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Abstract: Westminster's Foreign Enlistment Act *of 1819 and 1870 forbade British subjects from recruiting for or serving in foreign military forces. Despite this prohibition, Britons served with foreign militaries in Europe and South America, and British North Americans and later Canadians fought or attempted to fight in the American Civil War, the defence of the Papal States, and the Ten Years War in Cuba (1868–1878). Authorities only pressed charges on rare occasions, in spite of frequent violations. While some people characterized these volunteers as mere mercenaries, others saw them as harmless adventurers, or even heroes.*

Canada's Foreign Enlistment Act,[1] passed in response to the Spanish Civil War, is the successor of two British statutes of 1819 and 1870. Westminster's Foreign Enlistment Act of 1819 was vague – a general prohibition against British subjects serving in foreign militaries or recruiting others to do the same. Yet during the next four decades, Britons served with foreign forces in Portugal, Spain, Italy, and South America. The eponymous 1870 act, an updated statute passed in response to the Franco–Prussian War, forbade enlistment in or recruiting for foreign militaries at war, but with which Britain was at peace. Despite cases regarding other prohibitions under the act – namely, outfitting ships for warlike

[1] 1 Geo. 6 c. 32.

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operations[2] and launching military expeditions[3] – there were no convictions for enlisting or recruiting in Britain. In British North America, however, during the US Civil War, officials charged several people in the Province of Canada who recruited for the Union army, and authorities contemplated action against the Nova Scotian and New Brunswick raiders in the *Chesapeake* Affair of 1863.[4] In the late 1860s, 507 Canadians left for the Vatican to defend Pope Pius IX, and during the Ten Years War (1868–1878) unknown numbers worked in secret to support Cuban revolutionaries.

By looking at these incidents – including when British and Canadian authorities *did* and (mostly) *did not* apply the legislation – we can conclude that its prohibitions were not widely popular. Evidentiary difficulties, although notable, cannot themselves explain why charges were rarely laid despite frequent violations. This three-part article catalogues and analyzes the origins of the imperial ban on foreign enlistment, its application in British North America and Canada in the turbulent 1860s, and the developments in response to the new act of 1870.

BRITAIN AND THE FOREIGN ENLISTMENT ACT UNTIL 1860: WESTMINSTER'S FOREIGN ENLISTMENT ACT OF 1819

A prohibition against foreign enlistment has no basis at common law. Throughout the Middle Ages and the Renaissance, most societies

[2] In 1863, British shipbuilders constructed three vessels –the *Alabama*, the *Alexandra*, and the *Florida* – for the Confederacy. Authorities detained the *Alexandra* before it could depart, but the other ships made it to sea. The *Florida* and especially the *Alabama* caused considerable damage to the Union. In June 1863, five of the builders went to trial in Britain for breaches of the Foreign Enlistment Act after the attorney general charged them for outfitting a ship for warlike purposes for the Confederacy. A narrow reading of what it meant to outfit a ship for warlike purposes led to a finding of not guilty; *The Attorney General v. Sillem and Others* (1863) 2 H & C 431. International arbitration over the *Alabama* resulted in Britain's paying the United States $15.5 million in damages.

[3] In December 1895, Sir Leander Starr Jameson led a raid from the Cape Colony into Transvaal to raise a rebellion against its Boer government. He was arrested, tried, and found guilty under the Foreign Enlistment Act; *R. v Jameson*, (1896) 65 LJMC 218; 60 JP 662.

[4] In December 1863, British North Americans sympathetic to the Confederacy captured the Union steamer *Chesapeake*. They took the vessel into Nova Scotian waters, where the Union navy recaptured the ship and some of its crew. The incident remained a major point of friction between the United States and Britain during the Civil War.

considered soldiers' vocations little different from those of carpenters or masons; their services were available to people who could pay. Professional mercenary forces – owing no allegiance to any particular sovereign – antedate professional armies as we know them today. According to legal historian Sir James Fitzjames Stephen,

> Down to the end of the eighteenth century it was not in practice considered improper for persons so disposed to seek military service where they pleased, and writers on international law maintained that neutral nations were under no obligation to belligerents to prevent neutral subjects from engaging in the service of either belligerent as they might feel disposed.[5]

In the seventeenth and eighteenth centuries, Britain prohibited its subjects from serving in foreign militaries only when that service constituted a threat to the sovereign itself.[6]

Demobilization of the British army following the Napoleonic Wars left thousands of veterans without income or adventure, but they could find conflicts elsewhere. Simon Bolivar recruited these soldiers for his rebellion against Spain in its South American colonies. Britain remained neutral in the South American conflict; weary from the Napoleonic Wars, Britain supported neither the Spanish nor the rebels.[7] However, the formation of a legion of ex-British soldiers –

[5] Sir James Fitzjames Stephen, *History of the Criminal Law of England*, vol. III (London: MacMillan & Co., 1883), 259.

