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FEDERAL/PROVINCIAL DISPUTES, NATURAL RESOURCES
AND THE TREATY #3 OJIBWAY, 1867-1924

by

S. Barry Cottam

Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements for the
Ph.D. degree in History

Université d'Ottawa/University of Ottawa

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ABSTRACT

FEDERAL/PROVINCIAL DISPUTES, NATURAL RESOURCES, AND THE TREATY #3 OJIBWAY, 1867-1924

S. Barry Cottam,
University of Ottawa, 1994

Supervisor:
Professor Cornelius J. Jaenen

This dissertation argues that the Ontario-Manitoba Boundary Dispute (1870-1889) and its aftermath limited the ability of the Ojibway of northwestern Ontario to maintain and develop their interests in the lands and resources to which they were entitled by the terms of Treaty #3, signed in 1873. In particular, their rights to the mineral and timber resources on their reserves were threatened. Furthermore, once the Boundary Dispute was resolved in favour of Ontario, their reserve lands were found to be in the province, which therefore gained the right to confirm the reserves. Continuing disputes between the province and the Dominion resulting from this retroactive decision delayed this confirmation until 1915. Once the reserves were confirmed, however, the nature of the Indian interest in them prior to 1915 was questioned by the province. In this and other ways, the fiduciary responsibilities of the federal government toward the Ojibway were encroached upon by the province of Ontario.

The governments and individuals involved in the lawsuits generated by the Boundary Dispute overlooked the fate of an increasingly marginalized and politically inconsequential group in the pursuit of their own agendas and interests. The courts squeezed the concepts of Aboriginal title to the land and its resources into narrow nineteenth century perceptions that still limit the rights of First Nations peoples. Placing these cases, in particular the "Indian Titles" case, *R. v. St. Catharines Milling & Lumber Co.*, and its 'corollary', *Ontario Mining Company v. Seybold et al.*, into their historical context contributes to understanding the complex problems still faced by the Ojibway of Treaty #3. The dissertation concludes with an exploration of the continuing attempts made by the Ojibway to assert their rights in light of these events.

ACKNOWLEDGMENTS

Giving consideration to the people involved with the completion of this dissertation is a pleasant final task. Over the years, debts of gratitude have accumulated, and I welcome the opportunity to acknowledge them now.

Place of honour on the list must go, not by convention but by necessity, to my doctoral supervisor, Professor Cornelius Jaenen. His openness and willingness to share this student's often rambling exploration of ideas has been encouraging from the beginning. Toward the end, he was there to see it through the minefields of writing.

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A special thanks is due to someone who was a few short years ago a new colleague in the History Department and is now a colleague in all the ways that anyone can be. My wife, Theresa Redmond, has been unfailing in her understanding and enthusiastic support of this project. I have taken many lessons from her as well. As for Thomas, his looking forward to more time for fun was motive enough to meet the final deadline.

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INTRODUCTION

The Ojibway of northwestern Ontario in 1867 were autonomous in their territory. By 1873, they had ceded most of it away in a treaty negotiated by representatives of the Crown. By the turn of the century, they were still not adequately settled on reserves promised by the treaty; their rich fisheries had been depleted; their rights to hunt and fish were being diminished; their traditional agricultural practices had not been satisfactorily replaced by the new methods and opportunities promised in the treaty; they were eliminated from direct economic development of the resource potential on their reserves through the provisions of a paternalistic *Indian Act* and a process of reserve selection designed to keep them away from natural resources of interest to Eurocanadians; and their relationship with the federal government, in particular the Department of Indian Affairs, was being encroached upon by a provincial government that had no responsibility for them and little sympathy for their situation.

Such a litany of change invites explanation. The argument to be presented here is that the Ontario-Manitoba Boundary Dispute and its aftermath interfered with and seriously limited the ability of the Ojibway of Treaty #3 to maintain and develop their interests in the lands and resources to which they were entitled by the terms of the Treaty. Just as their rights to hunt and fish were undermined by the increasing presence of whites, so too were their rights to

resources on their reserves undermined as a consequence of the Boundary Dispute. The Boundary Dispute and the lawsuits it generated reshaped the rights of the Ojibway according to the needs and agendas of the dominant society. In particular, their rights to mineral resources found on their reserves, promised during the negotiations but omitted from the legal Treaty document, were not upheld and their rights to the timber on their reserves were not honoured. Furthermore, once the Boundary Dispute was resolved in favour of Ontario, their reserve lands were found to be in the province; the disagreements between the province and the Dominion that resulted from this retroactive decision delayed the final confirmation of their reserves by the Ontario government until 1915. Once the reserves were confirmed, the nature of the Indian interest if such existed in them prior to 1915 had to be determined. The three parties, Ojibway, federal and provincial, continue to disagree on this question.

In the course of making this argument, a number of elements will be put in place. These include overviews of the history of the Ojibway in the Boundary Waters region; of the negotiation and signing of Treaty #3, with an emphasis on the question of the disposition of resources on Indian Reserves; of the causes, contexts and progress of Boundary Dispute itself; of its impact on the development of the resources of the Canadian Shield; and of the lawsuits generated by the Boundary Dispute as governments struggled over the question of ownership of those resources, in particular the "Indian Titles"

case, *R. v. St. Catharines Milling & Lumber Co.*,¹ and its 'corollary', *Ontario Mining Company v. Seybold et al.*² The attempts of the Ojibway to assert their rights in light of these events will be examined.

The outline above indicates the complexity of the argument. On the face of it, and indeed for many students of the Boundary Dispute, the political, historical, geographic, legal and economic arguments are the primary fascination of that twenty-year struggle between the new Dominion and provinces of Ontario and Manitoba over the rights to the vast northwestern territories that, on July 1, 1867, were still known as Rupert's Land. The development of the lawsuits involving notions of the Aboriginal title and rights to the land and its resources have been ignored or only briefly mentioned in such accounts. The impact of these cases upon the rights of Aboriginal peoples has been explored in the works of those, usually lawyers, concerned with Aboriginal rights and law; but seldom has the attempt been made to bridge the gulf between law and other

¹ 10 O.R. 196, 13 O.A.R. 148; *St. Catharines Milling and Lumber Company v. R.*, 13 S.C.R. 577; *St. Catherine's Milling and Lumber Company v. R.*, 14 A.C. 46. The historical context of this case has been examined more fully in S. Barry Cottam, "An Historical Background of the *St. Catherine's Milling Case*," (M.A. thesis, The University of Western Ontario, 1987). The company's name was misspelled in the first three cases; only the final decision by the Privy Council agrees with the company's spelling of its name, *St. Catherine's*. This is the spelling that will be used in general references to the case in the text.

² [1903] A.C. 73, affirming 32 S.C.R. 1, which affirmed 32 O.R. 301, which affirmed 31 O.R. 386.

disciplines in order to grasp how the Boundary Dispute affected those ignored by it yet whose rights were argued in it.

An examination of the cases and their evolution as consequences of the Dispute will make a contribution to understanding the changes experienced by the Ojibway, for the governments and individuals involved overlooked the fate of an increasingly marginalized and politically inconsequential group in the pursuit of their own agendas and interests. Thus, while the main focus of this dissertation is on the Boundary Dispute and the resource and legal issues involved, the main objective is to gain an understanding of their consequences for the Ojibway of Treaty #3.

The Treaty #3 or Boundary Waters region has long been the locus of boundary disputes among the peoples with an interest in it, whether Aboriginal or European. While the archaeological record reveals human habitation for over 6,000 years, the presence of the Ojibway has fuelled debate over when and how they came. In the period of exploration and the fur trade, the British and French each exerted influence in the region prior to 1760 as they competed for furs. After 1760, competition among the fur trade companies left its mark upon the region. Furthermore, the question of the extent of the Hudson Bay Company lands, which reached into the region, was never settled. British and French did not agree in the seventeenth and eighteenth centuries; the governments of Ontario, Manitoba and the Dominion could not agree in the nineteenth.

These disputes over boundaries have been reflected in disputes over jurisdiction. The rights of the Hudson's Bay Company under its Charter are still the subject of scholarly discussion. Once the region was acquired by the Dominion of Canada, the federal, Ontario and, briefly, Manitoba governments vied for control. For a time in the early 1880s, the Treaty #3 region was considered by the governments of both Ontario and Manitoba to be subject to their own jurisdiction. These disputes were ultimately resolved when the courts decided, in *St. Catherine's Milling*, that the region was Ontario land. However, this appearance of finality opened the doors into other areas of jurisdiction that continued to implicate the Ojibway, as the Ontario and federal governments argued for decades over which had control of the resources and lands reserved to the Ojibway.

The roots of these factors extend into the region's geography which, although dominated by the Shield, has variations and boundaries of its own that have helped shape its human history. A brief delineation of that geography will help place the issues addressed in this dissertation into their physical context.

1.1: The Boundary Waters Region: A Brief Geography

Extending from modern Thunder Bay to Lake Winnipeg, covering the area now known as northwestern Ontario, the Boundary Waters region³ is a geographical transition zone presenting a variety of conditions: it is the meeting place of the drainage basins of Lake Winnipeg, Hudson Bay and Lake Superior; the zone in which the mixed forest of the south yields to the boreal forest more typical of the Canadian Shield; and the region in which the Shield itself begins tapering off into the grassy parklands of the prairies.

The Canadian or Precambrian Shield is the dominating physical factor, however.⁴ It has been described as "the single

³ A number of terms will be used in referring to the geographical locus of this thesis. These include Treaty #3, Boundary Waters region, northwestern Ontario, and the Disputed Territory. The area covered by Treaty #3 did not become northwestern Ontario legally until 1889. This area will often be referred to as 'northwestern Ontario' when reference is made to it in a general way. Between 1870 and 1889, it was commonly known as the 'Disputed Territory'. The terms 'Treaty #3', 'Disputed Territory' and 'northwestern Ontario' are approximately coterminous geographically. Generally, the area in question is west of Lake Superior (not including modern Thunder Bay), and is bounded on the south by the Rainy River, which forms the international boundary with the state of Minnesota, and on the north by the so-called 'height of land,' a line that represents the separation of rivers flowing into Lake Superior and those emptying into Hudson Bay; on the west, Treaty #3 includes part of eastern Manitoba, a complicating factor that, mercifully, is of little account here. See Map 1.

⁴ It was also known as the (Laurentian) Uplands or Plateau until the current appellation came into popular usage in the nineteenth century. J. Lewis Robinson, *Resources of the Canadian Shield* (Toronto: Methuen, 1969), 2. Robinson cited G.M. Dawson's 1897 volume, *The Physical Geography and Geology of Canada*, which credits the term "Canadian Shield" to an E. Seuss, a Swiss

topographical feature that has most influenced the shape of Northern Algonquian life."⁵ It has been a shaping force in the history of the Eurocanadians who have confronted it as well. A vast extent of Precambrian rock overlaid with a thin veneer of boreal forest and dotted with thousands of lakes, the Shield is the source of much of the country's vast wealth in primary resources. As such, it has been the magnet for development that pulled 'Empire Ontario' beyond the agricultural fringes of the south into the harsh land of dream and promise to the north. It was also one the formative factors in the maintenance in Ontario of a system of Crown control over resources, as opposed to the U.S. system which permitted the ownership and disposition of resources by individuals.⁶

Geologically, the Shield was formed by volcanic activity three billion years ago. Resulting structural differences in the rock

geologist.

⁵ Jennifer S.H. Brown and C. Roderick Wilson, "The Eastern Subarctic - A Regional Overview," in *Native Peoples: The Canadian Experience*, ed. R. Bruce Morrison and C. Roderick Wilson (Toronto: McClelland & Stewart, 1986), 136.

⁶ See H.V. Nelles, *The Politics of Development: Forests, Mines & Hydro-Electric Power in Ontario, 1849-1941* (Toronto: Macmillan of Canada, 1974), 42-7. Nelles attributes to the nature of the Shield some of the "conservatism apparent in these laws" of Ontario relating to natural resources and their development. Poor in arable land and rich in lumber, the "Shield supported an economy all its own and the strongest elements of that economy, the lumbermen, chose to protect and foster their interests by defending rather than reducing the power of the state." They were aided by the fact that Ontario had launched its Provincial Rights campaign to increase its jurisdictional control "without first establishing constraints upon the use of that power." *Politics of Development*, 42. This understated observation is borne out in later sections of this dissertation.

have been classified by geologists into provinces and subprovinces. Treaty #3 is in the Superior Province which, in the terms of the geologist, "consists of granitic rocks, divided by narrow linear belts of metavolcanics or metasediments into the sub-provinces each of which shows characteristic internal structure, rock assemblage and tectonic trend."⁷ The glaciers of successive ice ages, while laying down deposits of sand, gravel, clays and peat, eroded these rock layers into the characteristic formations seen today.⁸

The mineral resources of the Shield vary with the volcanic activity that created them. The Superior province holds deposits of copper, zinc, lead, silver, gold, nickel, asbestos, talc and iron, with occurrences of rarer minerals such as lithium, beryllium, cesium and molybdenum.⁹ Of these, gold is by far the most important. These mineral resources have not yielded themselves up easily to those who would exploit them, whether the ancient Aboriginal inhabitants, precursors of the Ojibway who dug deep pits for the copper to use in weapons and trading, or the optimistic miners and prospectors of

⁷ Ontario Ministry of Natural Resources, Ontario Geological Survey, *Ontario Mineral Potential, Kenora Sheet*, Preliminary Map P.1531, (OMNR-OGS, 1978). The subprovinces of the area are the English River Gneiss Belt covering the northern section of the region, which contains the oldest rocks; the main Wabigoon Belt, which begins just to the north of Lake of the Woods and to the south at about Fort Francis, running east to Lake Nipigon; the Quetico Belt in the southern part of the area; and the Wawa Belt, which tips into the extreme southern part.

