



# The Conclusion of the American-Canadian Halibut Treaty of 1923 and Its Importance for British-Canadian Constitutional Relations

La conclusion du Traité américano-canadien sur le flétan de 1923 et son importance pour les relations constitutionnelles canado-britanniques

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## Abstract

The article is focused on the analysis of British-Canadian relations in connection with the conclusion of the American-Canadian Halibut Treaty of 1923 and its importance for British-Canadian constitutional relations in the context of Canadian efforts to gain independent access in specific bilateral economic relations in North America. The circumstances and discussions that accompanied the negotiation and conclusion of the Halibut Treaty between the United States of America and the Dominion of Canada were all reflected to a large extent in a clearer definition of the constitutional status of the Dominions and the problems of negotiation, conclusion and ratification of international treaties.

**Keywords:** British-Canadian relations; Halibut Treaty of 1923; British Empire; Canada; Great Britain; Dominions; constitutional relations

## Résumé

L'article se concentre sur l'analyse des relations entre le Canada et la Grande-Bretagne dans le cadre de la conclusion du Traité sur le flétan de 1923 (entre le Canada et les États-Unis) et son importance pour les relations constitutionnelles entre le Canada et la Grande-Bretagne dans le contexte des efforts du Canada pour obtenir un accès indépendant à des relations économiques bilatérales spécifiques en Amérique du Nord. Les circonstances et les discussions qui ont accompagné les négociations et la conclusion du Traité sur le flétan ont toutes été reflétées dans une large mesure par une définition plus claire du statut constitutionnel des Dominions et des problèmes de négociation, conclusion et ratification des traités internationaux.

**Mots-clés :** Traité sur le flétan de 1923 ; l'Empire britannique ; Canada ; Grande-Bretagne ; Dominions ; Relations constitutionnelles

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## Introduction

The beginnings of economic relations between the self-governing colonies, or Dominions, and countries outside the British Empire date back to the 19<sup>th</sup> century when their long-term interests went beyond those of the mother country in some cases. Frequently, the British Secretary of State for Foreign Affairs would be pursuing a foreign policy in certain areas which was either contrary to the wishes or economic and political objectives of its self-governing colonies or Dominions (Ollivier Vol. 1, 187) or in which the Dominions were not allowed to take part in negotiations, even to some extent (Stevenson, 72). These blunders were most unfortunate, and, beginning in the 1890s, voices began to be heard demanding both the incorporation of the interests of overseas autonomous territories within Imperial foreign policy and more intensive cooperation between the British Colonial Office and the Foreign Office (Beeman, 51–52).

These tendencies were most noticeable within the oldest Dominion: Canada. The 1867 British North America Act meant that Canada was unable to conclude international treaties independently, as this remained the prerogative of the mother country. Beginning in 1870, Ottawa politicians endeavoured to gain the opportunity of communicating about commercial matters not just with the British Dominions but also with foreign countries. Although by 1874 they were able to name Sir John A. MacDonald's successor, who held negotiations on a trade agreement with America, they were unable to approve the resulting document (Tupper, 5–7). This principle was abandoned in the subsequent decade, and as such the 1884 trade agreement with Spain was signed in Madrid by Her Majesty's representative, the Canadian High Commissioner in London, Sir Charles Tupper (CAB 32/8 March 1911, 10). The same approach was taken for an 1893 commercial agreement with France (Keith 1935, 125). Subsequently, in 1895 the British Secretary of State for the Colonies, the Marquess of Ripon, made official the practice of allowing representatives of Dominions to take part in negotiating agreements affecting the Dominion's interests. However, if such conventions were to be considered an international document, only Her Majesty's Government would be able to conclude them with a foreign sovereign state (Mackenzie, 492; Kennedy, 680–693). When Sir Wilfrid Laurier's government separately negotiated an additional trade agreement with France in 1907, it still had to be signed by the British ambassador and subsequently ratified by the British government. The Colonial Office's memorandum of 1911 confirmed the rule that Dominions could not separately agree upon any convention with a foreign country (see Keith 1916, 269–277).