[6] After the Gunpowder Plot in 1605, Parliament passed An Act for the Better Discovery and Repression of Popish Recusants. This law did not prohibit enlisting in foreign militaries, but rather required that individuals departing the realm in order to join foreign militaries swear an oath not to reconcile themselves to the pope, not to plot against the king, and to reveal people whom they found to be plotting against the king. An Act to Prevent the Listing of His Majesty's Subjects to Serve without His Majesty's Licence, 9 Geo. II, c. 40 (1736), responding to the Jacobite risings, forbade subjects to join foreign militaries without a licence from the king. The prohibition was general: Jacobites were joining the military forces of France, Prussia, Russia, and Sweden. Yet the legislation explicitly permitted the Scotch Brigade, a unit of Britons in service to the Dutch crown, showing that foreign enlistment was not an offense to the sovereign. A 1756 act (29 Geo. II, c. 17) was more specific: it outlawed service to the French king – hardly surprising in the opening months of hostilities between England and France in the Seven Years War. The punishment for breaching any of these three statutes was death without the benefit of clergy.

[7] See D.A.G. Waddell, "British Neutrality and Spanish–American Independence: The Problem of Foreign Enlistment," *Journal of Latin American Studies* 19, no.1 (May 1987), 1–18.

with mostly enterprising British subjects organizing, recruiting, and dispatching them – certainly gave the appearance that Britain was tacitly supporting the rebellion. The recruiting effort thus presented an international issue.

How could Britain maintain its real or perceived neutrality? The answer: Parliament passed the Foreign Enlistment Act of 1819[8] prohibiting British subjects from joining foreign militaries,[9] which action "may be prejudicial to and tend to endanger the Peace and Welfare of this Kingdom."[10] These offences were punishable by fine and imprisonment, yet more than 5,000 Britons served with Bolivar in the Albion Legion and other units.

The law's full title was "An Act to Prevent the Enlisting or Engagement of His Majesty's Subjects to Serve in Foreign Service, and the Fitting out or Equipping, in his Majesty's Dominions, Vessels for Warlike Purposes Without His Majesty's License." "Service" could include accepting a commission as an officer, joining as an officer or non-commissioned officer, or "otherwise enlisting" to "serve in any Warlike or Military operation." Enlistment need not be a formal process involving oaths or documentation; it might be employment "of or for or under or in aid of any" foreign power.[11] The foreign power could include "any Foreign Prince, State, Potentate, Colony, Province or part of any Province or People, or of any Person or Persons exercising or assuming to exercise the Powers of Government." "Person or Persons ..." covered service in rebel or insurgent groups, such as Bolivar's army.

Prohibitions on enlistment often related to actions likely to occur outside Britain or its territories. Potential soldiers might enlist while in the realm, or they might travel abroad for that purpose. The 1819 law made it illegal to enlist in Britain or its colonies, but also forbade going to "any Foreign state, Country, Colony, Province, or part of any Province, or to any place beyond the sea" to do so.[12] In the latter cases, a British justice could issue a warrant for the person's arrest on his return. The act also restricted the movement of foreign enlistees by prohibiting masters of ships from transporting violators.

[8] 59 Geo. III, c. 69.
[9] The act also forbade outfitting ships, but that is outside our focus.
[10] Ibid., Preamble.
[11] Ibid, s. 2.
[12] Ibid., s. 2.

It did not otherwise prohibit aiding, abetting, or otherwise facilitating violations.

Consequently, the Foreign Enlistment Act was an example of both personal and territorial law. The prohibition on enlisting applied to a certain group – "any natural born subject of his majesty,"[13] including British North Americans – regardless of where enlistment occurred. However, the act also barred recruiting: that anyone "shall attempt or endeavour to hire, retain, engage or procure"[14] someone for military service. This prohibition applied not just to British subjects but to anyone in Britain or its territories, an example of territorial law.

APPLICATION OF THE ACT (1819–1860)

The Foreign Enlistment Act was neither popular nor effective. In fact, it passed the House of Commons in 1819 by only 13 votes.[15] In his classic study of the Legionnaires who served with Bolivar, Alfred Hasbrouck wrote,

> What really happened was, that the authorities contented themselves with giving warnings, instead of acting. Even in the War Office British officers applying for leave to serve in South America were informed that leave could not be granted for such a reason but if the officer had other reasons for asking leave, it might be granted, and no inquiry would be made as to how he spent his time while on leave.[16]

Military authorities seemed to have no qualms against the process. Local authorities, the police, and the judiciary seem to have felt the same way.

In the following decades, authorities responsible for enforcing the Foreign Enlistment Act remained indifferent to it. In 1832, 300 Britons joined Dom Pedro, the first ruler of Brazil, in his expedition against the Portuguese homeland. Despite much debate

[13] Ibid., s. 1.
[14] Ibid.
[15] Alfred Hasbrouck, *Foreign Legionaries in the Liberation of Spanish South America* (New York: Columbia University Press, 1928), 112.
[16] *Bell's Weekly Messenger*, 14 September. 1817; quoted in Hasbrouck, *Foreign Legionaries*, 106.

in Parliament,[17] local authorities took no action against the offenders. In 1835, Parliament suspended the law for two years to allow British subjects to join the army of Queen Isabella of Spain,[18] but this was the only formal suspension. Normally, the act was simply ignored. In the late 1860s, during the *Risorgimento*, forces of the Papal States recruited Catholics in Ireland (and Quebec; see below),[19] but no charges followed. Parliament and local authorities alike knew about subjects serving with Dom Pedro, Queen Isabella, and the Papal States, but did not act.

