

of the Commission is bound to remove the weir. There does not seem therefore to be any ground for the fear expressed by Hon. Mr. Guthrie, in his argument before the Commission, that 'if it goes in, it will never come out,' for it must come out unless the Commission, on a new application, and after hearing all parties interested, allows it to be maintained. The removal of the weir, at the end of the term fixed, is not even conditioned on the reimbursement to the applicant of the moneys it has expended in constructing it. In other words, if the applicant builds the weir, it can only build it as a temporary structure, and must remove it unless a new order is obtained from the Commission, and if the company applies for a new order, the whole question of its right to place an obstruction in the South Sault Channel will be examined anew as if this order of approval had never been granted.

War Department's Proviso

"It is to be further observed that the applicant is identically in the same position should the Secretary of War of the United States order the removal of the weir. The permit of the War Department contains the express condition, 'that if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause an unreasonable obstruction to the free navigation of said water, the permittee will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation or other modification of the water-course hereby authorized shall not be completed, the permittee at his own expense, and to such extent and in such time and manner as the Secretary of War may require, shall remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the water course. No claim shall be made against the United States on account of such removal or operation.'

"Mr. Gordon, in his argument before the Commission, stated that if the company does not remove the structure within the time specified by the Secretary of War, it would be liable to a fine of \$5,000 a day. Looking at the matter from any viewpoint, it is clear that the applicant acquires no vested right by virtue of the order of the Commission, and the condition imposed by this order is even more rigorous than that contained in the permit issued by the Secretary of War, for the expiration of the term specified, without any further order of the Commission, compels the applicant to remove the weir.

Rights Carefully Safeguarded

"As a matter of fairness, however, and because the order of the Commission is a mere interim measure, this order reserves to the applicant or any other interested party the right to apply to the Commission, at least one year before the expiration of the period specified, for a further continuance of the submerged weir. It will make this application without having acquired any vested right by reason of the present order, and then the Commission may approve of such continuance on such terms and conditions as it may deem appropriate and equitable for the protection of the rights and interests of the people on both sides of the line in accordance with Article VIII of the Waterways Treaty. It is not easy to see how the rights of the people in both countries could be more carefully

safeguarded, and if, on such application, the continuance of the weir is not allowed, the applicant will be obliged to remove it."

The Webster-Ashburton Treaty

The main contention of the Canadian Government and of the other interests opposing the application was that Article VII of the Webster-Ashburton Treaty of 1842 is an absolute bar to the construction of the proposed weir in the South Sault channel. This article is in the following terms:—

"VII.—It is further agreed that the channels in the river St. Lawrence on both sides of the Long Sault islands (Croil island was then called 'Upper Long Sault island') and of Barnhart island, the channels in the river Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties."

On the one hand it was contended that this provision absolutely prevents the construction of the proposed submerged weir, and on the other hand, while there was some discussion as to the exact meaning and effect of Article VII, the chief contention was that this article has been superseded by the provisions concerning navigation of the Waterways Treaty, and is no longer a binding enactment.

"It is needless to say," states Mr. Mignault, "that the legal problem thus submitted to the Commission is an extremely important one. Without any idea whatever of reflecting in any way on the arguments of counsel, it may be added that this question should be most exhaustively argued, and that before deciding it the Commission should have ample time for full consideration.

"Neither of these requirements has been available to the Commission. The arguments of counsel—probably on account of the very magnitude of the interests involved and the many questions of fact arising out of the testimony, and also on account of the number of those who desired to be heard—did not deal exhaustively with this question. Giving the fullest possible effect to Article VII of the Webster-Ashburton Treaty, it still remains to determine whether the words 'free and open' have the absolute and unqualified meaning contended for.

No Time for Full Consideration

These words are used in other provisions of the same treaty, especially in Article II where it is stated that 'all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.'

"These words are also used in the Treaty of Washington of 1871 as to the navigation of the River St. Lawrence, from the forty-fifth parallel of north latitude to the sea, and this is a treaty right secured by the citizens of the United States. Would it be contended that the closing of the Rainy River at International falls for power development, which has been done, or of the St. Lawrence River at the Lachine rapids, where an alternative navigation route exists via the Lachine canal, would be a violation of treaty rights? And there is further question whether the High Contracting Parties in 1909, did or did not, by the navigation provisions of the Waterways