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CANADA AS A TREATY MAKER.

Canada's status within the British Empire, particularly in relation to external affairs, has been much debated since the Imperial Conference of 1926. It is thus perhaps not untimely to attempt to locate accurately Canada's position in at least one phase of external relationship—treaty making.

Most people are agreed that the so-called Halibut Treaty of 1923 marked the high point in Canadian treaty making practice. Much was said and written on the forum and in the press at the time about its constitutional and international significance, and it even yet causes an occasional ripple on the sea of journalism. Indeed so varied and inconsistent with one another have been the expressed opinions, all apparently with some shadow of authority, that at this time it may be useful to discover just what occurred when this treaty was entered into.

The negotiation, signing, ratification, and incidentally the effectuating of the Convention which is popularly known as the Halibut Treaty will thus be discussed briefly in this paper. As a basis for discussion of each of these steps, a brief chronological account of the events which accomplished each step will be given. This account is founded upon official data given to the public through the Canadian Parliament or in parliamentary papers and by the United States Department of State.

I.

As a result of the work of the American-Canadian Fisheries Conference of 1918, the conclusion was reached that there should be an annual closed season to preserve the halibut in the waters of the northern Pacific Ocean. Accordingly the then United States Secretary of State, Mr. Charles E. Hughes, caused a draft Convention to

be prepared, which he sent to the British Ambassador at Washington on December 14, 1922.¹ In an accompanying note he said that he would be pleased to be informed of the views of the British and Canadian Governments with reference to it, and expressed a desire that, should it be acceptable to them, it be signed at an early date so as to enable the United States Senate to give its advice and consent to ratification during the session then in progress.² The British Ambassador transmitted to the Canadian Government for its consideration, through the Governor-General, a copy of this draft Convention and note. He also sent copies of these documents to His Majesty's principal Secretary of State for Foreign Affairs at London.³

On January 16, 1923, the Canadian Government replied to the British Ambassador at Washington through the same channel, setting out three modifications which would make the draft convention acceptable to it. The only suggested modification which is relevant to matters discussed in this paper was that the words "Dominion of Canada" be substituted for the words "Great Britain" in the draft heading which read, "Convention Between the United States of America and Great Britain Concerning Halibut Fishery."⁴ On the same day the Governor-General, on instructions from the Canadian Government, telegraphed to the Secretary of State for the Colonies that with the three modifications the draft Convention was acceptable.⁵ Finally, after two messages from the Canadian Government requesting him to inform the United States Government that the Canadian Government was anxious to effect conclusion of the Convention at the earliest possible moment, the British Ambassador replied on February 12 that he had informed the United States Government of the modifications in the draft Convention desired by the Canadian Government and that he had notified the Secretary of State of the Canadian desire for an early conclusion of the Convention. He also added, however, that, having regard to the fact that the Treaty as signed would bear no title, its object being plainly expressed in the preamble of the document, he had, under instructions from His Majesty's Government at Westminster, omitted from his note to Mr. Hughes modification No. 1 proposed by the Canadian Government, namely, the substitution in the title of the words "the Dominion of

¹ (1923) Canadian Sessional Paper, No. 111a, pp. 4 and 5.

² *Ibid.*, p. 5.

³ *Ibid.*, p. 3.

⁴ *Ibid.*, pp. 7 and 10.

⁵ *Ibid.*, pp. 7 and 9. Note: The Governor General's messages of January 16, 1923, were based upon an approved Minute of the Privy Council for Canada of January 11.

Canada" for the words "Great Britain."⁶ This interchange of communications completed that stage in the process of concluding the Convention which may be classified as negotiation.

There are three noticeable features of the negotiation of this Convention: (a) There was direct communication between the British Ambassador at Washington and the Canadian Government through the Governor-General at Ottawa. The circuitous but once orthodox channel, from the Ambassador to the Secretary of State for Foreign Affairs at London, thence to the Secretary of State for the Colonies and thence to the Governor-General was avoided. However, this more direct method of communication was far from new and marks nothing more than recognition of an already established precedent.