## The Halibut Treaty

In 1917, discussions began between the USA and Canada on treaties dealing with the issue of fishing in coastal waters and in the Pacific. These made up a significant part of the economy, and as such both countries wanted to deal with contentious issues. In 1919, two separate treaties were agreed on, regulating the rights to fish for salmon and halibut in the area (DCER, 624–628). It was shown that in practice the treaty conditions did not apply to the rest of the Empire, and Canada's negotiator, Sir John Douglas Hazen, endeavoured to add some modifications (DCER, 622; Wigley 1977, 175). Although the so-called Salmon Treaty did go into force, contradictions between the competencies of state and federal authorities in the United States meant that it was difficult to enforce (DCER 1970, 628–629). Negotiations on the so-called Halibut Treaty were put on ice (Wigley 1977, 175). It was not until March 1922 when there were changes at government-level in both countries that discussions resumed (FRUS, 669–670). A document was produced for signing in early 1923.

The Canadian Prime Minister, William Lyon Mackenzie King, judged that countersignature by Britain was not necessary, since Canada had negotiated the treaty's contents independently, and so he replaced "Great Britain" in the preamble with "the Dominion of Canada" (Dawson, 254; CO 886/10/2 24 January 1923, 303). In January 1923 Mackenzie King officially asked the Foreign Office through the Colonial Office for their consent that the Canadian minister Ernest Lapointe, whose resort included Pacific fishing, sign the document alone (CO 886/10/2 17 January 1923, 302). Although Britain's Colonial Office did not have any objections since it was a local and special interest relevant only to Canada which did not threaten the Empire's diplomatic unity, the Foreign Office was vigorously opposed, despite admitting that there was precedence in the matter in the form of the recently concluded trade convention between Canada and France (CO 886/10/2 30 January 1923, 304). Foreign Office representatives did not share Ottawa's position that the signature of the authorised Canadian minister sufficed and signature of Britain's ambassador in Washington, Sir Auckland Geddes, was unnecessary since he represented the United Kingdom and not Canada. They instructed Geddes to order the preamble be changed so that in accordance with practice hitherto his signature would be first, with Lapointe merely attaching his signature on behalf of Canada (CO 886/10/2 10 February 1923, 304; Wigley 1977, 176).

Despite the strong objection of Foreign Office officials and the Washington Embassy, Mackenzie King was adamant. On 21 February 1923, he announced that Ernest Lapointe alone would sign the treaty since it was purely a Canadian-American matter. He threatened that were this not to occur, he would be forced to name an entirely independent Canadian diplomatic representative in Washington (CO



886/10/2 21 February 1923, 306; Wigley 1973, 225). When British representatives were told by American colleagues that the ratification process would begin on 4 March, they found themselves pressed for time (CO 886/10/2 28 February 1923, 307; Dewey, 138). The British Foreign Office chose the “lesser evil.” They agreed that the Canadian minister could formalise the treaty independently as Britain’s authorised representative without the involvement of the British Ambassador in Washington (CO 886/10/2 1 and 2 March 1923, 308–309). On 2 March 1923, Ernest Lapointe and America’s Secretary of State, Charles Evans Hughes, undertook the signing ceremony for the so-called Halibut Treaty (FRUS 2 March 1923, 468–470).

Shortly afterwards, the British Prime Minister found himself facing demands in the House of Commons that he submit the British-Canadian telegrams about the fishing treaties, and being asked whether a signature of the Ottawa minister had the same weight as that of a member of His Majesty’s Government. Andrew Bonar Law refused to publish the correspondence and confirmed that Canada’s representative had authorisation and was thus able to sign it on behalf of the King (CO 886/10/2 8 March 1923, 309). His Canadian opposite number had it no easier; the Conservative opposition leader, Arthur Meighen, suspected him of secret cabinet diplomacy which was putting relations between Canada and Great Britain in danger. Mackenzie King was determined to defend himself against this accusation, and he asked Britain’s Colonial Office to consent to the publication of the correspondence which it had had with Canada’s Governor-General. Although he received a negative response from them, he used its ambiguous formulation as an excuse to submit the relevant telegrams to members of Parliament (DCER, 655–659). This did not go down well with Britain (DCER, 660–663).