In short, although the legislation remained in force, Parliament, the police, and the local authorities largely paid it no mind. In 1833, MP John Murray proposed repeal: "There never was an Act of the Legislature so little in accordance with the general opinions of the country."[20] His bill failed, but his opinion was hardly unique. The law, according to James Kent, "slumbered for nearly fifty years in the Statute-book undisturbed and unthought of; and certainly it is a remarkable fact that whereas in the law reports of the United States a large number of judicial decisions will be found wherein their Foreign Enlistment Acts have received construction on various points, in England not one legal argument was heard, nor one judgement passed upon the British Act until the well-known case of the *Alexandra*," during the US Civil War.[21]

BRITISH NORTH AMERICA AND CANADA APPLY THE ACT (1860–1870)

Westminster's Foreign Enlistment Act of 1819 applied equally in British North America. No one could recruit in British North America, a part of the realm, and British North Americans, as "natural born subjects of his majesty"[22] could not enlist in foreign militaries. The 1819 act applied to service with either the Union or the Confederacy, both of

[17] Hansard Debates - Great Britain, 16 December 1831, vol. 9, cc. 316–22; 9 February. 1832, vol.10, cc. 108–186.
[18] Ibid., 15 June 1835, vol. 28, cc. 779–781.
[19] Ibid., 18 June 1860, vol. 159, cc. 571–580.
[20] Ibid., 6 August. 1833, vol. 20, cc. 381–389.
[21] James Kent and Thomas Abdy, *Kent's Commentary on International Law* (Cambridge: Deighton, Bell & Co., 1877), 288.
[22] Foreign Enlistment Act (1819), s. 2.

which "exercise[d] the Powers of Government."[23] However, when civil war broke out in the United States in April 1861, it quickly became clear that many British North Americans would participate, despite Britain's declaration of neutrality on 13 May 1861. In May 1861, Governor General Sir Edmund Walker Head of the United Province of Canada reminded his people about this rule, as later (twice) did Arthur Hamilton-Gordon, the lieutenant-governor of New Brunswick.[24] Yet more than 50,000 British North Americans enlisted in the Union army, with only a small number enlisting in the Confederate forces.[25] Some British North Americans joined the Union forces in the cause of freedom, some needed a job, and a few were allegedly tricked or pressed into service against their will.

This section looks at challenges and changes to the law during the 1860s. The American Civil War generated a high-profile case, several reported trials, concern over military expeditions, and a clarifying statute with resulting trials. In the late 1860s, Confederation transformed the law's status in Canada, and the Papal Zouaves challenged its relevance.

A HIGH-PROFILE CASE

Arthur Rankin was a serving militia colonel and a member of the Canadian legislature. His sympathies lay with the Union, and in the summer of 1861 he travelled to Washington, DC, to offer his services to President Abraham Lincoln in person. He accepted a commission in the Union army and volunteered to raise the First Michigan Lancers with British North American recruits.[26] Newspapers covered these events widely, and Rankin asked Governor General Head for a leave of absence from his command of the 9th Militia District. Head reminded him of Britain's neutrality and the strictures against foreign enlistment.[27] Rankin ignored the warning, and he was arrested

[23] Ibid, s. 1.

[24] Robin S. Winks, *Canada and the United States: The Civil War Years* (Baltimore: Johns Hopkins Press, 1960), 190.

[25] Danny R. Jenkins, "British North Americans Who Fought in the American Civil War, 1861–1865" (MA thesis, University of Ottawa, 1993), 1.

[26] "Arthur Rankin," in *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1965).

[27] John E. Buja, "Arthur Rankin: A Political Biography" (MA thesis, University of

soon after his return to Toronto. The police magistrate in Toronto tried him in October 1861 for enlisting and recruiting.

Rankin pleaded not guilty. The prosecution's witnesses asserted that Rankin had shown them his Union commission.[28] The defence cited insufficient evidence for his enlisting or recruiting, challenged the court's authority over foreign activities, and claimed that the existence of a local parliament in British North America made the imperial law inapplicable.[29] The judge rejected the arguments on jurisdiction, but he dropped the charge of recruiting for lack of evidence – although every recruiting poster sported Rankin's name and signature – and referred his enlistment to the Court of Queen's Bench. The matter was dropped, and a trial never took place.[30] Ultimately, Rankin lost both of his commissions – British[31] and American (Union).[32]

Rankin was unapologetic and publicly denounced the Foreign Enlistment Act. He and his compatriots had "a perfect right to enrol themselves in the cause of freedom – that of the North against the South. There will be no lack of Canadian gentlemen not only willing but eager to avail themselves of the opportunity now presented to them of achieving an honourable distinction."[33] One editorialist similarly criticized the law and questioned the magistrates' motives:

> If the law were strictly carried into effect, it is clear that all those who left Ireland to serve under the banner of LAMORICIERE [a commander of the Papal army] and the triple tiara [the pope's crown], made themselves liable to the penalties of the Foreign Enlistment Act, and it was only the good sense of the Government officers which saved us the humiliating necessity of punishing those who were bent upon punishing themselves. But in the case of Col. RANKIN it is possible

Windsor, 1982), 99–100.