⁸ MNR, OGS, Map P.1531.

⁹ MNR, OGS, Map P.1531.

the late nineteenth and early twentieth centuries who invested hard time and money in the captivating quest for Eldorado.

As noted above, the Boundary Waters region is a transition zone for the various flora of the Shield. The 'line' between the mixed forest to the south and the boreal forest to the north divides the region, with Lake of the Woods being in the belt of mixed forest. In terms of resource exploitation, the mixed forest supported the lumbering activities of the later nineteenth century, supplying for a time red and white pine to markets in Ontario, Manitoba and the northern United States. The boreal forest became a focus of exploitation after the development of the pulp and paper industry in the early twentieth century, which is today the most important industry in northwestern Ontario.¹⁰

The fauna of the Boundary Waters region include large game animals, such as moose, deer, caribou, wapiti and bear; small game animals, such as rabbit and hare; fur bearing animals, most notably the beaver, but significantly the martins and other members of the weasel family, along with muskrat; and fish, including sturgeon, whitefish, pike, muskellunge, bass, lake trout and pickerel. Of these, the most important to the economy of the area have been the sturgeon and whitefish. Both species were utilized as staples by

¹⁰ Robinson, *Resources of the Canadian Shield*, 30-40. Radforth also offers a description of the forests of the Shield that provides ample citations; see Ian Radforth, *Bushworkers and Bosses: Logging in Northern Ontario 1900-1980* (Toronto: University of Toronto Press, 1987), 10-12.

the Ojibway and their precursors; the sturgeon were valuable as well for the oils they contained. These stocks were overfished in the 1880s and 1890s and rapidly depleted until, by the turn of the century, only a small percentage of the original catch was available. The usable flora of the area include berries of various kinds, plants with medicinal and other properties, birch for the making of canoes and other objects, and wild rice, a grass that still plays a vital role in the Ojibway economy.

The region provided as well the continuation of the east/west route across the continent that begins in the east with the St. Lawrence. That great river leads to the five inland seas that edge the southern Shield below the Bay. Lake Superior is connected to the prairie west by a route beginning with the Pigeon River, which meets the height of land at North and South Lakes, the first in a chain of lakes ending at Rainy Lake. From there, Rainy River flows into Lake of the Woods, which is part of the Lake Winnipeg drainage basin, the two lakes being connected by the Winnipeg River. This route had great strategic importance, both in the days of the fur trade and in the early assertions of sovereignty by the new Dominion of Canada.

The height of land separating the drainage areas of Hudson Bay, Lake Superior, and Lake Winnipeg meanders through the eastern portion of the Boundary Waters region. The height of land has presented its own difficulties to those who would ascertain the

limits of the region. On maps, it can be shown as a fixed line, suggesting a precision of definition that is impossible on the ground.¹¹ These and other geographical uncertainties were reflected in the disputes between France and Britain, and the Dominion and Ontario, in their respective claims to the region.

1.2: The Ojibway in a Time of Change

Between the eighteenth and early twentieth centuries, the Ojibway of northwestern Ontario encountered successive waves of Eurocanadian activity that confronted their laws, patterns of governance and religious, social and economic activities. The first of these waves was the fur trade, which had a dramatic impact upon Ojibway social organization, migration, and religious practices.

¹¹ Robert Bell, a geologist with the Geological Survey of Canada who had extensive knowledge of the area, explained the problem to the House of Commons Select Committee, headed by Simon Dawson, that examined the issue of Ontario's boundaries in 1880:

It has occurred to me ... that if the height of land were to be defined as a boundary, it would be exceedingly difficult to find it. The country in its vicinity is almost always level, and the heads of the streams interlock so much that you cannot easily tell which way the water may tend to run. ... If the country were rugged you could find a line dividing them [the streams] even if they did interlock, but along this line it is so level it would be difficult to do so. The water soaks through the moss and swamps and one cannot tell on which side of the watershed he may be.

Canada, House of Commons, Select Committee on Boundaries of Ontario, Report, 42, quoted as "Testimony of Robert Bell Before the Select Committee on Boundaries, 1880," in Elizabeth Arthur, ed., *Thunder Bay District 1821 - 1892: A Collection of Documents*. Champlain Society Ontario Series no. 9 (Toronto: Champlain Society, 1973), 27.

The fur trade was closely associated with missionary activity, a less successful endeavour for the Eurocanadians. The Ojibway were capable of resisting Christianity and either maintaining their own beliefs or producing new syncretic forms. European diseases accompanied these activities, taking their toll from earliest contact into the early years of the twentieth century.

The period under consideration in this dissertation addresses other activities than these, however. The Ojibway were affected by changing perceptions of both them and their environment, as the Eurocanadians' knowledge of the Boundary Waters region and its resources increased. These and other, national factors, especially the need to acquire a right of way through the region for Col. Wolseley's troops, necessitated the negotiation in the early 1870s of a treaty with the Ojibway. The negotiation of Treaty #3 took several attempts before it was successful, for the Ojibway had learned how valuable their land was to the Eurocanadians; in fact, the terms of Treaties #1 and #2 were revised in favour of the Indians after the signing of Treaty #3.

The acquisition of Rupert's Land by the Dominion in 1870 produced, however, the long and bitter dispute between the Dominion and Ontario governments over the ownership of the region that brought more powerful metropolitan influences into play. For the next thirty years at least, the Ontario-Manitoba Boundary Dispute placed great strains upon economic and jurisdictional activities,

resulting in legal battles that too frequently turned on questions affecting the Ojibway without taking them into consideration. These processes overshadowed the relations between the Ojibway and Eurocanadians and interfered with the ability of the Ojibway to adapt to the changes confronting them. These changes were extensive enough in their own right without the additional complications brought on by the Boundary Dispute.

Although the Ojibway were not consulted in the cases deciding the nature of their rights, they remained nonetheless active players in the drama that will unfold here. They were a strong physical presence in the area, having by one contemporary estimate about 800 armed warriors.¹² Thus, although by mid-nineteenth century the number of explorers and other adventurers passing through the area was increasing, the Ojibway maintained a measure of control over the routes through which these people passed. Furthermore, they were familiar with the treaty-making process in neighbouring areas, especially in Minnesota, for there was much movement back and forth across the international border.¹³ They had been able to put the

¹² The estimate was Simon J. Dawson's. He was speaking of a potential rather than any desire of the Ojibway to exercise such force. Dawson's message to government was that the Ojibway should be treated with some respect.

¹³ The border is ours, not theirs, and it is mistaken nationalistic thinking to consider that the Ojibway of Treaty #3 and the Chippewa of Minnesota were somehow limited in their interaction by something as ephemeral as a boundary line. This is not a topic that has received much consideration from scholars, who tend to have more respect for borders. The most extensive research regarding the border and rights to cross it have resulted from attempts by governments to limit and control international traffic

knowledge gained to good use, proving to be shrewd negotiators at the making of the Treaty. The Ojibway expected the terms of the Treaty to be honoured and were vocal in their demands if they perceived violations of those terms. Nonetheless, their fortunes were increasingly overshadowed by events beyond their control, both in the region and in the centres of government and economic activity. The lawsuits resulting from these events are touchstones that can be used to examine this change.

1.3: Outline of Chapters

Placing the experiences of the Treaty #3 Ojibway into their historical context requires examination of wide-ranging issues that have been dealt with here in a logical sequence. The physical setting has been examined briefly in this introductory chapter; that setting has yielded archaeological information, discussed in chapter two, that permits an evaluation of the continuity of the Ojibway in the Boundary Waters region. The history of the Ojibway is next explored, beginning with the debates surrounding their first presence in the region through to the signing of the Treaty in 1873. Their use of resources from the fur trade until the reserve period, especially their knowledge of minerals and use of the forest, and their changing role in the labour economy are also outlined. The coming of the Treaty and the promises made during its negotiation are analysed, using comparisons of both the legal

by Indians.

Treaty text and accounts of the negotiations. These promises include both those contained in the legal text and the 'outside promises', understood by the Ojibway and the negotiators to be part of the agreement but omitted from the final text. The focus is once again on promises relating to resources on the reserves allocated to the Ojibway.

The development and implications of the Ontario-Manitoba Boundary Dispute are examined next. This dispute is placed in its various contexts, beginning with the changing perceptions of the west that challenged Hudson's Bay Company hegemony and produced the expansionist movement that was instrumental in the acquisition of Rupert's Land. This latter event sparked intense discussion over the lines dividing Ontario and federal lands, because the northern and western boundaries of the province had not been settled at the time of its creation in 1867. The Boundary Dispute was fuelled as well by the Provincial Rights movement, essentially a clash of ideas over the nature and shape of the new confederation.

The Boundary Dispute was carried to different tribunals, before which detailed, historical arguments were made by both sides as to the validity of their respective claims. Since these relied upon the assertions of the original European claimants, the arguments of Britain and France are presented as utilized by Ontario and the Dominion before these tribunals. *St. Catherine's Milling and Ontario Mining v. Seybold*, the two key lawsuits, are introduced.

Chapter three concludes with an overview of the local situation, including the advent of white settlement and its effect upon the Indian Reserves of Treaty #3.

In chapters four and five respectively, the development of timber and mineral resources in the Treaty #3 area is examined, placing each of them in the context of the Ontario-Manitoba Boundary Dispute. As these chapters make clear, the development of the lumbering and mining industries was hampered by confusion over title and jurisdictional responsibility. While companies could occasionally turn such confusion to their advantage, economic development was made more difficult by the Boundary Dispute. Chapter four illustrates this through the activities of various lumbermen in the Disputed Territory. The lumber industry was particularly affected by the political situation, for the Dominion, especially in the early 1880s, used timber limits as a tool for cementing its claim to the region. This chapter also examines the relationship between lumber and mining as these are revealed in the activities of one particular company, the powerful Keewatin Lumber Company. These interests collided on Sultana Island, part of Indian Reserve 38B, the locus of conflicting federal and provincial grants of mining licences. After a description of mining in the Disputed Territory and the gold fever of the 1890s on Lake of the Woods, chapter five examines the confusing claims and counterclaims that landed in the courts as *Ontario Mining v. Seybold et al.*, a case that determined the interests of the federal and provincial

governments in the precious metals found on Indian Reserves. It determined as well that the Indians did not have and had never had any interest in such metals.

For these reasons, *Ontario Mining v. Seybold* merits treatment of its own, and chapter six analyses the federal and provincial positions placed before the courts. These arguments are reflected in the decisions, which are examined as well, especially from the standpoint of their determination of rights of the Ojibway. The important implications of this case for the Ojibway are explored.

The attempts of governments to resolve these issues are traced in chapter seven, which focuses on the confusion over jurisdiction, especially of lands reserved for Indians, that continued into the twentieth century. Early in the Boundary Dispute the two governments signed a Provisional Boundary Agreement that set up a conventional boundary on either side of which the governments could operate until the Dispute was resolved. But the resolution of the Dispute did not solve the problems regarding jurisdiction and licensing of resources, especially on Indian Reserves, for the Reserves set up by the Dominion in Treaty #3 were now declared to be on Ontario lands. So other arrangements had to be made, including agreements and legislation in 1891, 1894, 1902 and 1924. Furthermore, the Ontario government had gained the right to confirm the Treaty #3 Reserves, which it did not manage to do until 1915, some forty years after the Reserves were initially set up.

Obviously, much was at stake in these issues and two highly competitive governments had great difficulty in arriving at satisfactory agreements regarding Indian lands in Ontario and the disposition of resources upon them, as these attempts at resolution attest.

The Boundary Dispute and the resulting lawsuits and overhanging issues had and continue to have serious implications for the Ojibway of Treaty #3. In part, chapter eight addresses the question of how the Ojibway could be ignored by the processes that affected them so deeply. Thus, the attitudes of Eurocanadians toward them are examined. While overshadowed in the ambitions of Eurocanadians for the region and its resources, however, the Ojibway could not be entirely ignored, as their role in the treaty-making process shows. The Ojibway and their interests had to be taken into account, at least by the federal Department of Indian Affairs, since Indian Reserve lands were involved and decisions had to be made regarding jurisdiction and ownership of resources on those lands. A most dramatic example of making the government and developers aware of their concerns was Chief Blackstone's attempts to curtail mining activities in his area until a treaty had been signed. After Reserves were established, the Ojibway attempted to maintain some control over events on them, especially with regard to timber cutting, mining and road building. Thus, the Ojibway must be taken into account not only in the historical past, if it is to be fully

understood, but also in the present, for the issues raised continue to be relevant and controversial today.