In hindsight, Canada’s March 1923 diplomatic success would seem to create momentum for further constitutional changes in relations between the Dominions and the motherland, although it seemed at first to be purely a formal and internal change in how treaties were concluded. It had been repeatedly demonstrated since the signing of the Treaty of Versailles that in practice the Dominions were acting more and more like independent states, although from a legal and constitutional perspective they still held a subordinate status towards London which allowed them to request and advise, but not to make decisions (Stevenson, 73; Wilson, 730). Ernest Lapointe saw the Canadian-American fishing treaty as purely a domestic matter, but he nevertheless believed it had far-reaching consequences since by concluding the treaty the United States was recognising Canada’s international position (Allin, 255). He was drawn to this conviction because the United States had not ratified the Covenant of the League of Nations, and therefore did not perceive membership of the Dominions within the League of Nations as evidence of their new status within the British Empire (Lowell 1923/1924, 15).

## Subsequent discussions

Thus the time came for Britain to reassess its Dominions policy. The Foreign Office viewed the circumstances around signing the purely trade-focused Canadian-American treaty as a major threat for joint imperial diplomacy, since in signing it Lapointe had geographically unrestricted authorisation in representing not just an autonomous part of the British Empire but also London itself. Thus the opportunity was now there for Dominions to deal with foreign policy affairs themselves, breaking free from their role as “sleeping” partners to the Foreign Office. While the British Governor-General in Canada, Lord Byng, and the British Secretary of State for the Colonies preferred to put the incident behind them, Britain’s Foreign Office was determined not to admit “defeat,” nor even mere retreat from established procedures (cf. CO 886/10/2 28 March 1923, 311; Lowell 1923/1924, 20; Wigley 1977, 178–179; Wrong, 14). This position was in line with Lord Curzon’s persistent efforts to retrieve full control over foreign policy, about which more decisions were made during David Lloyd George’s period in office amongst a small circle of people around the Prime Minister than within the Foreign Office (see Bennett, 467–482; Maisel, 60–88).

The British position that Mackenzie King should at least apologise to the Americans for the diplomatic confusion and clumsiness surrounding the completion and signature of the Halibut Treaty, or to Lord Byng for publishing the correspondence, was not realistic. The Canadian Prime Minister went on the counter-attack and demanded that the issue of publishing communication between Dominions and the mother country be dealt with at the upcoming Imperial Conference (Wigley 1977, 179; Wigley 1973, 226). At the same time, the ratification process was underway for agreements in other overseas Parliaments, in which Dominion politicians held different opinions over the importance of these agreements.

Over the course of the summer of 1923, discussions were held in Whitehall that confirmed the Foreign Office and Colonial Office had different perspectives on how to deal with the issue of whether Dominions could agree treaty arrangements “technically” without British involvement. Representatives of the British Foreign Office conceded that the Dominions had begun over “the last few years to regard themselves as members of a community of free nations [...],” and came to the conclusion that it would be best to hold intensive discussions over the whole process of signing international agreements and clarify the situation at a meeting of Dominion and British leaders. As such, they proposed in an August 1923 internal memorandum that each overseas autonomous government should be able to negotiate its own bilateral agreements with foreign states and sign it without British countersignature on condition that responsibility for any benefits and obligations arising from such agreements should be borne by that Dominion (CAB 32/8 24<sup>th</sup> August 1923, 6–7).



In surprising contrast, the Colonial Office took an almost opposing position. In a September 1923 internal memorandum, officers there expressed the opinion that controversies arose only for multilateral agreements in which the Dominions did not negotiate alone, and which were generally signed by British negotiators in their name. They came to the conclusion that there was no need for radical changes to the system of concluding agreements as long as the principle of properly consulting the Dominions about everything was strictly observed, and that Dominion and British representatives would subsequently sign such agreements. The Colonial Office nevertheless indirectly admitted from a diplomatic and legal perspective that it would be difficult to keep these conventions to a uniform form (CAB 32/8 11 September 1923, [1]–9).