[28] "Mr. Rankin's Case," *Globe,* 9 October 1861, 2.

[29] Ibid.

[30] According to Buja, "Arthur Rankin,"102, only the Court of Queen's Bench could try matters regarding the Foreign Enlistment Act because of its status as an imperial statute. However, regular courts in British colonies could and often did try such matters. In fact, at s.9 of the law expressly states that offences *may* be tried before the Court of King's Bench at Westminster. This wording does not indicate a requirement, but an option.

[31] Ibid., 102. Peter McCutcheon and Alister Clark, two Canadian militia officers who joined Rankin's Union regiment, also lost their commissions.

[32] "COL. Arthur Rankin Resigns," *New York Times*, 29 December 1861.

[33] Arthur Rankin, Letter to the *Toronto Leader*, 5 October 1861, reproduced in Frank Moore and Everett, *The Rebellion Record* (New York: G.P. Putnam, 1862), 187.

> that even this option may be denied to us. A hot-headed political opponent may positively compel the Courts at Westminster to devote their time to the trial of a Canadian who has accepted a commission from the Government at Washington, and to condemn a loyal colonist to serious loss and inconvenience.[34]

Such criticisms of the act were common. In covering Rankin's trial, the Globe, a pro-Union newspaper, called the law "absurd" and "revolting to common sense." In particular, it scoffed at the notion that British subjects could not do "as they please" while in a foreign country.[35]

REPORTED TRIALS

Records of British North American trials under the Foreign Enlistment Act during the Civil War are scarce. Notable cases that were heard by a judge would sometimes be recorded in court reports like the *Upper Canada Law Journal*. However, most of these trials were presided over by police magistrates or justices of the peace. These authorities were not required to provide written reasons for their decisions, and if they did, the records were not held in a centralized repository. Newspapers reported very few cases, and they provided few details when they did. For example, the *Globe* reported at least six other cases besides Rankin's in local police courts[36] but provided only the names of the accused. Sometimes reported cases refer to the application of the Foreign Enlistment Act only tangentially. For example, in *The Queen v MacLeod*,[37] reported in the Upper Canada Court of Queen's Bench's court reports, a charge under the act was mentioned in passing because it interfered with an individual's ability to participate in unrelated proceedings. In the Galt bank robbery case, reported in the *Globe*, the defendant called the accusations unfounded – merely revenge by someone whom he had previously had charged under the act.[38] Personal correspondence

[34] "The American Question Generally: The Case of Col. Rankin," *London News*, 16 November 1861.
[35] "Mr. Rankin's Case," *Globe*, 11 October 1861, 2.
[36] William MacPherson and Joseph Farley (3 February 1865); Francis War (13 April 1865); and John Ernest, Thomas Hart, and William Kennedy (2 May 1865).
[37] (1865) 24 UCQB 458.
[38] *Globe*, 29 September, 1866, 2.

from the time sometimes refers to trials that an individual had witnessed or been aware of. From such sources, roughly 40 instances where charges were laid have been identified, but this number is far from determinative. An accurate count would require extensive archival research beyond the scope of this survey, but remains a fruitful subject for future researchers.

Three cases reported fully provide enough detail to be useful. The first trial involved Francis Martin, whom authorities charged for "enlisting men for the United States Army, offering them $350 each as bounty."[39] Martin, like Rankin, raised the defence of jurisdiction. He claimed that the legislation was irrelevant in British North America because of the local parliament. The court declined to address this issue, throwing out the case because the warrant was not specific enough. The warrant simply stated that he was enlisting men for the United States Army, not that he was enlisting men as soldiers for the United States Army.

The concern of jurisdiction received greater treatment in *R v Schram et al and R v Anderson et al.*[40] where two men had recruited John Talbot for service in the Union army. Their argument was not completely without merit. Under the doctrine of reception, British colonies were subject to the common law upon colonization but were not automatically beholden to all British statutes. Colonies with local assemblies – entrusted with making local laws – were only subject to British statutes that specifically indicated that they applied to the colonies. Chief Justice Richards of the Court of Common Pleas held that the intent of Parliament in the case of the Foreign Enlistment Act was clear, as it explicitly stated that it applied "in any ... colony." Furthermore, although the colony in question had its own separate legislature, Chief Justice Richards concluded,

> As long as it is admitted by the home government, by whom the supreme power of the empire is exercised, the proper channel through which all our relations and intercourse with foreign governments are to be carried on, the power to pass laws to bind the whole nation so far as regards

[39] (1864) 3 Ontario Practice Reports, 298.

[40] Note that the names of cases are derived from the Latin *Rex*, for King, or *Regina*, for Queen, which are often abbreviated to the letter *R*. In other cases, the Crown is referred to in the case name as the King or Queen, depending who the reigning monarch was at the time. It signifies that the legal proceedings came at the Crown's behest, as in a criminal trial.

> those relations (and, as necessarily arising out of them, the peace of the empire) must rest with the Imperial Parliament.[41]

The act applied in British North America and was a tool of British foreign policy. Consequently, the court upheld the two convictions.