This theme is brought into the present in the conclusion, which ties together the threads of the argument then examines its implications as illustrated by the specific claims process. This process is proving to be as protracted as the original issues; in the past two decades of researching and presenting specific claims to both governments, the Treaty #3 Ojibway have had only one or two of dozens of claims resolved. This is the legacy of the Boundary Dispute and its resultant lawsuits.

CHAPTER II: THE OJIBWAY OF THE BOUNDARY WATERS REGION

Generalizations about the Ojibway are difficult to make, and even hazardous. This is in part because of the continuing debates among scholars over many aspects of their history and also because of the varied experiences of the different bands of Ojibway. Both the Treaty #3 region and the Ojibway are presented here as being more homogenous than a fuller cultural history would allow. The fertile valley of the Rainy River is very different country from the Lake of the Woods region, or areas to the north, such as the English-Wabigoon River system. These differences were reflected, for example, in the difficulties the Ojibway had in maintaining a united front during the treaty negotiations. Perhaps the homogeneity/differentiation continuum is determined by perspective as much as anything else. The differences noted above are revealed at the micro level; there is no doubt, however, that the Shield country as a region and the Ojibway as a generalized culture have a remarkable homogeneity over both space and time.¹ How the Ojibway arrived there and how long they have been there are issues of some dispute, just as are so many other aspects of life in the Boundary Waters region. Noble noted that their presence in the region prior to 1760 "has been the subject of considerable controversy in the

¹ Kenneth A.C. Dawson, "Prehistory of the Interior Forest of Northern Ontario," in *Boreal Forest Adaptations: The Northern Algonkians*, ed. A. Theodore Steegmann, Jr. (New York & London: Plenum Press, 1983), 56; James V. Wright, "Prehistory of the Canadian Shield," in *Handbook of North American Indians. Volume 6: Subarctic*, ed. June Helm (Washington, D.C.: Smithsonian Institution, 1981), 87.

academic community."² The importance of such concepts as continuity of occupation and "time immemorial" in assertions of sovereignty and Aboriginal title dictate an examination of this controversy.

2.1: The Question of Continuity in the Region: An Overview

There seems to be more historiographical debate about the Ojibway of northwestern Ontario than historical certainty. Among the issues debated are whether or not the Ojibway migrated into the area in the historical past or whether they continue the Aboriginal occupation of the boreal forest that has gone on for at least 6,000 years. The literature seems to espouse both interpretations. The archaeological evidence tends to favour the argument for continuity, but ethnohistorians are split on the question of migration. Those who favour migration into the area, such as Harold Hickerson, Charles Bishop and Arthur Ray, use early written sources and maps of French explorers and Hudson's Bay Company employees to reach their conclusion. Those who disagree, such as Greenberg and Morrison, are critical of the interpretations given these records. They argue that a confusion of names left the appearance of movements of peoples, masking the diffusion of the term 'Ojibway'. The situation is complicated by the Seven Fires cycle of the Ojibway themselves that recounts their migration from the eastern

² William C. Noble, ed., *An Historical Synthesis of the Manitou Mounds Site on the Rainy River, Ontario* (Cornwall, Ontario: Parks Canada, Ontario Regional Office, 1984), 82.

seaboard of present-day northern New England to the Sault Ste. Marie area.

2.1.1: The Archaeological Arguments

Recent reviews of the archaeological literature indicate that the accumulated data favour the thesis of a continuity among the various Aboriginal cultures that have inhabited and continue to inhabit the Shield region. James V. Wright argues that both the region and consequently the cultures are sufficiently homogenous that the four periods into which archaeologists have divided the human occupation of the region are primarily for the convenience of the scholars. The Paleo-Indian (Plano), Shield Archaic, and Initial and Terminal Woodland periods, in his words, are "taxonomic conveniences whose major function is to break the time column into more manageable units. They do not represent stages of cultural development."³

K.A.C. Dawson bears this out in his observation that even the Plano culture, dating back as much as 9,000 years in northern Ontario, was ethnographically similar to that of the Algonkians of the historical period.⁴ Dawson made similar remarks concerning the later periods, noting that the "Archaic peoples are the ancestors of the historic Cree, Ojibwa, and Algonkian peoples of the boreal

³ Wright, "Prehistory of the Canadian Shield," 87.

⁴ Dawson, "Prehistory of the Interior Forest," 64.

and Lake forests."⁵ Of the Terminal Woodland period, Dawson asserted that the "culture known as Algonkian appears to be a blending of the existing population and new but related populations which moved into the area from the south."⁶ Dawson went on to note that the archaeological record follows three geographic regions that "roughly correspond to the broad ethnic designations Cree, Ojibwa, and Algonkin."⁷ Of these, the Southwestern Algonkian culture corresponding to the northern Ojibway is of interest here. Dawson suggests that this culture, as represented by the Blackduck pottery tradition, moved into the Lake Superior region from Manitoba and Minnesota around 850 A.D. where it developed a "very long and intimate relationship" with the northwestern Selkirk culture now known as the Cree. These two traditions are now "regarded as a single archaeological unit of the Proto-Northern Ojibwa."⁸

The association of the Ojibway with the Blackduck culture has not gone without its detractors, however. Ronald Mason wryly observed that "by diverse interpretations Blackduck is connected with the Siouan-speaking Assiniboins exclusively, with Algonquian-speakers

⁵ Dawson, "Prehistory of the Interior Forest," 70.

⁶ Dawson, "Prehistory of the Interior Forest," 75.

⁷ Dawson, "Prehistory of the Interior Forest," 75.

⁸ Dawson, "Prehistory of the Interior Forest," 77. Compare Wright, "Prehistory of the Canadian Shield," 94, who notes the "abundant evidence for a long and close interrelationship between the Northwestern area (Selkirk) and the Southwestern area (Blackduck)."

(if not strictly Ojibwas) exclusively, or both."⁹ Wright noted that some archaeologists ascribe the Blackduck culture to the Assiniboine, a point of critical importance to the debate about the migration of the Ojibway into the region. Wright summarizes his reasons for rejecting this notion on archaeological, historical, linguistic, ethnological and anthropological grounds. In another recent evaluation of the literature on this question, Noble noted cautiously that:

The archaeology of Rainy River is by no means as complete or precise as one would wish, in order to identify specific ethnicity, but it does demonstrate some continuity between the 1730s and the earlier Blackduck-Selkirk culture.¹⁰

Noble is critical of the arguments of Arthur Ray and Charles Bishop, who assert that the region was occupied in the seventeenth and eighteenth centuries by the Assiniboine. He notes that no Siouan cultural artifacts occur in the archaeological record in the area, and that "there is nothing in the available archaeology that would deny Monsoni [Ojibway] residency of Rainy River throughout the 17th and 18th centuries." Noble stressed that the record is incomplete and that it does suggest that not all the Aboriginal inhabitants were related. Rather, "interpretations [incorporating continuity] ... represent the most logical working hypotheses yet

⁹ Ronald J. Mason, *Great Lakes Archaeology* (New York: Academic Press, 1981), 393.

¹⁰ Noble, *Manitou Mounds Site*, 31.

formulated."¹¹ This conclusion is supported by Greenberg and Morrison, who argue that it was the term 'Ojibwa' that travelled rather than the people themselves.¹² Denise Fuchs has criticized some of the minor points made by Greenberg and Morrison, yet agrees substantially with them.¹³

This view is opposed by a number of ethnohistorians who believe that the fur trade drew the Ojibwa into the region north-west of Lake Superior as far west as Lake Winnipeg in the early decades of the eighteenth century. Arthur Ray noted the opposition to the notion that the Blackduck culture was Assiniboine, referring to Wright's argument that it was Ojibway and to an article by G.E. Evans ascribing it to the Cree. Yet Ray interprets the archaeological data to assert that "just prior to contact, the Assiniboine occupied the boundary-waters area. ... Their neighbours to the north and east were the Cree."¹⁴ Harold Hickerson and Charles Bishop have made similar assertions. Mason's tentative conclusion, based on physical anthropological research into crania

¹¹ Noble, *Manitou Mounds Site*, 31-2.

¹² Adolph M. Greenberg and James Morrison, "Group Identities in the Boreal Forest: The Origin of the Northern Ojibwa," *Ethnohistory* 29, no. 2 (1982): 75-102.

¹³ Denise Fuchs, "Indian Identities in the Border Lakes Region During La Verendrye's Explorations 1729-1738," unpublished paper presented to the CHA Annual Meeting, Charlottetown, PEI, 1992.

¹⁴ Arthur J. Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson's Bay, 1660-1870* (Toronto: University of Toronto Press, 1974), 4.

collected from archaeological sites in Minnesota, North Dakota, southern Manitoba and western Ontario, sheds light on these divergent views:

the skulls from northern Blackduck sites are most similar, and thus probably most closely related, to known Ojibwa populations. Southern Blackduck sites, on the other hand, have produced a series of skulls that measure closest in biological distance to Dakota (Sioux) groups. It is with crania from western Blackduck ("Manitoba Focus") that the known Assiniboin sample most tightly aligns itself.¹⁵

2.2: The Ojibway¹⁶

¹⁵ Mason, *Great Lakes Archaeology*, 394.

¹⁶ The source and spelling of 'Ojibway' is as contentious as many other details of their existence. The *Handbook of the Indians of Canada*, derived from an American publication and first published as an appendix to the tenth annual report of the Geographic Board of Canada, provides the following definition of 'Chippewa': "popular adaptation of Ojibway, 'to roast till puckered up,' referring to the puckered seam on their moccasins; from ojib 'to pucker up,' ub-way 'to roast'." *Handbook of the Indians of Canada* (Ottawa: Geographic Board of Canada, 1913; Toronto: Coles Publishing, 1974), 96. Dozens of variations on the three most common names, Ojibwa, Chippewa, and Saulteur, are given, as well as names given the Ojibway by other groups, Native and non-Native, including such incorrect translations of 'Saulteur' as 'Jumper' and 'Leaper'. Geographic Board, *Handbook*, 99-100.

A fuller synonymy, by Ives Goddard and E.S. Rogers, can be found appended to Edward S. Rogers, "Southeastern Ojibwa," in *Handbook of North American Indians. Volume 15: Northeast*, ed. Bruce G. Trigger, 768-70. The 'puckered up' derivation of the term Ojibway is contained, according to Goddard, in William H. Keating's journal of 1824. The terms Ojibway and Saulteur have apparently been associated since 1667. Brown does not mention these references to puckered moccasins, but states that 'Ojibwa' derives from 'ocipwe' and its variants, which was the early seventeenth century name provided by a Sault Ste. Marie band. Jennifer S.H. Brown, "Northern Algonquians from Lake Superior and Hudson Bay to Manitoba in the Historic Period," in *Native Peoples: The Canadian Experience*, ed. Morrison and Wilson, 211.

The people of Treaty #3 add a 'y' to the term and that is the practice that will be followed here out of respect for their usage.

The Ojibway were a hunter-gatherer society, typically with little attachment to land as property but with a deep knowledge of it as a resource base supporting a variety of flora and fauna. Fiercer debate than about their name and migration has raged over their relationship to the land, centring on the question of the nature and development of the social forms that divided up the land and its resources. "The issue has boiled down," Hickerson noted in 1967,

to whether division of land among families or heads of families maintaining them in more or less permanent usufruct, and involving sanctions against trespass, was an aboriginal or postcontact form. I believe consensus now would hold that tenure based on small patrilocal family usufruct (the classic, but by no means universal form) is postcontact, but the precise form of tenure in aboriginal times would be a matter of doubt.¹⁷

Much more certainty is developing among students of Ojibway use of resources. Although the Ojibway made contact with the fur trade as early as 1610, the active fur trade in the Boundary Waters region dates back to 1732, when La Verendrye built Fort St. Charles, the first trading post on the Lake, at the Northwest Angle Inlet. He "discovered that the Indians already had firearms, iron utensils,

They call themselves the 'Anishnabe', which "often has the more general meanings 'Indian' or 'human being'." *Handbook of North American Indians. Volume 15: Northeast*, 768.

¹⁷ Harold Hickerson, "Land Tenure of the Rainy Lake Chippewa at the Beginning of the 19th Century," *Smithsonian Contributions to Anthropology* 2, no. 4 (1967): 41.

and tools" from trading with the English at Hudson's Bay.¹⁸ English traders were coming into the area themselves forty-five years later, as competition between the HBC and North West Company heated up. After the 1821 merger of the two companies, the HBC established a post in 1836 at Rat Portage.

