on the ground of the constitutional privilege against self-incrimination?

"(ii) What effect should be given by the Secretary-General to the refusal of the United States Government to issue a passport to a staff member for purposes of official travel?

"(iii) In view of the Charter requirements and the Staff Regulations, what action should the Secretary-General take when he receives information from an official source of the United States Government that a staff member of U.S. citizenship is alleged to be disloyal to his government?

"(iv) In the course of enquiries by agencies of the U. S. Government, should the Secretary-General make available archives of the Organization or authorize staff members to respond to questions involving confidential information relating to official acts?

"(v) If it appears that the Secretary-General possesses no present authority to dismiss holders of permanent appointments on evidence of subversive activities against their country or refusal to deny such activities, what new legal steps would be necessary and effective to confer such authority?"

These requests were made after a United States Senate Sub-Committee had voiced indignation at the refusal of the Secretary-General to authorize members of the United Nations called before the committee to testify with regard to official activities of the United Nations.

The jurists' opinion is a 50-page document, which was completed in two weeks and cites few authorities, judicial or non-judicial. Its reasoning and conclusions on the main issues may be summarized in the following propositions:

1. Any employee of the United Nations convicted of a criminal offence involving disloyalty to the state by the courts of his own country, or of any country having jurisdiction over him, should be regarded as absolutely barred from any employment in the United Nations.

2. Any employee of the United Nations, who in the course of any authorized national investigation, judicial or non-judicial (such as an investigation by a Congressional committee), exercises his constitutional privilege against self-incrimination, should also be absolutely barred from further employment.

3. The Secretary-General must act on any reports that an officer of the United Nations has engaged or is engaging in activities involving subversive activities in the United States as a host country. No member of any body declared subversive in the United States should be employed by the United Nations without special inquiry. Past membership of an organization declared subversive by the host country should not automatically justify dismissal, but should always put the Secretary-General on inquiry. Apparently this includes organizations declared subversive after membership has ceased. In cases where the Secretary-General is informed by any member state that an officer is or has been a member of an organization declared subversive in that state, the Secretary-General is not required to act solely on a communication in such a form, though he should institute a full inquiry; member states (including the host state) should provide the Secretary-General with the evidence upon which the accusation is based.

4. The commission suggests that because the procedure of the present Joint Appeals Board and the Administrative Tribunal—established to provide appellate machinery for dealing with contracts and discipline disputes of the staff—is unsuitable for the handling of security information, a special Advisory Panel composed of an independent chairman and two staff members should be created. This Advisory Panel is to pass on the evidence submitted by any member state and to recommend what action should be taken by the Secretary-General, which recommendation may or may not be accepted. The Joint Appeals Board and the Administrative Tribunal are not to interfere with the decisions of the Advisory Panel, though an appeal may still be taken to the Administrative Tribunal, which may award compensation in lieu of reinstatement if in fact the accused officer is discharged by the Secretary-General.

In communicating the opinion to the United Nations staff the Secretary-General said:

"I have decided to use the conclusions and recommendations of this opinion as the basis of my personnel policy in discharging the responsibilities entrusted to me by the Charter and staff regulations of the United Nations.

"In pursuance of the recommendation of the jurists, I propose to establish within a few days an advisory panel to assist me in dealing with specific cases in accordance with the opinion."

In its general observations the Commission of Jurists is eloquent on the need to balance the independent status and responsibilities of the United Nations, guaranteed by articles 100 and 105 of the Charter and the Convention on the Privileges and Immunities of the United Nations, with the demands of national security and loyalty. In effect, however, its recommendations appear to involve a large degree of surrender of independent standards of judgment by the United Nations whenever they differ from those of the

host country. In practice, this concerns particularly the relationship between the United Nations and the United States, since United Nations headquarters are on American territory and some 2,000 employees of the United Nations, including 350 senior ones, are American citizens. In the commission's view, standards of national loyalty in the host country may become automatically a test of fitness for employment as an international civil servant. Only by adopting this attitude could the commission come to the astonishingly naive view that:

"We can find nothing in the constitution of the United Nations or the provisions governing the employment of its staff which gives the least ground for supposing that there is or should be any conflict whatever between the loyalty owed by every citizen by virtue of his allegiance to his own state and the responsibility of such a citizen to the United Nations in respect to work done by him as an officer or employee of the United Nations".