(b) The next thing to notice is that the British Government was kept fully informed of all phases of the negotiation at all times and that the modifications suggested by the Canadian Government had the approval of the Ministers at London before being submitted to Mr. Hughes. And (c), an evasion by the British Government of what seems to have been an issue presented by the first modification to the draft Convention suggested by the Canadian Government appears. It was this apparent evasion which, by depriving it of a rightful name, likened the Convention in that respect to a bastard child. It was due to this that divers persons misnamed it with impunity; fancy being their only dictator. For example, the President of the United States has called it "a Convention between the United States of America and Great Britain,"⁷ and at the head of the official Canadian copy it is called simply a "treaty for the Protection of Pacific Halibut."⁸

This evasion is certainly the most noticeable feature of the negotiation of the Convention and was probably the most marked evidence of a reactionary British attitude in the entire transaction of concluding it. The Canadian Government seems clearly to have presented a clear cut issue when it suggested that the words "Dominion of Canada" be substituted for the words "Great Britain." The

⁶ *Ibid.*, pp. 9 and 10. Note: On February 15, 1923, the Secretary of State for the Colonies transmitted two suggestions of the Secretary of State for Foreign Affairs for modifications in the text of the draft convention to the Canadian Government through the Governor General. A title suggested was "Convention for the Regulation of Halibut Fisheries on the Pacific Coast of Canada and the United States." This was not adopted. The other suggestion was that the usual title of His Majesty in treaty practice be used in the preamble. This was possibly aimed at a patent error in the preamble of the draft convention which was corrected in the Convention as concluded. See 1923, Canadian Sessional Paper, No. 11a, p. 12 and p. 5; also U.S. Treaty Series, No. 701, p. 1.

⁷ U.S. Treaty Series, No. 701, Preamble to Proclamation, p. 1.

⁸ Canadian Official Copy, p. 3, Cf. (1923), Canadian Sessional Paper No. 11a, pp. 1 and 3.

ultimate decision of His Majesty's Government at London that there should be no title, thus avoiding giving express approval or disapproval of the suggested modification, or that the title, if any, should be "Convention for the Regulation of Halibut Fisheries on the Pacific Coast of Canada and the United States" was at best non-committal. Possibly it was artful, hardly bold. Assuredly it cannot be referred to as display of unbounded British enthusiasm for international recognition of a claim of the Dominions to negotiate international agreements such as treaties and conventions independently. Indeed the inference which arises from the presence in the recommendations of the Imperial Conferences of 1923 and 1926 of limitations and regulations concerning the independent initiation of treaty negotiations by Dominions is that the attitude of the powers at Downing Street has progressed far beyond that of February, 1923.

The British Government was admittedly correct when it stated that the object of the Convention is plainly expressed in the preamble thereto, which fact is advanced as a reason for not giving the document a title. But no one took the trouble to point out that neither the words "Great Britain" nor the words "the Dominion of Canada" would have correctly described the agreement-making party. The Convention is between the United States on the one part, and His Majesty the King of Great Britain and Ireland and the British Dominions beyond the Seas, Emperor of India, on the other part, and is so drafted.

This prompts a person to ask whether or not it would have been revolutionary or entirely unacceptable for some one to have suggested as a suitable title, "A Convention Between the United States of America and His Majesty the King for his Dominion of Canada Concerning Halibut Fisheries."

Taking all things into consideration, it seems difficult to establish that any great step in advance was made in the actual negotiation of this Convention. But it probably constitutes a goodly portion of the experience in the light of which the sub-committee of the Imperial Conference of 1926 on treaty procedure recommends that "In the case of a treaty applying to only one part of the Empire it should be stated (in the preamble) to be made by the King on behalf of that part."

II.

On January 16, 1923, the Governor-General of Canada telegraphed the Secretary of State for the Colonies, transmitting the

request of the Canadian Government that the Secretary of State for Foreign Affairs be informed that it was the desire of that Government that the necessary Full Powers be given the Honourable Ernest Lapointe to enable him to sign the Convention on behalf of the Dominion.⁹ After considerable insistence by the Canadian Government the Full Powers were issued bearing date the first day of February, 1923, and were despatched by post from Downing Street to Ottawa twelve days later.¹⁰