## The Imperial Conference of 1923

From 1 October to 8 November 1923, an Imperial Conference took place in the British capital. Compared to the previous conference its agenda did not include key constitutional topics, but it did play a significant part towards extending Dominion autonomy in matters of foreign affairs (Ollivier Vol. 3, 8–11; Wigley 1973, 224). It substantially affected relations between the Dominions and the motherland because it opened up a path towards accepting separate Dominion responsibility for foreign relations (Lowell 1926/1927, 382–383). After British Prime Minister Stanley Baldwin welcomed the representatives of the Dominions and the new Irish Free State in his opening speech, he admitted about the Commonwealth that, over the centuries, “our ever increasing control of natural forces has so knit the nations together that whatever affects one for good or ill affects them all.” He stressed the necessity to continue to strengthen their common bond, because “the British Empire cannot live for itself alone. Its strength [is] as a Commonwealth of Nations [...]” (Cmd. 1988, 10–11).

Due to the circumstances surrounding the Chanak Crisis (and the threat of war between the United Kingdom and Turkey) and discussions in Lausanne, Mackenzie King arrived in London with a basic vision that the Dominions should have the right to pursue their own foreign policy to avoid unwanted shared obligations. He was also of the conviction that diplomatic independence was best demonstrated by the Dominions acquiring the opportunity to conclude treaties with foreign countries independently (Wigley 1973, 225). He based his arguments on the wording of the talk “Canada and the Control of Foreign Policy,” given in early 1923 by his nationalist external affairs advisor, Oscar Skelton, who conditioned the idea of an independent policy towards foreign countries on any measures taken not being allowed to have a negative impact on other parts of the Empire. For this reason, he stressed the fact

that regular consultation should take place between the Dominions and the mother country in order to avoid different approaches in matters where the interests of participants overlapped, or even diverged. Skelton had long held a negative view of a common imperial foreign policy, as he considered it disadvantageous for the Dominions since it included many obligations with little opportunity for influence (Hancock, 304; Stacey, 66–67).

Finally, the Imperial Conference participants adopted a binding procedure for negotiating, signing and ratifying international agreements which have been signed by authorised representatives and which are subject to final approval. The Dominion representatives were able to negotiate conventions, but they had to look at the possible impacts on other Dominion and self-governing governments, or on the Empire as a whole. Before beginning discussions on conventions, they were to ensure that other Dominions did not want to be regularly informed – there were to ask Dominions whether they wished to be kept abreast of progress in negotiations and whether they were to participate directly in negotiations that were in the Dominion’s particular interest. Where an agreement was to be negotiated at international conferences through a British Empire delegation, all involved were to receive information regularly. A local authorised negotiator was to be able to sign bilateral agreements which resulted in obligations for just one Dominion. Where the agreements resulted in obligations for a number of Dominions, the corresponding number of delegates from the overseas autonomous territories involved were to sign it. The ratification process was to remain the same (CAB 32/22 16<sup>th</sup> October 1923, i–iii).

## Conclusion

The adopted resolution of 1923 on concluding agreements, formally acknowledging various precedents from previous years, allowed one of the problem areas in pursuing Imperial foreign policy to be resolved. Britain finally gave up its control over the conclusion of agreements, something which had come up against the aspirations and constitutional positions of the Dominions for many years, who now acquired the right to negotiate and sign agreements independently. At the same time, the Dominions began to consider themselves independent states, although their foreign affairs were managed by the British. Conflicts of opinion between the Dominions and mother country continued in later years, when a number of events occurred that impinged on matters of international relations. The circumstances and debate around the Chanak Incident, the Conference of Lausanne, the so-called Halibut Treaty, the 1923 Imperial Conference, the Geneva Protocol and the Pact of Locarno were significantly reflected in a clearer determination of Dominions’ constitutional position.



Ambiguities over the precise definition of the status and rights of Dominions towards the mother country were only overcome over the course of the Imperial Conference in 1926, which marked a new phase in the constitutional relations between the Dominions and the motherland. The 1926 Imperial Conference “resolved” the definition of Dominion status, and various longstanding anomalies and inequalities from the period when Dominions were perceived as subordinate territories. In some regards, the Balfour Declaration issued by the Conference rectified these aspects of institutional and constitutional relations within the Empire, even though in fact it merely formally acknowledged current practice. Nevertheless, the Conference resolutions and conclusions both covertly and overtly marked the beginning of a long road to extensive revisions and evaluations of the forms, measures and procedures within the Commonwealth. However, the Balfour Declaration did not come into force immediately. It took another five years for the legislative process, agreed at the 1930 Imperial Conference, to conclude in the form of the Statute of Westminster of 1931.

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