That such "conflict" may exist was recognized at the San Francisco Conference when the position of United Nations officials participating in the preparation of military sanctions by the United Nations against their own country was discussed. Even the first conclusion, namely, that conviction of a crime involving disloyalty by a national court should be an automatic bar to employment in the United Nations, can be accepted only with the important proviso that any act of disloyalty due to overriding duties owed to the United Nations must be disregarded (see Kelsen, *The Law of the United Nations* (2nd ed.), p. 308). In this connection it should be noted that the commission nowhere tries to define the term "disloyalty" and that it felt compelled to say in a corrigendum that "disloyalty" and "subversive activities" are synonymous terms. Unfortunately the one term is almost as imprecise as the other.

The gravest aspect of the commission's opinion is the view that the exercise of the legal privilege against self-incrimination in national proceedings is automatically a bar to employment in the United Nations. We do not venture an opinion on the interpretation of the Fifth Amendment to the American Constitution, dealing with self-incrimination, except to say that it is controversial. The issue of fitness for employment in the United Nations should alone be relevant when inferences are drawn from the exercise by United Nations officials of the privilege against self-incrimination in national proceedings. There should be no automatic transfer of national standards of employability to the United Nations administration. An adoption of the commission's recommendation would mean that any legislative extension of powers of investigation in any member state of the United Nations becomes automatically the standard to be applied to its nationals in the United Nations. This would seem to be inconsistent with the spirit if not the letter of article 100 of the Charter, which provides that, in performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government or from any authority external to the organization, and that each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and his staff, and not to seek to influence them in the discharge of their responsibilities. Yet, the United States government has already followed up the opinion by a presidential order which decrees that all present United States employees of the United Nations, as well as all applicants for em-

ployment, must undergo a United States loyalty check. This was accompanied by an official request to the United Nations that "in the meantime, appointment action be withheld on any pending appointments of United States citizens". Inevitably, in the present state of international law, an international organization, such as the United Nations, cannot be entirely detached from its members. It has no territory of its own and must have a host country. It is all the more important that the host country should not be authorized unilaterally to set standards of political belief and behaviour of United Nations employees.

The recommendations of the commission, particularly because of the proposed dismissal from employment on grounds of refusal to testify before investigating bodies, have increased the sense of insecurity in the United Nations Secretariat. At a time when the United Nations and other international institutions are undergoing severe political testing, the commission's opinion must in all fairness be considered a surprisingly unsatisfactory treatment of the complex problems presented to it. The statute of the International Court of Justice describes as a source of law the "general principles of law recognized among civilized nations". A similar test should determine United Nations standards, of substance as well as procedure. The Universal Declaration of Human Rights, approved by the General Assembly in December 1948 by a vote of 48 (including the United States) to 0, with 8 abstentions, also lays down standards which ought at least to be applied to the United Nations itself. The United Nations must work out its own code. Conviction by a national court for such major and generally recognized offences as treason, sedition or the betrayal of official secrets should justify dismissal from the United Nations, but the adoption, in any one country, of special offences, and investigation procedures that fall short of established standards of fairness, cannot be regarded as part of generally recognized principles, and therefore as a proper standard for the United Nations. Such national practices should not therefore by themselves establish good cause for dismissal.

The whole issue is too grave and far reaching in its implications to be decided hastily, or by any one member of the United Nations. The future of the United Nations and its affiliated agencies depends above all on a permanent staff, which is loyal to the purposes of the Charter as well as capable and free of fear and pressure. The jurists' opinion is far from an adequate definition of the rôle and legal position of the international civil servant. We urge that it should be subjected to searching examination.