A flourishing literature has charted the extensive and valuable Ojibway fisheries, especially of the sturgeon, and revealed as well that the Ojibway practised a good deal more agriculture in the pre-contact period than the hunter/gatherer designation might indicate.¹⁹ Other work has helped correct the lingering notion of the Ojibway as primitive peoples whose life in the Shield tended to be 'nasty, brutish and short.'²⁰ Charles Bishop and Harold

¹⁸ John Ryan, "The Kenora-Keewatin Urban Area: A Geographic Study," (M.A. thesis, University of Manitoba, 1964), 62.

¹⁹ The literature on fisheries includes: Tim E. Holzkamm, Victor P. Lytwyn and Leo G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy," *The Canadian Geographer* 32, no. 3 (1988): 194-205; Edward S. Rogers, *Ojibwa Fisheries in Northwestern Ontario* (Toronto: Ministry of Natural Resources, Commercial fish and Fur Branch, 1972); John Van West, "Ojibway Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interests and the Collapse of the Sturgeon Fisheries of the Lake of the Woods," paper presented at the annual meetings of the Canadian Anthropological Society, May 2-4, 1990, and the CHA, May 26-29, 1990.

²⁰ Tim E. Holzkamm and Leo G. Waisberg have done the most to promote better understanding of Ojibway agriculture. Their articles include: "'Our Land Here Is Not As On The Plain': The Development and Decline of Ojibway Agriculture in Northwestern Ontario 1805-1915," paper presented to the American Society for Ethnohistory, 1989, and "Ojibway Agriculture in Northwestern Ontario 1805-1875: 'Their Gardens Mostly On Islands'," paper presented to the American Society for Ethnohistory, 1990 (Kenora: Treaty and Aboriginal Rights Research (hereafter TARR) of Grand Council Treaty #3, n.d.).

Hickerson expended much scholarly effort on the problems of big game hunting that developed, especially during the fur trade period.²¹ Hickerson's work has been examined through a gender-correcting lens by Jennifer S.H. Brown and Laura Peers, who have discovered the male bias, both in Hickerson the scholar and in his predominantly male reporters, that allowed us to think that if big game were not available, the Ojibway starved. Peers has revealed the extent to which rabbit was relied on in such times and shown how the hunter disdained to report such reliance, preferring instead to announce his 'starvation'.²² Add to this Mary Black-Rogers' insights into the use of the term 'starve', and our conceptions of Ojibway lifeways are altered significantly.²³ The reality is that the economy and land usage of the Ojibway were and are highly sophisticated.

²¹ Charles Bishop, *The Northern Ojibwa and the Fur Trade: An Historical and Ecological Study* (Toronto: Holt, Rinehart & Winston, 1974); Harold Hickerson, *The Chippewa and Their Neighbours: A Study in Ethnohistory* (New York: Holt, Rinehart & Winston, 1970).

²² Laura L. Peers, "'A Woman's Work is Never Done': Harold Hickerson, the male bias, and Ojibwa ethnohistory," paper presented to the Rupertsland Research Centre Conference, Churchill, Manitoba, 1988, *passim*. Brown and Peers revised and expanded Hickerson's study, recently republished in an edition that includes their review essay and bibliographical supplement, with a foreword by Charles Bishop (Prospect Heights, Illinois: Waveland Press, 1988).

²³ Mary Black-Rogers, "Varieties of 'Starving': Semantics and Survival in the Subarctic Fur Trade, 1750-1850," *Ethnohistory* 33, no. 4 (Fall 1986): 353-83. Her study strongly "suggests ... that the image of Indians as dependent, childlike, begging, destitute, starving, and oriented toward welfare has been overdrawn." *Ibid.*, 373.

2.2.1: Ojibway Control over the Boundary Waters Region

The Ojibway were in a position of power, still in effective control of the Boundary Waters region, in the first decade after confederation. This fact had a strong bearing on the nature and progress of the negotiations that resulted in Treaty #3. Simon Dawson, who of all people associated with government was most familiar with the people and the area, reported in 1869 that the Ojibway were "sufficiently organized, numerous and warlike to be dangerous if disposed to hostility."²⁴ For decades, the Ojibway had resisted the blandishments of missionaries²⁵ and observed the movements of travellers through the area. They frequently acted as guides, but on occasion refused either to provide such an essential service or insisted that people go back or take alternate routes through the area. Their control was effective because the area does

²⁴ Simon J. Dawson, "Report of May 1st, 1869," reprinted in Alexander Jamieson Russell, *The Red River Country, Hudson's Bay and North-West Territories Considered in Relation to Canada* (Montreal, 1870), 192. Russell had been a surveyor on the Dawson Route.

²⁵ Mawendopenais, a civil chief and medicine man who signed Treaty #3, was so instrumental in this resistance that he was dubbed by Rev. Robert Phair the "greatest enemy of the gospel." TARR, *Grand Council Treaty #3, "Indigenous Government of Treaty #3 Indians,"* (April, 1992). Not even an Ojibway missionary, the Reverend Allan Salt, could make much headway among them; Jennifer S.H. Brown, "'I wish to be as I see you': An Ojibwa-Methodist Encounter in Fur Trade Country, Rainy Lake, 1854-1855," *Arctic Anthropology* 24, no. 1 (1987): 19-31. See also: Michael R. Angel, "The Ojibwa Missionary Encounter at Rainy Lake Mission 1839-1857," (M.A. thesis, University of Manitoba, 1986); Elizabeth Arthur, "Orientation and Disorientation in Rainy River," *Ontario History* 73 (Dec. 1981): 195-218, especially 203-5; Christopher Vecsey, *Traditional Ojibwa Religion and Its Historical Changes* (Philadelphia: American Philosophical Society, 1983), 26-57.

not lend itself to easy travel and Ojibway knowledge and technology - snowshoes and the canoe, for instance - were essential to the exploration and development of the region.

The Ojibway continued to exercise control over their territory until after the middle of the nineteenth century. Travellers who sought passage through their region in the pre-treaty period required permission and the service of guides from the Ojibway. By the late 1840s and 1850s, scientific expeditions were following the old fur trade routes to the northwest. The most famous of these were the expeditions of Captain John Palliser and of the geologist Henry Youle Hind. Palliser and his men soon learned they had to follow the etiquette of the countryside if they were to pass through safely. They spent hours listening to the speech of an old chief who had a long list of grievances regarding the coming and going of whites.²⁶ Hind followed soon after. He wanted to take a more southerly route than the one traditionally taken. Hoping to reach Red River by the Roseau, he and his party, which included Simon J. Dawson, set off across Lake of the Woods in 1857, stopping to camp on Garden Island. This island drew its name from the practice of the Ojibway to grow corn, pumpkins, potatoes and squash there since the eighteenth century. Hind was interested enough in this to take samples of the produce. A war party of Ojibway, fresh from a raid against the Sioux, came across them there and, unhappy

²⁶ Irene Spry, ed. *The Papers of the Palliser Expedition, 1857-1860* (Toronto: Champlain Society, 1968), 78.

with Hind and Dawson's evasive explanations of their activities, denied them the guides required for the trip on the Roseau. The words of the chief who addressed Hind are instructive:

It is hard to deny your request, but we see how the Indians are treated far away. The white man comes, looks at their flowers, their trees, and their rivers; others soon follow; the lands of the Indians pass from their hands, and they have nowhere a home. You must go by the way the white man has hitherto gone.²⁷

The chief continued, offering reasons for refusing the guides:

We have hearts, and love our lives and our country. If twenty men came we would not let them pass today. We do not want the white man; when the white man comes, he brings disease and sickness, and our people perish. ... Many white men would bring death to us, and our people would pass away; we wish to love and to hold the land our fathers won, and the Great Spirit has given to us.²⁸

Hind and his party revised their plans.

2.3: Ojibway Knowledge of Natural Resources

The concerns expressed to Hind by the chief reflect both the deep attachment the Ojibway had to the land and their interest in the disposition of the land and its resources as whites moved into their territory. Since each of these elements have been

²⁷ Henry Youle Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858*. 1860; New York: Greenwood Press, 1969, 1:97-100. This account can be found as well in W.L. Morton, *Henry Youle Hind 1823-1908* (Toronto: University of Toronto Press, 1980), 38-42.

²⁸ Hind, *Canadian Red River Exploring Expedition of 1857*, 97-100.

consistently misunderstood, Ojibway knowledge of mineral and forest resources will be outlined in the following sections.

2.3.1: Minerals

Perhaps the value of metals was first learned by the Ojibway from their experience in the fur trade. Steel knives and axes were quickly seen as superior to stone or copper tools. Silver trade ornaments became highly valued objects, symbolizing both the relationship with the traders and status within the group. One early trader, Peter Grant, described their estimation of trade silver:

Their intercourse with us has given them such an idea of the value of silver, that nothing in their estimation is so valuable and so becoming to set off their persons as trinkets made of that metal.²⁹

But silver was more than merely a bright and shiny metal; as with gold, the Ojibway knew something of its value to whites and could distinguish between inferior and higher quality products. Traders who sought to pass off inferior quality medals, for example, could be brought up short. During the negotiations for Treaty #3, Manitobusiness showed Morris a medal given out at a Red River Treaty: " - they called it silver - I do not. I would be ashamed to wear it

²⁹ Louis F.R. Masson, ed., *Les bourgeois de la Compagnie du Nord-Ouest: Récits des voyages, inédits relatifs au Nord-Ouest canadien* (Québec: 1889-1890), 1:318, quoted in Tim E. Holzkamm, "Ojibwa Knowledge of Minerals and Treaty #3," in *Papers of the Nineteenth Algonquian Conference*, ed. William Cowan (Ottawa: Carleton University Press, 1988), 90.

on my breast," he said, striking it with his knife. "I would not disgrace the Queen."³⁰

These accounts reveal the importance of minerals to the Ojibway, yet little has been written of the knowledge that the Ojibway possessed regarding the mineral wealth of the Boundary Waters region. A number of factors can be offered in explanation. Little is known in part because the Ojibway had a tradition that required keeping such knowledge to themselves. As well, the Ojibway were not considered to be consumers of minerals, especially the so-called 'precious metals', gold and silver. This perception was reinforced by nineteenth century attitudes that made any positive use of resources by the Ojibway difficult to acknowledge. Furthermore, the 'precious metals' were understood to be the property of the Crown, and not the Indians, so the question of Ojibway use would border upon the irrelevant.

The lack of use of metals such as gold and silver probably reveals more of the state of knowledge of metallurgy among the Ojibway than an awareness of or interest in metals. The Ojibway and their ancestors in the region used a variety of minerals for centuries. Perhaps the best known of these is copper, although use of the so-called 'baser metals' such as pipestone and clay are also reasonably well documented.³¹ The use of copper goes back to

³⁰ Quoted in Holzkamm, "Ojibwa Knowledge of Minerals," 91.

³¹ Holzkamm, "Ojibwa Knowledge of Minerals," 89.

prehistoric times and was first recorded in the region by the Jesuits and French explorers.³² In the Boundary Waters region, copper was found in sufficiently pure form that it could be hammered into shape; it was used for ornaments and cutting and piercing tools such as knives, awls and fishhooks.³³

One account contemporaneous with the treaty was written by William B. Frue, superintendent from 1870-75 of the most famous silver mine in the region, Silver Islet on the north shore of Lake Superior.³⁴ In 1872, Frue wrote a ten-page account of the "Rise and Fall of the Various Copper Interests of the South Shore of Lake Superior." The first of many copper mining companies, he noted, was formed following discoveries of the metal in 1839-40. "Little was known" prior to that period, apart from "an occasional rumor" of large deposits discovered by the Jesuits, for the Indians of that time had "no knowledge of such deposits." But many nineteenth century mines were found by recognizing the pits left behind by the "ancients," unknown people who, in Frue's mind, were not associated with the current Aboriginal population. These ancients dug mines

³² Holzmann, "Ojibwa Knowledge of Minerals," 89.

³³ Mason, *Great Lakes Archaeology*, 13.

³⁴ "The Story of Silver Islet" has been told by Beryl H. Scott in *Ontario History* 49, no. 3 (1957): 125-37. A personal account of the social life on the island, apparently as rich as the veins of ore, was written by the daughter of the "government representative" for the company, John Livingstone. See National Archives of Canada (hereafter NAC), Algoma Silver Mining Company Papers, MG 28 III 19, 1872, reel C-1336, Janey Livingstone, "Historic Silver Islet: The Story of a Drowned Mine."

and took out copper over long periods of time, but eventually disappeared. Frue had explored such pits himself and commented on how the ancients operated, although no adequate theory had been developed to explain how they knew where the copper lodes were.³⁵

The interest of the French in copper mines on Lake Superior is revealed in various memoirs sent back to France. For example, in 1710, Antoine Denis Raudot sent a "Memoir Concerning the Different Indian Nations of North America," a series of letters written while he was an intendant of Canada between 1705-1710. His knowledge of the Lake Superior country was gleaned from those who had returned from there to Quebec and from other accounts.³⁶ In Letter 48, Raudot reported that it was

almost certain that there are copper mines on the shores of this lake and on the islands in it. Pieces of that metal are found in the sand; and the Indians make daggers of them, which they use. ... It is claimed that there is a mine on the island of Minoncg and that some small islands are composed entirely of the metal.³⁷

³⁵ NAC, Algoma Silver Mining Company Papers, C-1336, W.B. Frue to Earl Dunraven, Nov. 3, 1872. Frue's interest in copper may have preceded an interest in silver. Silver Islet was discovered in 1868 by a small group of prospectors seeking copper at Thunder Cape. Livingstone, "Historic Silver Islet," 3; Scott, "Story of Silver Islet," 125-7.

