CORRESPONDENCE
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Treaties and Rights of Transit on the St. Lawrence

TO THE EDITOR:

I have read with some interest the article written by Professor Lawford, in the December issue of the Review, on Treaties and Rights of Transit on the St. Lawrence[1] and would, with respect, take some exception, if not to the premise, to the conclusion, which I quote:

> It is difficult to think of any change in Canadian legislation concerning St. Lawrence navigation which does not involve the commitments arising from treaties binding Canada. Is not Canada obligated to extend the recent pitotage concessions granted to the United States to a number of other countries? Proposals to restrict the St. Lawrence coasting trade to Canadian vessels or to exempt American vessels from pilotage or other requirements should not be undertaken lightly.

Undoubtedly, your learned contributor has overlooked one or two points which I set out briefly.

1. The coasting trade of Canada—that is to say, the right to carry goods and passengers from one port or place to another—has always been restricted to "British ships" during the whole of this century and prior to that time.[2] We know that following the enactment of legislation, in respect of Canadian citizenship, a new definition was placed in the Canada Shipping Act defining a "Canadian ship"[3] but not altering in any way its co-equal status with the former definition of a "British ship" which emanated from the then applicable Imperial Statutes embodied in the Merchant Shipping Acts, 1894.[4] It is clear from this that foreign ships have at no time possessed the right to trade between Canadian ports.

2. Surely, in the context of international law, the rights of "navigation" and "trade" are not co-extensive. It would be only the most

[1] (1961), 39 Can. Bar Rev. 577, at p. 602.

[2] See, for example, An Act Respecting the Coasting Trade of Canada, S.C., 1902, c. 7.

[3] An Act to Amend the Canada Shipping Act, 1934, S.C., 1950, c. 26, s. 1(2).

[4] Canada Shipping Act 1934, S.C., 1934, c. 44, s. 2(5).

extreme view that the grant of a right to navigation would include a right to trade or take part in commerce.

3. The provisions of the British Commonwealth Merchant Shipping Agreement, which was signed at London on the 10th day of December 1931,[5] are of course basically to provide for a common status, standards of safety, the certification of officers and the treatment of seamen and (although not specifically mentioned as such) for a common policy in respect of what is known as "national character and flag"—of some importance when belligerent and other rights are considered. In any event, article 24 provides for a very simple method for a signatory government to withdraw from any given article (in this case article 11). In this context it is interesting to note that, at the Imperial Conference of 1930, which discussed the matters and things leading up to the Agreement,

> Canada reserves the right, when signing the agreement, to declare the extent, if any, to which the provisions of the agreement, other than those of Part I, shall not apply to ships navigating the Great Lakes of North America.[6]

It must be conceded that the Great Lakes of North America, however defined for legislative purposes, comprise a basin which drains to the sea through the St. Lawrence River and, by statutory definition, the "inland waters of Canada" encompass such waters as far seaward as a line drawn through a defined point on Anticosti Island. It is the area thus defined which was referred to by the Honourable Minister of Transport in his statement to the House on the 12th day of May 1961, the statement which in fact has given rise to the article upon which I offer these comments.

I should mention, in passing, that, although I offer no comment here as to Professor Lawford's references to "pilotage", it was necessary for Canada and the United States to co-operate in this respect in order to provide some effective means of control, since I believe it true to say that otherwise the individual States of the Union, bordering upon the Great Lakes of North America, have a constitutional power to enact suitable legislation with regard to that subject.

Referring back to the conclusion of the author quoted above, the only "change in Canadian legislation . . ." contemplated in the statement of the Honourable Minister of Transport is to place "British" ships in the same category as those foreign ships that have always been excluded from the coasting trade of Canada. In other words, Canadian ships will, for the first time, have some separate rights not granted to all other British ships, amongst which (heretofore) Canadian ships have been included.

The proposed change, as I see it, does not contemplate a denial

[5] The United Kingdom Trade Agreement Act 1932, S.C., 1932-33, c. 2.
[6] (1930), Summary of Proceedings, p. 26.

of any right of "transit" or "navigation" and in effect merely reserves the right to carry goods and passengers between ports situated in the inland waters of Canada to Canadian ships only. British ships—that is to say, those registered outside of Canada—will continue to enjoy the privilege of the coasting trade on the coasts of Canada

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TO THE EDITOR:

What the parties to a treaty understand it to mean may be reflected by their subsequent action.[1] Therefore Canada's restriction of her coasting trade to British vessels for a number of years is some indication that the treaty rights of non-Commonwealth nations do not include the right to engage in the Canadian coasting trade.

On the other hand, the failure of the non-Commonwealth nations to assert treaty rights to engage in the coasting trade need not constitute an abandonment of such treaty rights. Before conduct by the non-Commonwealth states can be used in construing the legal position, the conduct must have been based upon a feeling of legal obligation and not simply on considerations of convenience or political expediency.[2]

Although many Canadian treaties granting rights of navigation or transit contain a reservation respecting the coasting trade, two do not. I have referred to one, with Bolivia, in my article.[3] The other, with Iran, provides that Iranian ships must be given equal treatment with Canadian ships "in all matters relating to trade and navigation".[4] Bolivian and Iranian shipping may not con-

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[1] See the dissenting opinion of Read J. in the *Asylum Case*, 1950 I.C.J. Rep. 266, at pp. 323-324, citing *Corfu Channel Case: Merits*, 1949 I.C.J. Rep. 4, at p. 25. See also the *Minquiers and Ecrehos Case*, 1953 I.C.J. Rep. 47, at p. 83 (*per* Basdevant J.) and p. 87 (*per* Levi Carneiro J.).