W. FRIEDMANN — F. E. LABRIE
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The Authority of English Decisions in Canada

TO THE EDITOR:

In the field of constitutional law in particular, lawyers are accustomed to considering issues where reasonable cases can be made for different points of

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view. A reasonable case certainly can be made against certain views of Mr. D. N. Hossie, Q.C., on the subject of the principles of precedent which now obtain in Canadian courts. In his paper on "The Civil Liability of Directors of a Corporation" published in the last issue of this Review, Mr. Hossie quotes at pages 912-913 the relevant passage from the judgment of Viscount Dunedin in *Robins* v. *The National Trust*, [1927] A.C. 515, and interprets its implications in part as follows:

> "The House of Lords was in 1931 the only body that could declare the Privy Council wrong, but since the Supreme Court of Canada has become a court of last resort, presumably it now has that prerogative as well. What happens when the House of Lords hands down a judgment contrary to one given by the Supreme Court of Canada will undoubtedly lead to much argument, but, since the question is what the English law on the point involved is, one would expect the decision of the House of Lords to prevail."

I have two main objections to the validity of these propositions:

(i) In large part the principles which obtain in our courts determining the authoritative effect of precedents are customary laws, constitutional in nature, developed and declared by the judges of those courts. The Supreme Court of Canada — now supreme in law as well as in name — has made no pronouncement which warrants Mr. Hossie's position, indeed the contrary seems to me to be true. (ii) Furthermore, where statutory provision for the establishment and authority of a final appellate court has been made, the binding authority of the decisions of that tribunal as precedents for the courts below it seems clearly and necessarily implicit in the statute or statutes concerned.

Let us look first in more detail at the second of these grounds of objection. It seems clear to me that no Canadian court is bound to follow as precedents decisions rendered in any English court after December 22nd, 1949, when appeals to the Judicial Committee of the Privy Council were terminated by appropriate amendments to the Supreme Court Act by the Parliament of Canada. These provisions are valid under section 101 of the British North America Act, which, when read with the Statute of Westminster, 1931, confers the necessary power to abolish appeals. The statutory words are that "The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the court shall, in all cases, be final and conclusive". This, I suggest, means two things as a matter of necessary implication: (a) No Canadian court is bound to follow as a precedent any decision of any English court rendered after December 22nd, 1949. Neither the Supreme Court of Canada nor any other court in Canada or elsewhere has power to rule to the contrary. The Canadian Parliament is constitutionally supreme in this respect and by necessary implication has spoken the last word. The English Court of Appeal and House of Lords — if their decisions ever were constitutionally authoritative here — are now just as much excluded as is the Judicial Committee. (b) Equally, it is necessarily implicit in the new provisions of the Supreme Court Act that all lower Canadian courts, at least in the common-law provinces, are now bound to follow as precedents any relevant decisions of the Supreme Court of Canada rendered since December 22nd, 1949. For them also there is no longer any question of being required to follow English decisions.

With these statutory exceptions, the principles of precedent are to be

found in judicial custom and, so far as the Queen's Canadian courts are concerned, such rules are subject to definition and development at the hands of Her Majesty's Canadian judges. For the Supreme Court of Canada, I suggest this means that the judges of the Supreme Court will settle by their own practice and declaration just what regard that court will henceforth pay to the body of Privy Council and House of Lords decisions accumulated during the period before December 22nd, 1949. Their determination in this respect will, in my view, be conclusive for all lower Canadian courts on the same issue. In addition, the Supreme Court judges will have to determine for themselves whether their court is to be absolutely bound to follow its own previous decisions or whether it is to reserve a power to depart from them in sufficiently strong circumstances. In the case of *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515, Chief Justice Rinfret had something to say relevant to these issues:

> "It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this court of the decisions of the Judicial Committee, should be accepted as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this court or from the Judicial Committee."

The *Woods* case concerned determination of the proper rules for calculating the value of expropriated property. These are the "rules" referred to in the last sentence of the passage just quoted. Also, since the case was commenced before December 22nd, 1949, appeal to the Judicial Committee was still possible, the termination of such appeals applying only to cases commenced after that date; hence that *final* reference by Chief Justice Rinfret to the Judicial Committee is not significant for this discussion. It should be noted that the Chief Justice speaks only of the Judicial Committee —he does not mention the English Court of Appeal or House of Lords — and moreover he speaks of "the interpretation *by this court* of the decisions of the Judicial Committee . . ." as the important consideration.

I conclude by taking care to point out that I have been speaking only of the problem of what precedents are now absolutely binding for Canadian courts as a matter of constitutional law. No doubt the influence of judgments of the highest English courts upon Canadian judges at the persuasive level will continue to be great.