³⁶ W. Vernon Kinietz, *The Indians of the Western Great Lakes 1615-1760* (Ann Arbor: University of Michigan Press, 1940; 1965), 335-6.

³⁷ Antoine Denis Raudot, "Memoir Concerning the Different Indian Nations of North America," trans. of letters 23-41 and 45-72 by W. Vernon Kinietz, Letter 48, "Of Lake Superior and a Copper Mine," in Kinietz, *Indians of the Western Great Lakes*, Appendix, 374-5.

Raudot went on to report on another mine on an island in Michipicoten River country. The Indians stayed away from it, he allowed, owing to "frequent fogs and thunderstorms" and "lynxes and hares of an amazing size." He provided a more realistic explanation in the story that some Indians had been forced to land on the island during a storm and having prepared a meal using heated rocks that, unknown to them, contained copper, subsequently died of poisoning. The Indians also believed that the copper-bearing islands were guarded by an evil spirit and fish in the form of men who prevent the Indians from destroying the mines as they go by. "All Indians believe," Raudot asserted,

that, if they were to point out a mine to anyone else, they would die within the year; they are so convinced of this that it is almost impossible to get them to reveal where they are, and this is why we know only those the knowledge of which they cannot possibly conceal.³⁸

Similarly, Christopher Vecsey discussed the traditional aversion the Ojibway had to revealing the location of mines. This may have applied only to sacred sites, for it is clear that the Ojibway were willing to act as sources of information on the location of mines, for which commissioner Morris had assured them they could be paid.³⁹ In his 1887 study of the resources of Algoma West, A.W.

³⁸ Raudot, Letter 49, "Of Another Copper Mine in Lake Superior," in Kinietz, *Indians of the Western Great Lakes*, Appendix, 375-6.

³⁹ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke & Co., 1880; Coles

Roland attributed the location of a number of mines in the area to the cooperative efforts of the Ojibway: Rabbit Mountain Silver Mine, in 1882; Silver Mountain, East & West; Partridge Lake Gold Mine, formed after John McIntyre, Indian Agent at Fort William, was shown a gold vein by Namabin.⁴⁰ Roland mentioned Weisaw, an Indian who helped locate mines, and went out himself with Fort William Indians to find a mountain of silver ("shuniah").⁴¹

2.3.2: The Forest

The Treaty #3 region lies within the Quetico and Rainy River sections of the Great Lakes/St. Lawrence Forest Region.⁴² This mixed forest is characterized by a number of species of deciduous and boreal forest trees, dozens of plants for food and medicinal purposes, and fauna that includes fur-bearing mammals, large and small game animals and various species of fish. All of these resources were known to and used traditionally by the Ojibway according to principles that, for our present-day purposes, might

Canadiana Collection, 1971), 50.

⁴⁰ A. Walpole Roland, *Algoma West: Its Mines, Scenery, and Industrial Resources* (Toronto, 1887), 90-1, 99, 179, 187.

⁴¹ Roland, *Algoma West*, 187, 107-8.

⁴² Tim E. Holzkamm and Leo Waisberg, "These Indians are all Good Axmen and Good Workers': Historical Report on the Usage of Forest Resources and Involvement in the Forest Products Industry by the Ojibway of the Treaty #3 Region" (Grand Council Treaty #3, Forestry Environmental Assessment, 1990), 1. Cited hereafter as "Usage of Forest Resources."

best be described as sustainability with maximum utilization.⁴³ The Ojibway used everything that could be used, but without overuse to the point of loss of the resource.

The richness of the forest lore possessed by the Ojibway is difficult for the non-Native to grasp. Facile assumptions of the nineteenth century - that still linger today - diminished this traditional knowledge, failing to appreciate the extent of the interactions between forest and forest-dweller, reducing the Ojibway to roaming bands that hunted and gathered in virtual oblivion of the wealth of resources around them. Yet Ojibway knowledge of the forest was intimate, detailed and highly varied, embracing botanical, ecological, pharmacological and phenological aspects.⁴⁴

Ritzenhaler summarized the extensive utilization of the forest and its central role in the Ojibway economy:

The basis of the Chippewa material culture was forest products: wood, bark, and plant fibers. Wood was used to make utensils, implements, and weapons. Birchbark served as wigwam coverings, storage containers, and the "skin" of their canoes, for which they are famous. Inner barks were used: basswood for bag weaving and twine, cedar for mat making, and willow for kinnikinnick, which was smoked with their tobacco. The sugar maple was tapped for sap that was converted into sugar. Nuts, berries, and fruits

⁴³ Holzkamm and Waisberg, "Usage of Forest Resources," 2. The idea of maximum utilization is credited to anthropologist Jack Steinbring; a Rainy River Band elder expressed the concept this way: "'there was nothing they didn't use that grew ...'," 2.

⁴⁴ Holzkamm and Waisberg, "Usage of Forest Resources," 1-41.

were gathered. A great variety of medicine was concocted from roots, stems, and leaves of local flora. Their knowledge of the forest and its resources was impressive and it was necessary for survival in a region of long, and often severe, winters. Considerable time and effort were invested in wresting a living from the forests.⁴⁵

Ritzenhaler listed some of the handcrafted items produced by the Ojibway from wood, bark and plant materials such as cattails and bulrushes. Many of these items went beyond utility and entered the realms of aesthetics and religious significance:

Wood was the most favored and most accessible material, and it was used for a host of utilitarian objects: bowls, ladles, bows and arrows, snowshoes, lacrosse racquets, canoe parts, flutes, drums, cradle-boards, fish lures. A profusion of bowls and ladles was carved from burlled portions of hardwoods such as maple and birch; these combined a simple beauty of form with attractive grain, which resulted in some of their finest art products. There were human, bird, and animal forms, for magical or religious uses, sculptured with varying degrees of artistry and skill.

Bark was another important medium. Birchbark was the "skin" of the graceful Chippewa birchbark canoes. It covered their wigwams. In lieu of basketry, they constructed a variety of birchbark containers for carrying, storing, and cooking. An art form unique to the Chippewa was the dental pictograph: designs bitten into a thin sheet of folded birchbark that, when opened, exposed a mirror pattern, usually floral. Cedarbark was used to weave mats.

Cattails were sewed into mats to cover the lower portion of the wigwam. Dyed bulrushes were twined over basswood bast to make colorful floor mats. Rectangular bags were woven of basswood twine.⁴⁶

⁴⁵ Robert E. Ritzenhaler, "Southwestern Chippewa," in *Handbook of North American Indians. Volume 15: Northeast*, 746.

⁴⁶ Ritzenhaler, "Southwestern Chippewa," 749.

2.4: The Ojibway and the Changing Labour Economy

Their extensive knowledge of mineral locations and of woodcraft suggests more than one way that the Ojibway could become involved in the local economy as white settlement altered it. The Ojibway did not want whites to come in and take the resources without compensation and the provision of opportunities for labour.⁴⁷ Shortly before the treaty was signed, treaty commissioner Simon J. Dawson reported to the Minister of the Interior that the attitude of the Ojibway to the treaty was positive; they had been observing "the white men in unaccustomed numbers ... [and] have begun to look with favour on the altered position in which they were being placed by the opening up of their country."⁴⁸

Dawson himself had endeavoured to supply work for Ojibway men along the Red River route, and when he could not do so prevailed upon the government for supplies for them.⁴⁹ Labour was also supplied by the

⁴⁷ Steven High, "Responding to White Encroachment: Selective Participation of the Robinson-Superior Ojibwa in the Capitalist Wage Labour Economy, 1880-1914" (unpublished graduate paper, Lakehead University, January 12, 1993). The historiography on this question is limited, especially for northern Ontario, and I am grateful to Steven for providing me with a copy of his paper.

⁴⁸ Archives of Ontario (hereafter AO), Irving (AEmelius) Papers, Mu 1514, 75/16, [1910], *Province of Ontario v. Dominion of Canada*. In the Supreme Court of Canada on Appeal from the Exchequer Court of Canada. *Record of Proceedings*, S.J. Dawson to Minister of the Interior, August 26, 1873, p. 225.

⁴⁹ NAC, Records of the Department of Public Works, RG 11, B 1(a), vol. 270, subject 429, S.J. Dawson, Estimates, Red River Route, February 18, 1873, Item 18.

Ojibway in copper mining by the mid-nineteenth century, as mines were opened up by whites⁵⁰, lumbering, railway building, and as guides, packmen, canoe men and camp attendants,⁵¹ picket men for surveyors,⁵² as canoe builders⁵³ and in fisheries and furs. Any ecological collision between Native and non-Native in Treaty #3 was more a matter of degree of development than 'environmentalist' Indians - a version of the romantic savage - versus greedy white capitalists. The Ojibway were quick to discern the economic possibilities of a treaty and important questions were raised during the negotiations about the status of resources, including both timber and minerals.

2.5 The Coming of the Treaty

As the pressures from whites increased, the Ojibway began to see the inevitability of a treaty. But the Ojibway were more prepared to seek a treaty on their own terms than perhaps other First Nations had been. They had the experiences of their American cousins and the Ojibway of the Robinson Treaty area to draw upon.

⁵⁰ Holzkamm, "Ojibwa Knowledge of Minerals," 91.

⁵¹ NAC, Malhiot (Zephraim) Papers, MG 29, C 28, "Seventy Years of Growth with Canada." Malhiot was a railway engineer who worked on establishing the line of route of the C.P.R. through the Treaty #3 region. He "made a point of engaging local Indians," 197.

⁵² AO, Crown Lands, RG 1, Series CB-1, Survey Diaries, Field Notes and Reports, Box 17, Lake of the Woods, C.F. Miles Diary, Jan. 18, 1875-June 24, 1876. Miles hired Indians as guides, picket men, dog drivers, axe men, canoe men and survey assistants.

⁵³ Holzkamm and Waisberg, "Usage of Forest Resources," 44.

The discovery of copper in 1845 and the subsequent turmoil between whites and the Ojibway living on the northern shores of Lakes Superior and Huron resulted in the signing of the Robinson Treaties in 1850.⁵⁴ The Chippewa of northern Minnesota confronted a gold rush at Vermillion Lake in 1865. Difficulties between the miners and the Bois Fort Chippewa led to a treaty between the latter and the U.S. government in 1866.⁵⁵ Treaties 1 and 2 were negotiated in 1871 and 1872 with the Chippewa and Cree of the new province of Manitoba; disagreements over the terms and difficulties with administration arose immediately. The Boundary Waters Ojibway, who had been waiting to see how these treaties went, took these results into account.⁵⁶ As well, the Ojibway were considered to be highly independent and a military threat. Dawson counselled the new Dominion government to treat them with respect.⁵⁷

⁵⁴ See DSGIA Spragge's memorandum of September 5, 1872, reprinted in AO, Irving Papers, Mu 1514, 75/16, 1910, *Record of Proceedings*, 197. See also Elizabeth Maria Ellwood, "The Robinson Treaties of 1850," (M.A. thesis, Wilfrid Laurier University, 1977), 17ff.

⁵⁵ Holzkamm, "Ojibwa Knowledge of Minerals," 92.

⁵⁶ Wayne E. Daugherty, "Treaty Research Report: Treaty One and Treaty Two," (INAC, Treaties and Historical Research Centre, 1983), 14, and "Treaty Research Report: Treaty Three," (INAC, Treaties and Historical Research Centre, 1986), 7, 43.

⁵⁷ Dawson reported regularly on the Ojibway from 1857, the year he went through the region with Hind. In 1870, for example, he observed that the Ojibway "hold a very critical position on the line of route and that, if disposed to hostility, they might give a vast amount of trouble." NAC, RG 11, B 1(a), vol. 267, subject 429, S.J. Dawson, "Memorandum, in reference to the Indians on the line of route between Lake Superior and the Red River Settlement," Dec. 19, 1870, p. 16. Dawson was not the only one to report on the military strength of the Ojibway. Capt. Huyshe of the Wolseley expedition commented on their 'guerilla' capabilities; Daugherty,

The Ojibway had a good understanding of the treaty-making process and were in a strong negotiating position. Attempts at formal negotiations with them dated back to 1869 and were influenced almost from the beginning by the resources of the region. The Ojibway first had discussions with Dawson in the 1860s regarding the possibility of a treaty. Shrewd bargainers, conscious of the value of the resources sought by the whites, the Ojibway were able to increase the benefits of making treaty to an extent that raised the possibility of reopening Treaties 1 and 2. Government negotiators, on the other hand, tried to whittle these terms down to reflect their misperceptions of the utility of the land to the Ojibway.⁵⁸

2.5.1: Natural Resources and the Negotiation of Treaty #3

The opening up of the Boundary Waters region to settlement led to the construction of roads and railways that provided new

"Treaty Three," 5.