MILITARY EXPEDITIONS

There was also the matter of military expeditions. Apart from the offence of recruiting, the Foreign Enlistment Act applied only to British subjects. It did not apply to foreign agents launching a raid from British North America of which perhaps the most famous was the 1864 Confederate operation from Montreal to rob banks in St. Albans,Vermont. However, the act would apply to British subjects participating in such an endeavour. Although the statute did not explicitly mention expeditions, it did prohibit employment "in any Warlike or Military Operation, in the Service of or for or under or in aid of any Foreign Prince, State, etc."[42] A military expedition conducted by private citizens, whether or not it was conducted at the behest of a foreign power, met these criteria if it was conducted in support of a foreign power. There were no trials to this effect during the Civil War, although it was contemplated. In the *Chesapeake* Affair, the lieutenant-governor of New Brunswick and the law officers of the crown contemplated possible charges under the act if the offenders escaped charges of piracy.[43] Ultimately, however, they laid no charges.

CANADA LEGISLATES (1865)

On 18 March 1865, the Province of Canada passed a law to further implement and clarify the Foreign Enlistment Act.[44] Reformer

[41] *R v Schram et al and R v Anderson et al*, (1864) 14 Upper Canada Common Pleas, 318–323.
[42] Foreign Enlistment Act (1819), s. 2.
[43] Winks, *The Civil War Years*, 259.
[44] An Act to facilitate the conviction and punishment of person's enticing Her Majesty's subjects to enter any foreign service contrary to the provisions of the Foreign Enlistment Act (1865) c. II.

Thomas Campbell Wallbridge proposed the legislation; one can only imagine the heated conversations he had with his fellow Reformer, Arthur Rankin, on the subject.[45] The content of the statute and the circumstances of the times suggest three potential purposes of the statute. First, the Canadian statute provided some refinement to a law that gave the judge or magistrate extremely broad discretion when it came to sentencing. The 1819 statute provided for imprisonment and fines, but with no stated limits. Even among the few cases we have available, this led to a broad range of penalties, from small fines to four years imprisonment without any reasons given.[46] The new Canadian act specified "a penalty of two hundred dollars, with costs," and possible committal "to the Common Gaol of the District, County, or City, for a period not exceeding six months at hard labour, and, if such penalties and costs be not forthwith paid, then for such further time as the same may remain unpaid."[47]

The Canadian act also provided an opportunity for the colony to announce its intentions to the public and its neighbours to the south. The act reminded the public again about the imperial statute of 1819 (the pronouncements by Governor General Head and Lieutenant-Governor Hamilton-Gordon indicating that such reminders were necessary). Also, as a colonial government with no formal means to declare or enact foreign policy, the new law indirectly reaffirmed its neutrality vis-à-vis the Civil War. Although Britain was officially neutral, incidents like the commandeering of the *Chesapeake* and the high-seas depredations of the British-built Confederate cruiser *Alabama* antagonized the Union. As the Union forces marched to victory in early 1865, Canada perhaps wanted to distance itself from such events that fuelled the perception that the British Empire generally supported the Confederacy. Of course, the province's tens of thousands of troops serving (despite the Foreign Enlistment Act) with the Union forces, and the massive efforts of the Underground

[45] *Journals of the Legislative Council*, vol. 24 (Quebec: Hunter, Rose & Co., 1865).

[46] In *The Queen v Gaffney*, a conviction for conspiracy to induce parties to violate the act resulted in a prison sentence of four years. Gaffney's lawyer, Thomas Galt, wrote to Attorney General (Canada West) John A. Macdonald requesting commutation. There is no record of Macdonald's response or the final outcome. Although there are no reports of the case, the letter is in Library and Archives Canada, RG 13-A-2. There is no record of Macdonald's response or the final outcome.

[47] (1865) Cap. II.

Railroad smuggling slaves to freedom in Canada, bespoke the true sympathies of many of its inhabitants.

APPLYING THE NEW LAW

The *Upper Canada Law Journal* reported two cases in full soon after the Canadian law was passed. *Re Bright* involved charges against James Bright for attempting to enlist John F. Russel and Thomas Livingood in the Union army. *Re Smith* saw prosecution of Andrew Smith for recruiting an unnamed fellow into the Union army.[48] Both defendants took their case to the Court of Queen's Bench following their conviction before police magistrates and justices of the peace.[49]

The court discharged Bright's conviction, largely due to inadequacies in the warrants, but also because it held that the $200 fine in the Canadian act was non-discretionary. Bright had received a $100 fine plus costs for the first charge, and a $100 fine plus costs and six months of hard labour in the common gaol for the second. However, the court held that "a fine for too little was as bad as a fine for too much." The fine had been set by Parliament at $200 and could not be modified.

In *Re Smith*, Justice Hagarty addressed the issue of when the act might apply:

> It seems to me that it is impossible to serve as a soldier in the army without serving as a soldier in some warlike or military operation. It is made an offence to serve as a soldier in any warlike or military operation, or in any other military or warlike capacity. I think to serve as a soldier in the army comes within the words of the statute. Mr Read [counsel for Smith] urged that the statute pointed to serving in actual hostile operations. I do not think it is so limited, but that it covers attempting to procure soldiers here for the army of a foreign state, at peace as well as at war. I think serving as a soldier in the army must come under either alternative, as a warlike or a military operation.[50]

[48] *Upper Canada Law Journal*, vol. 1, 1865, 241.
[49] Ibid, 242.
[50] Ibid.