The next move on the part of the Canadian Government was to inform the British Ambassador at Washington that in its opinion, as respects Canada, signature of the treaty by Mr. Lapointe alone would be sufficient and that it would not be necessary for him to sign as well. This message was sent on February 21, and two days later the Ambassador replied that he had been instructed by His Majesty's Government to sign the Treaty in association with Mr. Lapointe. In the same telegram he advised as follows: "Until I am informed that the United States Government are ready to sign it would be preferable that Mr. Lapointe should not actually start" (for Washington). Subsequently, four days later, he sent a telegram marked "Very Urgent" to the Governor-General which read in part: "They," (the U.S. Government), "are most anxious to sign on the afternoon of Thursday, March 1, in order to obtain ratifications before the Senate rises on March 4. Can Mr. Lapointe be here by that time . . . ?"¹¹ And later in the same day he again very urgently wired stating that the State Department had now informed him that it was very desirable if possible to present the Halibut Treaty to the Senate on March 1st and had enquired whether he could sign the Convention on the next day, February 28, "on behalf of Canada."¹² He also said, "I have thought it best to transmit this message, as additional delay of one day may make a difference

⁹ (1923) Canadian Sessional Paper, No. 111a, p. 7. The request was based upon an Approved Minute of the Privy Council for Canada of January 11, 1923: *ibid.*, p.8.

¹⁰ *Ibid.*, pp. 9, 10 and 11.

Note: *Ibid.*, pp. 9 and 10. Telegrams from the Governor General to the Secretary of the State for the Colonies; (January 30, 1923), "My telegram, January 16th. Fishery Treaty last paragraph. My Ministers most anxious for reply." (February 13), "My Ministers most anxious for reply to my telegram January 30 relative to furnishing Minister of Marine and Fisheries with necessary Full Powers to sign Halibut Fishery Treaty at earliest possible moment."

¹¹ *Ibid.*, p. 13.

¹² *Ibid.*, p. 14. Note: It was thought advisable to quote rather extensively from correspondence which passed at this stage rather than to resort to a briefer descriptive method of presentation in order not to lose the aid which "atmosphere" might lend to a proper understanding of the significance of the events.

as regards ratification by the Senate. I presume, however, that it would be more satisfactory that Mr. Lapointe should sign with me. Please telegraph."

The following day, February 28, the Canadian Government replied that Mr. Lapointe was then on his way to Washington, and reiterated its view that, (the Convention being one of concern solely to Canada and the United States, and not affecting in any particular any Imperial interest), signature on behalf of Canada by Mr. Lapointe, who had Full Powers, should be sufficient, and concluded, "A communication is being sent to-day to His Majesty's Government expressing the hope that His Majesty's Government will concur in this view and advise your Excellency accordingly."¹³

In this communication to the British Government, just referred to, addressed to the Secretary of State for the Colonies by the Governor-General as usual, and marked "Very Urgent," after acknowledging receipt of the Full Powers, he said:

"My Ministers are of opinion that, as respects Canada, signature of the Treaty by Mr. Lapointe alone should be sufficient. They proceeded on this assumption in asking for Full Powers for Mr. Lapointe. Having so notified the British Ambassador at Washington, it was with some surprise that an intimation was received from Sir Auckland Geddes to the effect that he had been instructed by His Majesty's Government to sign the Treaty in association with Mr. Lapointe. Evidently it has been assumed by His Majesty's Government that such is the wish of the Canadian Government. The view of my Ministers, however, is that the Treaty being one of concern solely to Canada and the United States, and not affecting in any particular any imperial interest, the signature of the Canadian Minister should be sufficient, and they would respectfully request that His Majesty's Ambassador at Washington be instructed accordingly. . . . It is most important that word should be cabled to Washington with the least possible delay. . . . Kindly inform me, as soon after the receipt of this message as possible, of the action that may be taken by His Majesty's Government."¹⁴

On the next day, March 1, the British Government cabled in reply that the wishes of the Canadian Government were being telegraphed to His Majesty's Ambassador at Washington by the Secretary of State for Foreign Affairs.¹⁵ The Canadian Prime Minister gracefully acknowledged the cable in these words:

"On behalf of my colleagues and myself, I desire to thank your Grace and the Secretary of State for Foreign Affairs for so promptly communicating to His Majesty's Ambassador at Washington the wishes of the Canadian Government with respect to the signing . . . of the proposed Halibut Treaty."¹⁶

¹³ *Ibid.*, p. 14 at bottom and p. 15 at top.

¹⁴ *Ibid.*, p. 14.

¹⁵ *Ibid.*, p. 15.