⁵⁸ This was an ancient process, as old as the first attempts of colonists in America to acquire Indian lands. See William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill & Wang, 1983), 56: "To European eyes, Indians appeared to squander the resources that were available to them. Indian poverty was the result of Indian waste: underused land, underused natural abundance, underused human labor." Cronon was speaking of New England in the early 17th century. Compare E.B. Borron's comments to AEmilius Irving in 1894 during the preparation of the Annuities case: Borron noted that Ontario had won "not only the far larger - but the best, and most accessible part of the territory included in Treaty No. 3. [Furthermore, the annuities paid] bear no relation whatever to the value of the surrendered territory." AO, Irving Papers, Mu 1468, 30/36/(6)3, E.B. Borron to AEmilius Irving, Oct. 10, 1894.

opportunities for learning about the resources of the Boundary Waters region. Increasing knowledge generated fresh pressures to settle and exploit the area. Dawson himself became an early exponent of the potential of the Rainy Lake region for settlement and recommended a route as early as 1859 in his report on the Hind expedition, to which he had been appointed by J.E. Cauchon, Commissioner of Crown Lands, in 1857.⁵⁹ In May 1859, P.M. Vankoughnet, Commissioner of Crown Lands, asked Dawson to inform the Indians at Fort William of the government's proposals regarding their Robinson Treaty Indian Reserve. Dawson plunged into the task, and "met chiefs from Lake Nipigon to Lac des Milles Lac [sic]."⁶⁰ Such contacts improved his knowledge of the Indians in the region, resulting in a more positive attitude toward them. But expeditions and experiences such as these increased knowledge of the natural resources as well. Dawson was proud that the building of his route had proved instrumental in the discovery of gold in the region of Lake Shebandowan, "a little beyond the Height of Land" (i.e., outside old Ontario), in 1871.⁶¹ Similarly, surveyors for the Canadian Pacific Railway discovered metalliferous outcroppings that

⁵⁹ Arthur, "Orientation and Disorientation," 209; Elizabeth Arthur, *Simon J. Dawson, C.E.* (Thunder Bay: Thunder Bay Historical Museum Society, 1987), 4.

⁶⁰ Arthur, *Simon J. Dawson*, 11. See also A.A. Vickers, "Treaty-making with Indians," *Thunder Bay Historical Society, Papers of 1911-1912*.

⁶¹ Dawson to Alexander Campbell, September 12, 1871, quoted in *Thunder Bay District 1821-1892*, ed. E. Arthur, 146.

speeded up prospecting in the area, even as transportation routes provided the infrastructure required to develop them.⁶²

The discovery of gold aroused an interest in the land that was palpable. Certainly it was a prominent factor in the progress - or lack of it - of the negotiations. Dawson reported the failure of negotiations in 1872, after 16 days of discussion, noting that the Ojibway had made the "most extravagant demands for roads made on their lands and wood taken for steamers and buildings."⁶³ The discovery of gold and silver had also held up progress, Dawson complained, since the Ojibway

have not been slow to give us their views as to the value of that discovery. 'You offer us', said they, '\$3 per head and you have only to pick up gold and silver from our rocks to pay it many times over.'⁶⁴

The Ojibwa, Dawson observed, "seem fully alive to their own interests and evince no small amount of intelligence in maintaining their views."⁶⁵ Dawson may have been referring to Chief Blackstone's attempts to keep miners off his lands until the treaty

⁶² NAC, Malhiot Papers, "Seventy Years of Growth," 109.

⁶³ NAC, Records Relating to Indian Affairs, RG 10, vol. 1868, file 577, Simpson, Dawson, Pither to Joseph Howe, July 17, 1872. Indeed, the problem of payment for the wood taken by steamboat operators was the first recorded question during the round of talks the next year that culminated in the signing of the treaty.

⁶⁴ NAC, RG 10, vol. 1868, file 577, Simpson, Dawson, Pither to Joseph Howe, July 17, 1872.

⁶⁵ NAC, RG 10, vol. 1868, file 577, Simpson, Dawson, Pither to Joseph Howe, July 17, 1872.

was negotiated.⁶⁶ In any event, minerals and timber played a significant role in the treaty negotiations.

2.5.2: Natural Resources and the Official Treaty Document

In spite of the discussion of the issue during treaty negotiations, and the strong concerns shown by Blackstone and other chiefs, no mention of minerals is made in the legal text of Treaty #3. Dawson was quick to deny them payment for the wood the Ojibway had cut to provide firewood for the steamships, the first issue that the chiefs raised at the final negotiating session. Morris' account of the negotiations is a major source of information regarding the points of concern raised by the chiefs, and he reported that he had promised that the Ojibway could keep mines discovered on their reserves and sell information just like anyone else relating to the location of mines.⁶⁷

How these promises did not become part of the legal text when they were so clearly part of the understanding the chiefs had as to the content of the treaty is unclear. It is difficult to believe that it is a mere oversight, for such omissions are common, leading to significant differences between the Aboriginal signatories' understanding, based on oral memory of the terms as negotiated and the government's legal memory as put down in the text. It is

⁶⁶ Chief Blackstone's activities are discussed in chapter 8.

⁶⁷ Morris, *Treaties of Canada*, 50.

insufficient to indicate that, once the legal text was drafted, it was explained fully to the Indians; the content of these explanations is lost in time apart from the memory of Aboriginal participants.⁶⁸ Sometimes these differences have come to light only as the descendants of the Aboriginal signatories, having heard their elders' accounts and learned English which enabled the reading of the text, have noted the differences between the two.⁶⁹

2.5.3: Natural Resources and Other Documents

Other accounts than Morris' exist of the negotiations of Treaty #3. In fact, other versions of the treaty itself exist, and a good deal of effort has been expended to describe the important differences between the texts. Joseph Nolin, a Métis from Point du Chêne, had been engaged by the Ojibway to take notes of the negotiations; Morris enclosed a copy of these notes with his own report, but they were not reproduced in his *Treaties of Canada with the Indians*.⁷⁰ Morris did include in that volume the account of a short-hand

⁶⁸ Morris wrote that after some hours of discussion clarifying numerous question, of which the issue of minerals was but one, the "conference then adjourned for an hour to enable the text of the treaty to be completed, in accordance with the understanding arrived at." The treaty was read, but only "an explanation of it in Indian" was given to the Ojibway by James McKay, a Métis who had assisted in the negotiations. Morris, *Treaties in Canada*, 51.

⁶⁹ George Erasmus recounted just such a situation during a talk at the University of Ottawa a few years ago. See also *The Spirit of the Alberta Indian Treaties*, ed. Richard T. Price (Edmonton: Pica Pica Press, 1987), 43.

⁷⁰ Morris, *Treaties of Canada*, 48.

reporter at the negotiations, apparently one of the soldiers sent with the Commissioners. This account had been published in the *Manitoban* in Winnipeg on October 11 and 18, 1873. Dawson's notes of the negotiations are also extant. The Ojibway "had also an Indian reporter, whose duty was to commit to memory all that was said."⁷¹ All four accounts of the negotiations contain in very similar terms the promise regarding minerals and mines. Yet this promise did not appear in the legal text of the treaty.

Another version of the treaty document is known as the Paypom Treaty after the elder who bought it from the photographer C.G. Linde. Apparently Linde had obtained it in 1906 from Chief Powasson, a signatory of Treaty #3.⁷² The Paypom Treaty is described by the Grand Council of Treaty #3 as "an original set of notes made for Chief Powasson at the signing of the 1873 treaty." The Grand Council observes that there are a number of differences between these notes and the legal text of the treaty which, their research indicates, "may have been written a year before the 1873 North West Angle negotiations."⁷³ If a standard form of the treaty were used for the signing, this would explain how the treaty document could have been prepared in an hour, as Morris stated;

⁷¹ Morris, *Treaties of Canada*, 48.

⁷² Grand Council Treaty #3, "The Paypom Treaty." A note on the back of the copy sold to Paypom, signed by Linde, attests that "this copy was given to me in 1906 by Chief Powasson at Bukety - the Northwest Angle - Lake of the Woods."

⁷³ Grand Council Treaty #3, "The Paypom Treaty."

presumably, in the haste to complete it, the mineral stipulations were overlooked. The Paypom Treaty records the promise in terms very similar to those used by Morris himself in his report of the proceedings.

These are not mere oversights that can be ignored, however. Morris himself described these omissions as 'outside promises' and there was concern in the field, on the part of at least one agent, that such misunderstandings, being so fundamentally important, would generate deep unrest should they come to light among the Indians. J.A.N. Provencher, one of the commissioners for Treaty #3, wrote to his superiors that the Indians of the prairie treaties had very different understandings of the effects of those treaties than indicated in the legal text. The difference was fundamental: the Indians believed they had made an arrangement to share their lands with the newcomers, not, as the legal texts intoned, cede them away forever. During the negotiations of Treaty #3, for example, the Lac Seul chief used the terms "borrow" and "lend" to indicate his understanding of the arrangement:

We are the first that were planted here; we would ask you to assist us with every kind of implement to use for our benefit, to enable us to perform our work. ... We would borrow your cattle; we ask you this for our support. ... The waters out of which you sometimes take food for yourselves, we will lend you in return.⁷⁴

⁷⁴ Morris, *Treaties of Canada*, 63.

Provencher cautioned against the reaction should the Indians learn that the government meant to deny them any rights as "proprieters of the soil."⁷⁵ The government had learned - or should have learned - from its experiences with Treaties 1 and 2 that, as Archibald noted,

It is impossible to be too particular in carrying [sic] out the terms of the arrangements made with these people. They recollect with astonishing accuracy every stipulation made at the Treaty, and if we expect our relations with them to be of the kind which it is desirable to maintain we must fulfil [sic] our obligations with scrupulous fidelity.⁷⁶

Archibald spoke from experience, for there were discrepancies as well between Treaties 1 and 2 and the understanding the Indians have of the terms negotiated: Commissioner Simpson had a memorandum that Archibald had witnessed and signed revealing these differences. "The Indians expect these promises to be rigidly kept," Archibald warned the Secretary of State, "and it will be most unsafe to disappoint."⁷⁷ Archibald was more prescient than he could know. The Ojibway memory of these promises extends indelibly into the present.

⁷⁵ AO, Irving Papers, Mu 1514, file 75/16, *In the Supreme Court of Canada. On Appeal from the Exchequer Court of Canada. Between The Province of Ontario and The Dominion of Canada. Record of Proceedings*, J.A.N. Provencher's report on Treaties 1, 2 and 3, October 25, 1875, p. 283.

⁷⁶ PAM, Archibald (Adams G.) Papers, MG 12, A1 #20, Despatch Book 3, Archibald to Secretary of State, February 12, 1872.

⁷⁷ PAM, MG 12, A1 #26, Despatch Book 3, Archibald to Secretary of State, February 12, 1872.

CHAPTER III: THE ONTARIO-MANITOBA BOUNDARY DISPUTE

The opening decades of Confederation witnessed numerous constitutional and jurisdictional battles between the federal government and the Provincial Rights movement, an Ontario-led process of redefining the Confederation agreement in the interests of the provinces. These battles were waged on many fronts, from the federal power of disallowance and the role of Lieutenant-Governors to the right to award the honour of Queen's Counsel and the control of liquor licences.¹ Unfortunately for Canada's Aboriginal peoples,

¹ The most extensive analysis of the political side of the Provincial Rights movement is still J.C. Morrison's Ph.D. dissertation, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations," in *Three History Theses* (Toronto: Ontario Public Records and Archives, 1961). Written from a strongly centralist point of view, it is at times antagonistic of Mowat. Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942*. Ontario Historical Studies Series. (Toronto: University of Toronto Press, 1981), 8-32, follows Morrison (on matters relevant here) but is more neutral in tone. More recent treatments include Paul Romney's helpful analysis of Ontario's - read Mowat's - views and struggles in the provincial rights arena in his *Mr. Attorney: The Attorney general for Ontario in Court, Cabinet and Legislative, 1791-1899* (Toronto: Osgoode Society & University of Toronto Press, 1986), chapter 7, "In Right of Ontario". Margaret Evans styles Mowat as the 'defender of provincial rights' in her discussion of the balance and balancing of powers after 1867; *Sir Oliver Mowat*, chapter 6. Garth Stevenson, *Ex Uno Plures: Federal-Provincial Relations in Canada, 1867-1896* (Montreal & Kingston: McGill-Queen's University Press, 1993), offers a frequently insightful nation-wide treatment of intergovernmental agendas. A different tack is taken in Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York, 1991). Vipond distinguishes his work neatly from previous approaches, offering instead of 'external' constitutional, legal, political or economic explanations an analysis of the 'internal' elements at play: the differing reconciliations of philosophies of individualism and community taken by Liberal and Conservative in post-Confederation nineteenth century Ontario.

the Ontario-Manitoba Boundary Dispute was a major front that involved their rights, whether Aboriginal or treaty.² The Boundary Dispute was not begun as an assault on Aboriginal rights; rather, these rights were dragged into the protracted fray in a last-ditch effort by the Dominion to assert its claims to the Disputed Territory.³

The Boundary Dispute can be approached in many different ways: it has been analysed from historical, geographical, political, and cultural points of view.⁴ The contribution here however is not to

² One argument for the centrality of Aboriginal issues in the post-Confederation constitutional debates is Anthony J. Hall, "The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada," in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Winnipeg: University of Manitoba Press, 1991), 267-86.