Hagarty upheld Smith's conviction and affirmed that the 1819 act forbade enlisting in or recruiting for foreign militaries in times of peace as well as war.

The various recorded cases beg at least two questions. First, why were there so few charges, despite tens of thousands of violations? Unfortunately, reported cases and newspapers tell us little. Presumably, publicity about individuals' breaches made charges more likely. For example, Rankin attempted to raise a regiment, a public action that threatened British neutrality on a very different scale than a quiet recruiting effort. Sometimes, the choice of potential recruits may have been the issue. A letter from the Wentworth County attorney described 15 charges under the act and indicated that at least five involved attempts at recruiting serving British soldiers from the 47th (Lancashire) Regiment of Foot.[51]

Second, why no trials about *enlisting*? Rankin presumably escaped a full trial because of his position; his actions clearly violated the act. In the other cases, on the one hand, perhaps authorities recognized how difficult it would be to prove that an individual had enlisted in the Union army or was departing for such purposes. If the soldier enlisted in the United States, reliable witnesses would be hard to come by – most of them fellow enlistees reluctant to implicate themselves. On the other hand, perhaps authorities viewed enlisting as not a crime or as not particularly disruptive. Many people saw the action as a personal choice and, where it did not interfere with British neutrality, not worth bothering about.

Authorities in British North America laid few charges under the Foreign Enlistment Act, and only during the US Civil War. Britain never prosecuted anyone. It seems likely that Westminster's stated purpose for the statute – the preservation of neutrality – played a significant role in the few prosecutions. Britons acting in conflicts in South America or Italy did not threaten British neutrality, regardless of method of recruitment. However, the United States and British North America shared a long, porous border, and Britain and its colonies had many interests at stake in the US Civil War. While enlisting may have seemed a private matter, allowing recruiting

[51] LAC, "County Attorney Freeman-Wentworth - Refers to prosecutions under Mutiny Act and five under *Foreign Enlistment Act which* he *had* watched," RG 13-A-2. Note that in spite of the documents title, the document itself refers to 15 charges under the Foreign Enlistment Act.

could jeopardize Britain's neutrality. Prohibiting the recruiting effort, even if the law was applied unevenly, likely pushed the recruiting effort underground, making it less public and therefore less likely to implicate the Crown. The statute therefore helped uphold official British foreign policy, and may have helped British North America maintain stability.

CONFEDERATION AND THE PAPAL ZOUAVES (1867–1870)

After Confederation, Westminster's Foreign Enlistment Act of 1819 remained in effect in Canada with all three levels of government – imperial, federal, and provincial. As the court found in Schram, the act pertained to "intercourse with foreign governments," a matter that fell exclusively to the imperial Parliament. However, it was also an issue of criminal law, delegated to Canada's new federal government under 91 (27) of the British North America Act, which the provinces administered.[52] Ottawa could modify the Foreign Enlistment Act, but only in ways not repugnant to the imperial statute.[53] Even though the colonies-turned-provinces could no longer legislate on criminal law, their pre-1867 laws remained in effect until federal legislation supplanted them. Consequently, the Province of Canada's 1865 statute upholding the Foreign Enlistment Act[54] still held in effect in Ontario and Quebec. The imperial act remained in effect throughout the new dominion.

Soon after Confederation, Canadian volunteers again rallied to fight under a foreign flag. In the late 1860s, the Papal States stood as the last obstacle to the unification of Italy. King Victor Emmanuel II, whom the Catholic church had already excommunicated, was intent on incorporating the Papal States by force of arms if necessary. With the papacy under threat, Catholics from around the world rallied to provide Pope Pius IX with soldiers and funds. Mgr Ignace Bourget, ultramontanist bishop of Montreal, led the effort in Quebec. He put together a Central Committee of ten influential Montrealers, including Mayor Louis Beaudry, philanthropist Antoine-Olivier Berthelet, Conservative MP Rodrigue Masson, and Joseph Royal,

[52] 30–31 Vict., c. 3.
[53] Within the Colonial Laws Validity Act (1865) 28 & 29 Vict., c. 63.
[54] Ibid., c, II.

founder of *Le Nouveau Monde*. The organization sought upstanding, ultra-conservative young francophone Catholic men from across the province.

In total, 507 Papal Zouaves left Canada in 1868 for service to the pope. Following the sudden outbreak of the Franco–Prussian War in July 1870, the French garrison withdrew from the Papal States. Despite the remaining international volunteers, the Italian army soon laid seige to the Papal States and by November had occupied them. Most of the Canadian volunteers returned to Montreal within weeks of the defeat.