The Convention was signed on March 2, 1923, by Mr. Lapointe alone.¹⁶

The question which first comes to mind is, "Exactly what was Mr. Lapointe's diplomatic and international status when he placed his signature with that of Mr. Hughes of the United States upon the document setting forth this Convention on that March day in Washington?" Documentary evidence shows that he was a Plenipotentiary of His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India,¹⁷ duly appointed and empowered by Full Powers to sign with equal force and efficiency as His Majesty could do if personally present.¹⁸ Nothing more is shown, nothing less. There was nothing in his Full Powers, as there was in the Full Powers issued to the Canadians who signed the Versailles Treaty in 1919, to show that he signed in respect of the Dominion of Canada only.¹⁹

¹⁶ U.S. Treaty Series, No. 701, p. 3.

¹⁷ (1923) Canadian Sessional Paper No. 111a, p. 11; U.S. Treaty Series No. 701, p. 1; Canadian Official Copy of the Convention, p. 3.

¹⁸ (1923) Canadian Sessional Paper, No. 111a, pp. 11 and 12.

¹⁹ (1919) Canadian Session Paper, No. 41j, p. 9, Full Powers Issued to Canadian Plenipotentiary at Versailles Conference.

(Sgd.) George R.I.

George, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, etc., etc., etc. To all and singular to whom these Presents shall come, Greeting:

Whereas for the better treating of and arranging certain matters which are now in discussion, or which may come into discussion between Us and the Powers and States in connection with the forthcoming Peace Congress.

We have judged it expedient to invest fit person with Full Power to conduct the said discussion on Our Part in respect of Our Dominion of Canada: Know ye, therefore, that We, reposing especial Trust and Confidence in the Wisdom, Loyalty, Diligence, and Circumspection, of our Right Trusty and well-beloved Councillor, Sir Robert Laird Borden, Knight Grand Cross of Our Most Distinguished Order of St. Michael and St. George, one of our Counsel learned in the law, etc., etc., Member of the Parliament of Canada, Prime Minister of the Dominion of Canada, have named, made, constituted and appointed, and We do by these Presents name, make, constitute and appoint him Our Undoubted Commissioner, Procurator, and Plenipotentiary, in respect of Our Dominion of Canada; Giving to him all manner of Power and Authority to treat, adjust, and conclude with such Ministers, Commissioners, or Plenipotentiaries, as may be vested with similar Power and Authority on the part of any Power or States as aforesaid, any Treaties, Conventions or Agreements that may tend to the attainment of the above-mentioned end, and to sign for Us and in Our Name in respect of Our Dominion of Canada everything so agreed upon and concluded, and to do and transact all such other matters as may appertain thereto in as ample manner and form, and with equal force and efficiency as We Ourselves could do, if personally present.

Engaging and Promising upon Our Royal Word, that whatever things shall be so transacted and concluded by Our said Commissioner, Procurator, and Plenipotentiary in respect of Our Dominion of Canada, shall, subject if necessary to Our Approval and Ratification, be agreed to, acknowledged and

Concerning his status Mr. Lapointe himself has said: "The member of the Canadian Government who signed the treaty for His Majesty the King had full authority to act in that capacity, and another signature would have added nothing nor taken away anything from the merit or demerit of that agreement. This question of the protection of our fisheries was a purely Canadian question, purely a domestic question, and the government of Canada took the position that one of its members should represent His Majesty in negotiating and signing this treaty."²⁰

Objectively analyzed, all of the evidence of an official character concerning the manner of signing this Convention by Mr. Lapointe on behalf of His Britannic Majesty establishes that it marked the first occasion on which a Convention or treaty between the Heads of States, where the terms of the agreement affected solely Canadian interests, was signed by a single Plenipotentiary who at the same time was a member of the Canadian Government. Internationally, he was a representative of His Britannic Majesty as such, not of the Canadian Government as such. This proposition was borne out a few months later in a manner which will be now related and discussed. At the Imperial Conference held in London during the month of November, 1923, which was attended by duly accredited representatives of Great Britain, India and the British Dominions, "the principles governing the relations of the various parts of the Empire in connection with the negotiation, signature, and ratification of treaties seemed . . . to be of the greatest importance."²¹ Accordingly, the subject was fully examined by a Committee, with the Secretary of State for Foreign Affairs of Great Britain, the Marquess Curzon of Kedleston, as Chairman, on which each of the various parts of the Empire was represented. Canada's representative was Right Honourable W.L. MacKenzie King, C.M.G., then, as now, Prime Minister.

accepted by Us in the fullest manner, and that We will never suffer either in the whole or in part any person whatsoever to infringe the same, or act contrary thereto, insofar as it lies in Our Power.