W. R. LEDERMAN*

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TO THE EDITOR:

The paragraph at pages 912-913 of Mr. D. N. Hossie's interesting article in your last issue, in which he deals with the binding force of English decisions in Canada, concerns me. It is with very great respect for the author that I write

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to suggest a somewhat different approach to this subject and, in consequence, different conclusions to some extent. Mr. Hossie quotes the famous statement of Lord Dunedin in *Robins* v. *The National Trust*, [1927] A.C. 515, at p. 519, to the effect that the House of Lords is the supreme authority to settle English law and that a colonial court is bound to follow it. The author then makes the following statements: (a) that decisions of the English Court of Appeal, though not binding on provincial appellate courts, are binding on Canadian trial judges; (b) that decisions of the House of Lords and the Judicial Committee of the Privy Council are binding upon provincial appellate courts "and presumably, too, upon the Supreme Court of Canada"; (c) that where the House of Lords and Privy Council differ the House of Lords may correct the Privy Council; and (d) that the Supreme Court of Canada, since it has become a court of last resort, may "presumably" refuse to follow the Privy Council but not the House of Lords —"one would expect the decision of the House of Lords to prevail".

It is a little strange to find one of the most respected members of the Canadian Bar suggesting, in 1952, that any Canadian court, high or low, is bound by a decision of any English court. I should have thought that enough had been said on this subject already by Canadian courts and writers. Perhaps I may be permitted to direct attention to some earlier writings of my own in this Review: (1948), 26 Can. Bar Rev. 581; (1949), 27 Can. Bar Rev. 465; (1951), 29 Can. Bar Rev. 92. I should also like to direct attention to the statements, made earlier this year, of Mr. Justice Coyne and the late Mr. Justice Dysart of the Court of Appeal of Manitoba in *Kerr* v. *Kerr*, [1952] 4 D.L.R. 578. At page 584, Mr. Justice Coyne, in referring to decisions of the English Court of Appeal and of the House of Lords, says: "We are not, of course, bound by English cases and, with all deference, I am not prepared to follow the observations in these cases above referred to. The sound view, in my opinion, is that of the High Court of Australia in *Wright* v. *Wright* . . .". At page 592 Mr. Justice Dysart is reported to have said: "I venture to express my opinion that Canadian Courts should follow Canadian precedents rather than decisions of English Courts, which are not binding upon us". It is true that their lordships were here dealing with a point of law which had not at that date reached the Supreme Court of Canada, but on which there was much decision in divorce cases in both England and Canada, including very strong obiter in the House of Lords. The *Kerr* case was a nullity decision but the same question as to the onus of proof arose to be considered. The Canadian courts had to a large extent built up a jurisprudence different from that in England and particularly from that expressed in the House of Lords. It is also true that the judges in the *Kerr* case could easily have distinguished the English decisions. In fact some of them did so, but in addition these two judges, and Mr. Justice Montague who agreed with them, chose the more wholesome approach, by which they got directly to the merits of the rule.

There is a question whether our Supreme Court will ultimately agree with these and other views expressed in the last four years by judges of provincial appellate and trial courts. One clue to the possible approach of the Supreme Court appears in the judgment of Chief Justice Rinfret in *Rex* v. *Storgoff*, [1945] 3 D.L.R. 673, at p. 684, where his lordship says: ". . . the Supreme Court of Canada is now the court of last resort in criminal matters; and although, of course, former decisions of the Privy Council, or decisions

of the House of Lords, in criminal causes or matters, are entitled to the greatest weight, it can no longer be said, as was affirmed by Viscount Dunedin, delivering the judgment of their lordships in *Robins* v. *National Trust Co.* . . . that the House of Lords, being 'the supreme tribunal to settle English Law . . . the Colonial Court which is bound by English law is bound to follow it'". It is true that the Chief Justice was dissenting, but this does not appear to be the basis of his dissent. The majority preferred to accept a House of Lords' decision, which the Chief Justice preferred not to accept, and which his lordship was prepared to distinguish if necessary. No necessity appeared however. Presumably the Chief Justice would to-day say the same thing of all English decisions. It is to be noted that he is not referring solely to future English decisions, but also expressly to "former decisions". Reference should also be made to his lordship's remarks in *Woods* v. *The King*, [1951] 2 D.L.R. 465, at p. 475, reproduced in this Review (1951), 29 Can. Bar Rev. 837.