There were no charges against the Zouaves or their recruiters. John Cowan, acting consul for Italy in Montreal, responded to inquiries on the matter from Marcello Cerruti, Italian minister in Washington, DC, by reporting that newspapers had commented that the Papal States and Italy were not at war.[55] "This is open to question however, and the only effectual way to test the subject would be the institution of proceedings under the provisions of the said 'Foreign Enlistment Act.'"[56] Cowan was wise to be cautious, as the court would not accept such an argument. Since Italy and the Papal States were engaging in warlike activities – they had fought the Battle of Mentana only four months before the first contingent of Papal Zouaves departed Quebec – the act clearly applied. Furthermore, Justice Hagarty had held in *Re Smith* that the act applied equally to enlisting in or recruiting for militaries that were at peace or at war. It therefore seems unlikely that concerns over legal viability prevented prosecutions.

More probably, pursuing charges would have been political suicide. The papacy's sanction afforded a degree of protection within the deeply Catholic Quebec society. The volunteers were celebrated, instantly becoming folk heroes, and more than 1,500 people attended the first contingent's departure ceremony. The volunteers had all enlisted in the same way, with the same information, and had moved in organized groups. The Central Committee, composed of influential and wealthy citizens, also violated the law. None of these factors amounted to a legal defence, but they would definitely inhibit any would-be prosecutor, especially since neither British nor Canadian neutrality in Italy was ever truly at stake. The situation differed

[55] Italy did not declare war on the Papal States until 10 September 1870.

[56] Cited in Howard R. Marraro, "Canadian and American Zouaves in the Papal Army, 1868–1870," *Canadian Catholic Historical Association Report* 12 (1944–45), 94–95.

vastly from the relatively quiet and decentralized recruiting during the Civil War, and, in the delicately balanced new Confederation, no federal or provincial politician in Quebec could reasonably conceive of pursuing charges against brave young Québécois Catholics defending their spiritual leader and his lands.

BRITAIN AND CANADA IN THE 1870S: WESTMINSTER'S FOREIGN ENLISTMENT ACT OF 1870

As the sudden outbreak of the Franco–Prussian War led to a sequence of events causing the quick repatriation of the Papal Zouaves, so too did it require a quick re-examination and redrafting of the Foreign Enlistment Act. Fortunately, Westminster had convened a royal commission following the experiences of the American Civil War to examine potential updates to the statute. The report largely focused on provisions regarding the outfitting of ships, but it did include a recommendation to add a prohibition against engaging others for foreign enlistment by false representations.[57] With this report in hand, the British government quickly redrafted the Foreign Enlistment Act. Parliament repealed the 1819 legislation and passed a new act on 9 August,[58] only weeks after Prussia's invasion of France. The new act took effect throughout Great Britain's colonies and dominions upon publication, including the Dominion of Canada.

The new imperial statute added a few new offences. Preparing for or conducting military expeditions became an offence under the 1870 act. The statute also made it an offence to aid or abet any violators of the act, or to induce someone to enlist through misrepresentations, a recommendation of the royal commission.[59] Additionally, perhaps taking note of the wide ranging penalties imposed in British North America during the US Civil War, the new statute limited prison sentences to two years, four times longer than the Canadian statute of 1865. Most important, however, the new statute clarified the circumstances in which it applied.

[57] For the report's recommendations, see Gerald John Wheeler, *Foreign Enlistment Act, 1870, with Notes of the Leading Cases on This and the American Act* (London: Eyre & Spoltiswoode, 1896), 26–30.

[58] Foreign Enlistment Act, 1870, c. 90.

[59] Foreign Enlistment Act, 1870, c. 90, s. 8.

The new Foreign Enlistment Act was much clearer than the original. The 1819 statute had created a standing prohibition on foreign enlistment; in *Re Smith*, Justice Hagarty held that foreign military service, even in peacetime, violated the act. However, the 1870 statute applied to circumstances that much more closely matched the goal of enforcing British neutrality. The new act only forbade enlisting in the military of "any foreign state at war with any foreign state at peace with Her Majesty."[60] Foreign military service, outside of these express circumstances, was permissible, although the statute did not apply to activities in Asia.[61]

An interpretation clause added further refinement by explaining the terminology. For example, as we saw above, the act prohibited joining the military forces of "any foreign state at war with any foreign state at peace with Her Majesty."[62] Although "foreign state" would seem to exclude non-state actors, it actually encompassed "any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people."[63] Exactly *when* a non-state actor began exercising or assuming to exercise the powers of government would remain a matter to be debated in each circumstance. This was practically the same wording as the 1819 act, only without "potentates." As for "military service," it "shall include military telegraphy and any other employment whatever, in or in connexion with any military operation."[64]

CANADA AND THE NEW ACT

How would the Foreign Enlistment Act of 1870 affect Canada? Since the Province of Canada's clarifying statute of 1865 pertained only to the Foreign Enlistment Act of 1819, it was no longer of any force or effect. The provinces had no say over Westminster's new act, which

[60] Ibid., s. 4.
[61] Ibid., s. 33.
[62] Ibid., s. 30.
[63] Ibid.
[64] Ibid.

was a criminal law and so within Ottawa's exclusive jurisdiction. Only Parliament could now act on the matter.