³ S. Barry Cottam, "Indian Title as a 'Celestial Institution': David Mills and the St. Catherine's Milling Case," in *Aboriginal Resource Use*, ed. Abel and Friesen, 247-67.

⁴ See Cottam, "Historical Background of the St. Catherine's Milling Case," 11-14, for a review. Two biographies of Mowat address the Boundary Dispute as well as provincial rights: C.R.W. Biggar, *Sir Oliver Mowat: A Biographical Sketch*, 2 vols. (Toronto, 1905), and Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992). An excellent short account of the Boundary Dispute is Morris Zaslow's "The Ontario Boundary Question" in *Profiles of a Province*, ed. Edith G. Firth, (Toronto: Ontario Historical Society, 1967), 107-117. More recent works have addressed the Boundary Dispute with varying degrees of success. S.J.R. Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791-1896* (Toronto: University of Toronto Press, 1990) offers an overview in his analysis of Ontario's political culture; he implies that the Boundary Dispute ended with the Privy Council's decision in Ontario's favour in 1884 (259-260) and examines its implications in terms of Ontario's victory and the Dominion's loss. Stevenson's more complete description places the Boundary Dispute into the context of the competing agendas of the governments involved; *Ex Uno Plures*, 59-64. Stevenson (64, 294-6, 299) and

an understanding of the Dispute as such, but to how it intruded upon the rights of the Aboriginal inhabitants of the Disputed Territory. This dissertation attempts to show how the Ojibway have been trapped, by circumstances beyond their control, within almost interminable federal/provincial disagreements. As a context for understanding the position of the Ojibway, the details of the Boundary Dispute are not of much interest in and of themselves, although a summary of the Dispute is necessary. The focal points of further discussion are how the Boundary Dispute developed, how its reluctant resolution required legal actions that involved concepts of Aboriginal rights and land tenure, and how these issues have continued to limit the rights of the Ojibway into the present.

The Boundary Waters region, and in particular the lands covered by Treaty #3, was the locus of the Boundary Dispute, a twenty-year wrangle between the new Federal and Ontario governments - Manitoba was at best a reluctant player, merely a proxy for the Dominion - over the ownership of a large section of Rupert's Land, which had been acquired by the Dominion from the Hudson's Bay Company in 1870. The *British North America Act (1867)* stipulated merely that the boundaries of the new province of Ontario were the same as

Evans (175, 179-180) refer briefly to the Indian title issue and the *St. Catherine's Milling* case, but none of these authors addresses the implications of the Provincial Rights movement for Aboriginal peoples. (Vipond does not deal with the Boundary Dispute in his set of selected issues.)

those of Upper Canada.⁵ But the northern and western boundaries of Upper Canada had never been defined and, when the vast hinterland of the Northwest Territories changed hands, the question of how much of the new area was owned by each government had to be faced.

An adjudication was made in Ontario's favour in 1878 by a Board of Arbitrator's established by Ontario and the Dominion. It would have added the Disputed Territory, an area of about 55,000 square miles almost coterminous with Treaty #3, to Ontario. This Boundary Award, as it was called, was made during the short years in which Liberals held power in both arenas, but could not be acted upon before the election that year that saw the return to federal power of the Conservatives, led by Mowat's old enemy, John A. Macdonald. After much debate and delay, the question was put before the Judicial Committee of the Privy Council, which in 1884 upheld the Award. This should have been the end of the matter, but Macdonald refused to accept the Privy Council decision. He began to act upon his contention, made initially in 1882 then officially in 1884, that the Dominion owned the Disputed Territory - in fact, the entire Northwest - on the basis of treaties negotiated with the Indians. Since they had been the original owners of the land and these treaties extinguished their title, the land, Macdonald reasoned, passed to the Dominion. Thus, even if Ontario's boundaries were as the Privy Council had decided, the land and its resources belonged

⁵ Maurice Ollivier, *British North America Acts and Related Statutes, 1867-1962* (Ottawa: Queen's Printer, 1962), 64, section 6 of the Act.

to the Dominion. Macdonald put this theory to use by distributing dozens of timber limits to his 'political friends', including the St. Catherine's Milling and Lumber Company. The Ontario government brought an action against the Company in 1885 and so the question of Aboriginal title found its way into the courts.⁶ Ontario's position, that the Crown owned the land and the Indians had a mere right of use as long as it pleased the Crown, was upheld in the four courts which heard the *St. Catherine's Milling* case. While it effectively ended the Boundary Dispute, this case was but the first in a line of lawsuits that had implications for the Ojibway.

While the Boundary Dispute provides the main political foundation of this dissertation, then, it has contexts of its own and implications that long outlived it. Examination of these is essential if the position of the Ojibway is to be fully understood. The contexts include the long history of Rupert's Land itself, from the early days of exploration and fur trade that witnessed the conflicting and unreconciled claims of the French and English, through to the acquisition of Rupert's Land by the new Dominion in 1870 that triggered the boundary issue. This acquisition required, apart from the practicalities of the deal itself, changes in thinking about the region and its history. As perceptions of the west improved and dissatisfaction with the hegemony of the Hudson's

⁶ See Cottam, "An Historical Background of the *St. Catherine's Milling Case*," for both the background of the company, with its strong Tory connections, and the development of this action into the *St. Catherine's Milling* case.

Bay Company increased, the acquisition of Rupert's Land moved forward. The implications include the consequences of the continuing federal/provincial disputes for those living in the Disputed Territory, whether the Eurocanadians who sought to settle the region and develop its resources or the Ojibway themselves, increasingly confined to their reserves by the pressures of settlement. The contentious relations between governments manifested themselves in lawsuits and various legislative actions and agreements, the full history of which would bring us up to the present. These implications and contexts are examined in this chapter, setting up the fuller discussion in later chapters of the resource industries and the continuing federal/provincial disputes.

3.1: The Boundary Waters Region as Gateway to the West

For the new Dominion of Canada, the promise of Rupert's Land included a 'gateway to the west' through Canadian territory, rather than the alternative route through the United States via St. Paul, Minnesota. For the new province of Ontario, it offered a resource hinterland and access to the agricultural lands of the prairies. Thus, the region gained a strategic importance based in part on new national goals, as reflected in the National Policy and the requirement of a railway linking the new province of British

⁷ Simon J. Dawson may have been the first to use the term when he remarked that "standing as [the Ojibway] do in the gateway to the territories of the North-West, it is of the highest importance to cultivate amicable relations with them." S.J. Dawson, "Report of May 1st, 1869," in Russell, *The Red River Country*, 192.

Columbia to the centre of the country, in part on a reasonable reluctance to rely on the goodwill of the neighbour to the south, in part on the exigencies of dealing with events in the west that led to the creation of the first new province in the Dominion, and in part on Ontario's desires to meet the ambitions of those who were heading to the west to open up the prairie lands as southern Ontario filled up as well as to attain control over a new, rich hinterland.

Although it may be a truism now, the notion of the area as the gateway to the west - and indeed the notion of the value of the west itself - was slow to mature. The western part of the continent had initially been a mystery to the European explorers, the great 'towards' that pulled at men who initially sought passage to the northwest and advantages over competitors in trading with the Aboriginal inhabitants of the country. The west revealed itself in stages, as pieces of a giant puzzle to be put together without a finished picture in mind. During this process, the west was interpreted in varying ways that correlated to knowledge of it, its perceived usefulness, the state of the technologies that would permit that usefulness to be realized, and perceptions of its original inhabitants.

The perceptual shifts in the nineteenth century that brought the west into the positive attentions of ambitious men have been charted by Doug Owsram in *Promise of Eden*. In the first half of the

century, Owram noted, the northwest was seen as an inhospitable environment, an attitude reinforced for the fur traders as the trade moved toward the subarctic. In the absence of better information, views of the subarctic became views of the west as a whole.⁸ But as the potential of the land itself came dimly into view, this attitude was turned upon its head. By 1856-7, a western expansionist movement was taking shape, led by a handful of men, including at least two who became involved with Treaty #3, Simon J. Dawson and Alexander Morris.⁹ This group was at the forefront in the movement to dislodge the Hudson's Bay Company's hegemony over the region, which was weakening in any case. They began to see the west as a hinterland for the trade and commerce of Upper Canada that could be made accessible by railway.¹⁰

At the same time, ideas about the wilderness itself were changing, from a wild place that dominated and degraded humankind (Aboriginal peoples being seen as proof) to a beautiful place of great potential once it was 'tamed'. These notions are reflected in the shifts in language used to describe the wilderness. Thus, it was not unusual for travellers to marvel at the regions's natural wonders - how like a garden, this wilderness seemed to many - and then to proceed to comment on how these wonders could be improved

⁸ Douglas Owram, *Promise of Eden: The Canadian Expansionist Movement and the Idea of the West, 1856-1900* (Toronto: University of Toronto Press, 1980), 10-6.

⁹ Owram, *Promise of Eden*, chapter 2 passim.

¹⁰ Owram, *Promise of Eden*, chapter 3 passim.

through taming or exploited for capital gain.¹¹ The doctrine of usefulness was in full sway among these impressions; whether natural or not, something that could not be used was, virtually by definition, a waste.¹² Certainly this attitude pervaded perceptions of the original users of the environment, who appeared to have so underutilized the resources as to foster the belief in the nineteenth century mind - drawing from its roots in the seventeenth¹³ - that the value of the resources was simply lost on that more 'primitive' society.¹⁴

As a result of these shifts in thinking, the expansionists spearheaded the movement to acquire Rupert's Land from the British Crown. This goal was successfully met after a decade of effort when, in 1870, the new Dominion government received title to Rupert's Land for the sum of £300 000 and other considerations.

¹¹ Owram, *Promise of Eden*, 70-6.

¹² R. Craig Brown, "The Doctrine of Usefulness: Natural Resources and National Park Policy in Canada, 1887-1914," in *Canadian Parks in Perspective*, ed. J.G. Nelson with R.C. Scace (Montreal: Harvest House, 1970), 46-62.

¹³ The allusion here is to Locke's arguments, made c.1678, regarding labour as the source of the title to and value of land. See John Locke, *Two Treatises of Government*, A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett (New York: Cambridge University Press, 1960; rev. ed. 1963), chapter 5, "Of Property", especially sections 26, 30-43.

¹⁴ When Hind found old lodge poles covered in vines near Rainy River, he remarked that they were "records of the love of change which seems to form a leading characteristic ... in the habits of the barbarous race who possess, without appreciating or enjoying them, the riches of this beautiful and most fertile valley." Hind, *Canadian Red River Exploring Expedition*, 1:91.

With the acquisition of this territory, a number of factors affecting the country in a variety of ways were put into motion. Development of the west could now proceed; the rail link promised to British Columbia could now be built; the west was snatched from the outstretched hands of the burgeoning, ambitious neighbour to the south. Problems in the way included the need to deal with the Aboriginal populations: the Métis were asserting their rights to the Red River country and the new territory was subject to unextinguished Aboriginal title. But such issues added impetus: the Riel rising provided an urgency to the question of a national railway and the prairies could not be opened for settlement unless treaties had been made with the Indians. By the end of the 1870s, the entire prairie west was covered by the 'numbered treaties'.¹⁵ A more serious problem from our perspective is that the boundaries between Dominion and Ontario lands were far from clear.

3.2: The Acquisition of Rupert's Land

Although the new Hudson's Bay Company that resulted from the merger of 1821 received a 21-year royal licence for a monopoly of trade, the original charter of 1670 remained in place as far as Rupert's Land itself was concerned.¹⁶ By 1850, this charter was being called

¹⁵ The best recent treatment of these processes, based on an excellent synthesis of the secondary literature, is Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1984).

¹⁶ Glyndwr Williams, "The Hudson's Bay Company and The Fur Trade: 1670-1870," *The Beaver* (Autumn 1983): 49.

increasingly into question in both England and Canada. Protests over its extent were being made in Canada by expansionists such as George Brown, who argued in the *Toronto Globe* that it was "unpardonable that civilization should be excluded from half a continent on at best a doubtful right of ownership."¹⁷ Similar views were expressed by Company men, who could see the tide of opinion turning against them. By 1856, as the Toronto expansionists renewed their determination to gain the North West,¹⁸ Governor Simpson himself had to admit that "the Company Charter, as far as exclusive right to trade goes, is almost a nullity:- as we are unable to enforce its provisions, it is set at nought by the Americans and their Halfbreed allies."¹⁹ By December 1856, the

¹⁷ J.M.S. Careless, *Brown of the Globe. Volume One, Voice of Upper Canada 1818-1859* (Toronto & Oxford: Dundurn Press, 1989), 230.