There is a further problem whether Lord Dunedin's remarks are applicable at all today in Canada. Are we "bound by English law"? Is there no Canadian law? To state the problem almost seems to dictate the answer.

Few people in Canada would suggest that English decisions should be thrown overboard. I am merely trying to suggest that, with the colonialism of former years put aside, we should look to English decisions, and to the decisions of other jurisdictions where the English common law has spread, for guidance and help in the exposition, application and extension of the English common law. We should not continue to consider ourselves bound by the decisions of an outside court, right or wrong. In building up our own jurisprudence for Canadians the decisions of the House of Lords will undoubtedly be helpful and should receive much weight. But our whole education would be lost if we were not to consider in each individual case, not the technical application, but the merits of the rule we seek to apply.

GILBERT D. KENNEDY*

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The Use of Legislative History

TO THE EDITOR:

I should like the opportunity to add a footnote to Mr. MacQuarrie's footnote (30 Can. Bar Rev. 958) to my article on the rule against the use of legislative history in the interpretation of statutes (30 Can. Bar Rev. 769).

The purpose of the article was to examine the statement in *Maxwell's Interpretation of Statutes* that "it is unquestionably a rule that what may be called the Parliamentary history of an enactment is not admissible to explain its meaning". I examined the history of and many exceptions to the rule and concluded that it goes to weight rather than admissibility; that in the vast number of cases legislative history deserves little or no weight; but that there may be cases where it is of vital importance in throwing light on a doubtful point of statutory interpretation, and then its consideration should not be foreclosed by the statement in *Maxwell*. In short I suggested that the so-called rule was a "counsel of caution rather than a canon of construction".

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Mr. MacQuarrie pointed out that in the *Wheat Board* case the Privy Council prevented counsel from introducing the original version of the bill which eventually became the National Emergency Transitional Powers Act, because to admit it would be to offend the rule against legislative history. This refusal is in the long-standing tradition which was the starting point and reason for my article. Unfortunately the Privy Council did not give reasons for its refusal.

In view of the vanishing function of the Privy Council in our judicial system and the cavalier treatment the problem received at its hands, recent statements in our Exchequer Court are equally important and certainly more instructive.

In *Alloy Metal Sales Limited* v. *M.N.R.* (52 D.T.C. 1072) counsel sought to construe a section of the Excess Profits Tax Act by reference to speeches in the house at the time of its enactment. In rejecting this assistance Archibald J. said that:

> "After giving careful thought to the wording of the subsection, I am unable to see that there is any such ambiguity in the wording of the section as to justify resort to the discussions in Parliament at the time when consideration was being given to the legislation".

The inference is that there is some degree of ambiguity which would justify resort to legislative history.

In *Mountain Park Coals Ltd.* v. *M.N.R.* (52 D.T.C. 1221) Thorson P. refused to use marginal notes in aid of the interpretation of a section in the Income War Tax Act. In so doing he relied on the rule against legislative history, commenting that:

> "While there are many instances where the Courts have resorted to the parliamentary history of an enactment in aid of its construction and while on grounds of principle it may be argued that the so-called rule should be regarded as a counsel of caution rather than a canon of construction, the weight of judicial authority supports the statement in Maxwell".

Two observations are called for. In the first place it is doubtful whether marginal notes are properly classified as legislative history; in the words of the Dominion Interpretation Act they "form no part of the Act" and are "inserted for convenience of reference only". If that is so, the legislative history rule need never have been invoked. In any event marginal notes deserve very little, if any, weight and therefore would be excluded even on my interpretation of the rule. More important is the judicial recognition that *Maxwell* represents only the "weight of judicial authority". The matter then may still be said to be in the balance.

The principle involved is an important one in view of the increasing preoccupation of the courts with interpretation of statutes made by Parliament or regulations made by ministers. It is to be hoped that our final court of appeal will consider the problem afresh. It is fifty years since Taschereau C.J. rather reluctantly adopted the English rule, though he "would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful" (*Gosselin* v. *The King* (1903), 33 S.C.R. 225, at p. 264).

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