[2] For a usage to become customary international law, it must be not only constant and uniform, but must also be "the expression of a right" appertaining to one State and "a duty incumbent on" another State: *Asylum Case*, *ibid.*, at pp. 276-277, and p. 286.

[3] (1961), 39 Can. Bar Rev. 577, at p. 602.

[4] Agreement between the United Kingdom and Persia, modifying the Commercial Convention of February 9th, 1903. Effected by Exchange of Notes at Tehran, March 21st, 1920. Great Britain, Foreign Office, Handbook of Commercial Treaties, *etc.* with Foreign Powers (4th ed., 1931), p. 512, article 4. Although on February 18th, 1922, the Canadian government (exercising a power given by article 2 of the 1903 Convention and article 4 of the 1920 Agreement) withdrew from the 1920 agreement, the withdrawal was cancelled on March 7th, 1925. Therefore there seems to be no doubt that the treaty still binds Canada. Indeed, it is listed as binding in an External Affairs Department document of February 24th, 1959, "Treaties in Force between Canada and other States Dealing with Navigation Matters."

stitute a significant portion of the vessels using the St. Lawrence. However, many other states are entitled to invoke most-favoured nation treaties and to claim the rights granted to Bolivia and Iran.[5] Have all these states refrained from asserting rights in the coasting trade through a sense of legal obligation?

In part, my article sought to show that many treaties—and particularly the most-favoured nation treaties and the General Agreement to Tariffs and Trade[6]—have been overlooked in considering Canada's international commitments concerning navigation.

Secondly, I argued that scant consideration appears to have been given to whether a right of transit includes the right to engage in the coasting trade during transit. Possibly, Mr. Gerity is correct in believing it the most extreme view that rights of navigation include rights to engage in cabotage. Yet Dr. H. Fortuin, rapporteur of the International Law Association's committee on navigation aspects of international rivers, seems to hold such an extreme view.[7] At present, the problem must be described as "difficult and unresolved",[8] and deserves further consideration.

Thirdly, I suggested that Canadian government proposals to restrict the Great Lakes-St. Lawrence coasting trade to Canadian vessels require restriction of the rights of other Commonwealth states under the British Commonwealth Merchant Shipping Agreement. Article 11 promises national treatment respecting the coasting trade to other Commonwealth states. I believe Mr. Gerity is mistaken in describing withdrawal from article 11 as "simple". Article 24 provides a procedure for withdrawal, but article 11 thereby would cease to apply between Canada and other Commonwealth countries. There appears to be no provision for partial withdrawal from article 11—for withdrawal of the rights only as concerns the Great Lakes-St. Lawrence. Thus, if Canada withdrew from article 11, she would forfeit the grant by other Commonwealth states of the right to engage in their coasting trades. Canada cannot withdraw from the burdens of article 11 without surrendering its benefits.

Revision of the treaty by the procedure provided under article 25 would seem preferable to withdrawal under article 24. Unfortunately, article 25 requires the unanimous consent of the parties to the treaty.

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[5] It is impossible in this short space to discuss the most-favoured nation treaties. They are referred to at pages 591-593 and related footnotes of my article.

[6] 55 U.N.T.S. 187; 1947 Can. T.S. No. 27.

[7] H. Fortuin, The Regime of Navigable Waterways of International Concern and the Statute of Barcelona (1960), 7 Nederlands Tijdschrift voor Internationaal Recht 125, at pp. 132-135.

[8] As I stated *op. cit.*, footnote 3, at p. 600-601.

Insofar as the proceedings of the Imperial Conference of 1930 can be used to interpret the legal rights of other Commonwealth states,[9] the proceedings support the right of British ships to engage in the Great Lakes coasting trade. Canada stipulated that she should have power to make a reservation concerning the Great Lakes *when signing the agreement.* No such declaration was made at that time. Presumably, by refraining from exercising her right to make a reservation, Canada assented to the application of the agreement to the Great Lakes.

Finally, I must comment upon the suggestion that Canada must grant special pilotage concessions to the United States in order to prevent individual states of the Union from introducing pilotage regulations detrimental to Canadian shipping. The short answer is that the United States is already bound by treaty[10] to allow Canada the right of transit of the American portions of the river and its canals and of the Lakes—including Lake Michigan. The United States treaty obligation is the law of the United States and precludes inconsistent legislation by individual states. Indeed this demonstrates that a broad construction of a right of transit as precluding arbitrary pilotage regulations may be as much for Canada's benefit as to her detriment.

In any case, my main point concerning pilotage was that a concession to one country—here the United States—must be extended to other countries having most-favoured nation agreements with Canada. No such concession should be undertaken lightly.

H. J. LAWFORD*

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[9] "Travaux preparatoires"—materials akin to legislative history of a statute—are of doubtful value in interpreting a treaty. There is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself: Conditions of Admission to the United Nations, 1948 I.C.J. Rep. 57, at p. 63.

[10] Treaty between His Majesty and the United States of America relating to Boundary Waters and Questions Arising Along the Boundary between Canada and the United States. Signed at Washington, Jan. 11th, 1909, 102 B.F.S.P. 140, article 1.

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