In witness whereof We have caused the Great Seal of Our United Kingdom of Great Britain and Ireland to be affixed to these Presents, which We have signed with Our Royal Hand.

Given at Our Court of St. James, the first day of January, in the Year of Our Lord, One Thousand Nine Hundred and Nineteen and in the Ninth Year of Our Reign."

The Full Powers issued to Mr. Lapointe correspond with the above in form except that his includes no phrase: "In respect of Our Dominion of Canada." Cf. (1923) Canadian Sessional Paper, No. 111a, p. 11.

²⁰ Canadian Hansard, Vol. LVIII, pp. 4615 and 4616, June 27, 1923.

²¹ Imperial Conference, 1923. Summary of Proceedings (1923) C.M.D. No. 1987, p. 13.

With the assistance of the Legal Adviser to the British Foreign Office, Sir Cecil J. B. Hurst, K.C.B., K.C., a resolution, of which, at this point, will be quoted only that part concerning signature, was drawn up and agreed to:

"The Conference recommends for the acceptance of the governments of the Empire represented that the following procedure should be observed in the . . . signature . . . of international agreements. The word 'treaty' is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between the Heads of States, signed by plenipotentiaries provided with Full Powers issued by the Heads of States, and authorizing the holders to conclude a treaty."²² Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part."²²

The Convention here being discussed was within the exact definition of a "treaty" as here described; it was bi-lateral; and imposed obligations only on the Dominion of Canada. Mr. Lapointe was a representative (but not an agent) of the Canadian Government. The procedure followed in signing the Convention went thus far with the resolution and is approved thereby.

But the resolution continues. It says, "The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear." It has already been shown in this paper that the Full Powers issued to Mr. Lapointe did not follow those issued to the Plenipotentiaries who signed the Versailles Treaty "in respect of the Dominion of Canada." As discussion at the Imperial Conference in connection with this resolution has not been made public it is impossible to ascertain whether or not there was any criticism then of the Full Powers issued to Mr. Lapointe. However, there is enough tacit criticism in the resolution.

Since the Imperial Conference of 1923 there have been negotiated and signed between His Britannic Majesty and the United States a Convention for the Extradition of Offenders Against the Laws for the Suppression of the Traffic in Narcotics,²⁴ a Treaty For the Suppression of Smuggling Operations along the International Boundary,²⁵ a Treaty for the Further Demarcation of the Boundary Between Canada and the United States,²⁶ and a Convention and

²² *Ibid.*, p. 22.

²³ *Ibid.*, p. 23.

²⁴ Signed June 26, 1924.

²⁵ Signed January 8, 1925.

Protocol For Regulating the Level of the Lake of the Woods.²⁶ These international agreements all purport to impose obligations only on Canada and the United States and were all signed by Mr. Lapointe as Plenipotentiary for His Britannic Majesty. In each the preamble recites that His Majesty is a party "in respect of the Dominion of Canada."²⁷ Concerning the "Smuggling Treaty," Right Honourable W. L. MacKenzie King has said, "This Treaty has been negotiated and signed in accordance with the procedure laid down at the Imperial Conference of 1923."²⁸ This procedure is partly in accordance with and probably partly a result of the focussing of the attention of the public of the Empire on the method followed in the negotiation and signing of the "Halibut Convention" of 1923. The recommendation of the 1926 Imperial Conference treaty procedure sub-committee in substance merely affirms and approves the position reached at the 1923 Conference concerning the issuance of full powers and elaborates somewhat the position then reached concerning signature.²⁹

(To be Continued.)

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²⁶ Signed February 24, 1925.

²⁷ (A. 1924) Canadian Sessional Paper, No. 251, p. 3; (A. 1925) Canadian Sessional Paper, No. 93, p. 1; (A. 1925) Canadian Sessional Paper, No. 98, p. 3; (1925) Canadian Sessional Paper, No. 99, p. 3.

²⁸ Canadian Hansard, Vol. LX, p. 734, March 3, 1925. Texts of the Full Powers issued in connection with these last four international agreements were not made public.

²⁹ See: Imperial Conference, 1926, Summary of Proceedings, as published by order of the Parliament of Canada, Part V. (a) at p. 19 and appendix to Part V. (a) at p. 24.