The Ten Years War in Cuba (1868–1878) set off another slew of alleged Canadian infractions. An independence movement in Cuba against the Spanish had attracted the sympathies of many Canadians, and from 1869 until 1873 there were many rumours of recruiting for the rebel cause in Montreal and preparations for expeditions to Cuba from Nova Scotia and New Brunswick. Under the new Foreign Enlistment Act, military expeditions were expressly prohibited.

The new federal Department of Justice issued reminders to the lieutenant-governors of the Maritime provinces about the prohibitions under the Foreign Enlistment Act and launched investigations of these efforts. Alexander T. Paul, a New Brunswick county sheriff, visited one such expedition as it made preparations and "dissuaded" its members.[65] There were no charges in Nova Scotia or New Brunswick for violations, but there were some in Montreal, allegedly a hotbed of rebel recruiting.

Following an application by the Spanish consul general, Judge of Sessions Doucet issued a warrant for the arrest of James L. Starnes and William Robinson, serving militia officers in the local 1st Prince of Wales Regiment. They were accused of preparing for an expedition to support the revolutionary Cuban junta. The sole evidence newspapers mentioned was that *Montreal Gazette* reporter W.L. Thom "had several interviews with Major Robinson, in which the latter had admitted that there was some ground for believing that an expedition was being organized in Montreal for service in Cuba."[66] Also according to Thom, "The further the investigation proceeds the less ground there is for believing that anything serious was intended."[67] The hearing took place "behind closed doors,"[68] and the decision was not reported. However, the lack of follow-up in the papers indicates that the matter was dropped.

[65] Jonathan Swainger, *The Canadian Department of Justice and the Completion of Confederation, 1867–1878* (Vancouver: UBC Press, 2000), 52.
[66] "The Cuban Junta Fizzle," *Montreal Daily Witness*, 5 August 1871, 3.
[67] Ibid.
[68] "The Cuban Enlistment," *New York Times*, 6 August 1871.

BRITAIN AND THE FOREIGN ENLISTMENT ACT UNTIL 1860: THE LAST WORD

On 9 February 1875, Liberal MP Télésphore Fournier introduced An Act to Prevent Enlistment in the Services of Any Foreign State in Certain Cases not provided for by the Foreign Enlistment Act, 1870. Like the statute of 1865, it clarified and refined the relevant imperial act as it applied in Canada. It would establish fines of $200 and limit prison sentences to two years, a needless clarification in the wake of the 1870 act.[69] Unfortunately, the text of the bill has disappeared, so little else is known. The bill survived its first and second readings, but on 2 April 1875 Liberal Prime Minister Alexander Mackenzie stated that his government would not proceed any further because the bill "was not perhaps very urgently required at the present moment" and may have been in conflict with the imperial statute.[70]

Conservative Opposition Leader John A. Macdonald went much further. He stated,

> If the Act had been in force at the time the war was going on between the North and South, every man who went from Canada to fight for the Northern cause – and they went by the tens of thousands – would have been liable to have been marked as criminals. If such a law had been in operation in England some of the most conspicuous men in its history would have come within its provisions, including Sir GEORGE NAPIER,[71] Lord BYRON [who fought in the Greek War of Independence] and others. The whole of the officers serving, during the Peninsula War, by the consent of the Sovereign, with the Portugese [sic] army, although they were auxiliaries of England, would have come within the scope of such an act, had it been in force in England, and they would have been liable to be treated as criminals.[72]

Macdonald's criticism is telling. The 1819 statute had been in effect during the US Civil War, making it an offence for a British subject to enlist in the Union army. Further, the acts of 1819 and 1870 both

[69] Hansard Debates - Canada (9 February 1875), 29.

[70] Ibid. (2 April 1875), 1049. *The Journal of the House of Commons of Canada*, vol. 9, states merely that the order was discharged on its third reading (Ottawa: MacLean Roger & Co., 1875), 343.

[71] Although Napier had served in multiple locations during his military career, it had always been with the British army.

[72] Hansard Debates - Canada (2 April 1875), 1049.

allowed the sovereign's consent as sufficient to permit anyone legally to enlist in foreign militaries. Since Macdonald certainly knew all this – he was the attorney general of the Province of Canada while the act was being enforced – he was probably taking the opportunity to criticize the spirit of the British law and the idea of prohibitions against foreign enlistment in general. He, like many observers, considered such enlistments praiseworthy. His were the last words in Parliament on the matter until the Spanish Civil War in the mid-1930s.

CONCLUSION

Authorities rarely enforced the Foreign Enlistment Act during the nineteenth century. It was difficult to prove foreign enlistment, which often took place beyond the reach of British and Canadian courts. But the handful of convictions – despite many, obvious violations – indicates something more. Taken with the actions and statements of British legislators, and statements by Canadian legislators and journalists, it seems clear that many people did not see the practice of foreign enlistment as a problem. Many saw it as a laudable act in certain circumstances, while others seemed content to simply ignore the matter. Only the more public act of recruiting, which could pose a greater threat to neutrality, attracted sufficient attention to cause laying of charges. However, where neutrality was not in jeopardy, and particularly where charges could be detrimental to society – as with the Papal Zouaves in Quebec – local authorities did nothing. The act primarily supported foreign policy, forbidding subjects from acting contrary to British neutrality.

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