¹⁸ Careless, *Voice of Upper Canada*, 230.

¹⁹ Quoted in Williams, "Hudson's Bay Company," 79. The Métis became increasingly concerned in the 1840s about the threat of whites settling the prairies. They sought definition of their status from the governor of Assiniboia in 1845 and sent a petition to London in 1847. The petition asserted that HBC authority did not reach Red River country and sought a declaration that the charter of 1670 was invalid. Simpson had to admit that the Métis were beyond Company control: "The majority have settled where they liked and we could not prevent them." Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), 263-4. These issues came to a head with the Sayer trial of 1849; the Company's inability to enforce its jurisdiction was translated by the Métis into freedom from its monopoly over the fur trade. Dickason, 264; W.L. Morton, *Manitoba: A History*, 2nd ed. (Toronto: University of Toronto Press, 1967), 77.

Toronto Board of Trade was petitioning the Ontario government to investigate the Company's title.²⁰

With the Company's licence up for renewal in 1859, the British House of Commons established a Select Committee in 1857 to examine the issue. The Committee decided it required more information about the Canadian west. Two expeditions were mounted, by Capt. John Palliser from England and Henry Youle Hind from Canada. Palliser was sympathetic to the claims of the free traders and Métis to trade, but his recommendations in this regard were ignored. Instead, his report generated enthusiasm for the agricultural potential of the west in the so-called 'fertile belt'. Both expeditions added significantly to scientific knowledge of the prairies²¹ and, although the Select Committee did not question the title of the Hudson's Bay Company, it did recommend that Canada should acquire the fertile areas in the west (e.g., at Red River and in Saskatchewan) once it could manage them.²²

²⁰ The *Globe*, 4 December 1856, cited in Careless, *Voice of Upper Canada*, 232.

²¹ Williams, "Hudson's Bay Company," 80. For Palliser's account of his trip through Rainy River/Lake of the Woods country, see: Spry, ed., *Papers of the Palliser Expedition*, 74-79. The account includes the transcription of a speech given to the members of the expedition by a chief at Fort Frances.

²² J.M.S. Careless, *Brown of the Globe. Volume Two, Statesman of Confederation 1860-1880* (Toronto & Oxford: Dundurn Press, 1989), 240-1. Brown was unhappy with this result, believing it came from a lack of push by the Dominion and Ontario on the issue; 239, 241. His resolve to press for the acquisition of the North West increased; 307.

Although its licence was not renewed in 1859, the Hudson's Bay Company did retain its territorial rights. Ten years would pass before a deal could be worked out between the Company, Britain and Canada to extinguish those rights. Brown believed that the Dominion was slow to push its cause in part owing to the reluctance of Quebec, which feared that annexation would increase the numbers of the English and so swamp them politically.²³ In 1863, Edward Watkin acquired the Hudson's Bay Company for a consortium that was more interested in the development of other resources of the region than furs.²⁴ The new owners surrendered Rupert's Land to the British Crown in 1869, paving the way for a final transfer of the area to Canada. The Company received £300,000 and the lands around its posts in compensation as well as rights to 1/20 of the lands in Palliser's Triangle that were granted over the next fifty years.²⁵

One of the early acts of the Dominion government was the arrangement for the acquisition of Rupert's Land in 1868 with the passage of the *Rupert's Land Act*, "which provided for the surrender to the Crown by the Company of all non-commercial privileges" under

²³ Careless, *Voice of Upper Canada*, 308; *Statesman of Confederation*, 8.

²⁴ Williams, "Hudson's Bay Company," 80. The enterprising Watkin was also president of the Grand Trunk Railway; Careless, *Statesman of Confederation*, 59.

²⁵ Williams, "Hudson's Bay Company," 82.

section 146 of the British North America Act.²⁶ These included the rather broad legislative powers of the Hudson's Bay Company in Rupert's Land, a matter that has occasioned discussion in the literature.²⁷ The Act defined Rupert's Land as "the whole of the Lands and Territories held or claimed to be held by" the Hudson's Bay Company.²⁸ This phrase transferred to Canada and Ontario Britain and France's century of dispute over the extent of Hudson's Bay Company territory. Britain and France had each claimed the area, ceding it back and forth between themselves as their fortunes at war rose and fell. After 1760, the point between the two European powers became moot,²⁹ the concern over it ultimately transferring to the governments of the Dominion and the province of Ontario. With the creation of these new governments in 1867, the question of the southern limit of Rupert's Land, which would necessarily be the northern and western limits of Ontario, became

²⁶ Elizabeth Gaspar Brown, "British Statutes in the Emergent Nations of North America: 1606-1949," *American Journal of Legal History* 7 (1963): 119. The full title of the *Rupert's Land Act, 1868* is "An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of 'The Governor and Company of Adventurers of England trading into Hudson's Bay,' and for admitting the same into the Dominion of Canada," 31-32 Vic. c. 105 [July 31, 1868]. It was repealed by the Statute Law Revision Act, 1893, 56-57 Vic. c. 14. See Ollivier, *British North America Acts*, 107.

²⁷ Brian Slaterry, "The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of their Territories," (Ph.D. dissertation, Oxford University, 1979), 160-1.

²⁸ *Rupert's Land Act*, section 2, cited in Ollivier, *British North America Acts*, 107.

²⁹ Slaterry, "Land Rights of Indigenous Canadian Peoples," 184-90.

increasingly urgent. Not surprisingly, each side sought to maximize its claim at the expense of the other.

The Ontario-Manitoba Boundary Dispute had important implications for the shape of the new confederation. If the British claims were correct, then the Dominion government was the recipient of a large northern hinterland, complete with its extensive resources. If the French claims were correct, then the province of Ontario would gain the benefit of the transfer of much of the old Hudson's Bay Company territory. And if Ontario benefited, then Quebec would benefit as well, for as the boundary of one province moved to the north, so would the boundary of the other. The assertions made by the European powers regarding their claims to the area figured prominently in the settlement of the boundary dispute. An attempt will be made to delineate these and the issues resulting from them.

3.3: Colonial Claims to the Northwest

The boundaries of Rupert's Land had never been adequately defined, although the French and English did make attempts to settle the issue. For example, in 1713 the Treaty of Utrecht passed the region from France to Britain and provided for the appointment of a commission to locate with more precision the boundaries involved. The commission failed to do so, however, and contention over the

extent of the Hudson's Bay Company's territory persisted.³⁰ By 1763, with the acquisition of Canada by the British, the question became "how much of the modern west did France claim?" It is difficult to say conclusively, but apparently France claimed to the Pacific, whereas Britain claimed "virtually the whole of North America." Western Canada was not part of Louisiana (which was secretly ceded to Spain in 1762) and "so passed to Great Britain in 1763,"³¹ which claimed the "whole of western Canada north of the 49th parallel."³²

Actual control of the region is a question much more easily resolved. Until the time of the surrender of Canada in 1763, the French had maintained their dominance there. The Hudson's Bay Company had not managed to penetrate any further south than Henley House, only 125 miles inland.³³ Apart from the isolated trips of Henday and Kelsey, the northwest was virtually unexplored by the Company before 1763. Knowledge of the area was gained from the Amerindians with whom they traded. Not until after 1770 did Hearne and Mackenzie travel through, with further explorations coming in

³⁰ D.G.G. Kerr, ed., *A Historical Atlas of Canada*, 1st ed. (Toronto: Thomas Nelson & Sons, 1961), 22-3.

³¹ Slattery, "Land Rights of Indigenous Canadian Peoples," 179ff.

³² Slattery, "Land Rights of Indigenous Canadian Peoples," 189-90.

³³ Peter A. Cumming and Neil H. Mickenburg, eds. *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Assoc. in association with General Publishing Co., 1972), 134.

the nineteenth century.³⁴ What then was the nature of the Company's jurisdiction over Rupert's Land? In particular, what implications did that jurisdiction have for the Aboriginal inhabitants of the area? Brian Slattery examined the question from the viewpoint of whether or not Rupert's Land was a colony. He argued that the 1670 charter brought in English law for Company officials and employees, but that the Company had no more rights than the Crown, i.e., "underlying title to the soil subject to subsisting aboriginal interests, along with an exclusive right to extinguish such interests by session or purchase."³⁵

The issue of the extent of Rupert's Land (as opposed to the north-western territories as a whole) lay dormant, however, until the Ontario-Manitoba Boundary Dispute, when the Dominion and Ontario lawyers attempted to settle it before the Judicial Committee of the Privy Council in London. As will be seen in further discussion of that event, the question turned on how territorial rights were established by and between European states. Since Britain had laid claim by conquest to French Canada and France had been much more effective than Britain in controlling Rupert's Land and the North-Western Territory during the exploration and fur trade period, the argument could be made that Hudson's Bay Company's territory up to 1763 was limited to the area the HBC could control; i.e., to the

³⁴ Cumming and Mickenburg, *Native Rights in Canada*, 135-8.

³⁵ Slattery, "Land Rights of Indigenous Canadian Peoples," 161.

coastal strip around the Bay that had for so long been the centre of their trade activities. If Ontario could argue effectively that occupation and not a mere charter was the basis for laying claim to the territory, then the Dominion argument that it owned the Disputed Territory by right of acquisition of Rupert's Land from the British Crown could be undermined.

3.4: Federal and Provincial Claims During the Boundary Dispute

The most extensive treatment of the documents relating to the Ontario-Manitoba Boundary Dispute was made by David Mills,³⁶ appointed Ontario Boundary Commissioner in 1872, and federal and Ontario lawyers in preparation for the 1878 boundary arbitration hearings and the 1884 reference on the western boundary of Ontario, heard by the Judicial Committee of the Privy Council. Mills observed that

The proper location of the disputed Boundaries depends upon the proper construction of Statutes, Treaties, Orders in Council, and royal Proclamations, interpreted

³⁶ Mills was something of a polymath; during his long career, he was a teacher, lawyer, newspaper editor, and university professor. His experiences as a politician included serving as Liberal M.P.P. for Bothwell, Ontario; as an M.P., he was Minister of the Interior and Minister of Justice. His death cut short his long-awaited appointment to the Supreme Court. Mills even published a volume of poetry, although it must be said that this latter work hardly enhanced his name. An ardent reader, Mills was recognized by ally and opponent alike as an expert on constitutional matters. For further biographical information, see Cottam, "An Historical Background of the *St. Catherine's Milling Case*," 78-88, and Robert Vipond, "Mills, David," *Dictionary of Canadian Biography*, 13:707-712.

by the aid of contemporaneous facts, and by well-established principles of public law.³⁷

As Commissioner, Mills produced two volumes, in 1872 and 1877, in which he argued for the extension of Ontario as far as the Rocky Mountains. Mills' influence on the course of the boundary dispute has been examined elsewhere;³⁸ the focus here will be on his arguments in the 1877 volume, which revised the 1872 study. Further arguments by Ontario and arguments by the federal government will be drawn from the 1884 proceedings before the Judicial Committee of the Privy Council. All of these records relied heavily on the extensive research undertaken in libraries and archives in Canada, the United States and Great Britain, a formidable task given the state of information technology at the time.

In his 1877 report to the Ontario Government on the boundaries, Mills began with an examination of the earliest charters of exploration in North America. Of these various English and French charters he observed that "there was scarcely any portion of North America ... which had not been granted by each to some of its own

³⁷ David Mills, *Report on the Boundaries of the Province of Ontario, containing in part the substance of a report prepared for the government of the province in 1872, by David Mills, Esq., M.P., and afterwards revised and considerably enlarged by the author for the purposes of the arbitration between the Dominion of Canada and the Province of Ontario* (Toronto, 1877), 1.

³⁸ Cottam, "David Mills," in *Aboriginal Resource Use*, ed. Abel and Friesen, 247-67.

subjects."³⁹ The French were soon ahead of the slow-moving British in the use of such grants. By the early 17th century, France had possession of St. Lawrence Valley; by the end of the 17th century, "she had taken formal possession of the whole country from the shores of Hudson's Bay to the Allegheny Mountains, and the whole valley of the Mississippi from the source of that river to the Gulf of Mexico."⁴⁰ Such possession was disputed by the British, however, and Mills analyzed at length these 'Disputed Territories' in the areas east and south of the St. Lawrence (New England, Ohio Valley, St. Lawrence Valley).⁴¹ The disputes arose in part, Mills argued, because of the differing approaches of the British and French in North America. He sought to show that, as "agricultural communities ... [and] continuous settlements," the British colonies "had not, therefore, spread themselves over so vast an extent of territory as had the colonists of France ... they had not explored the country except where they purposed to colonize it."⁴²

These differing patterns had implications for assertions of sovereignty in North America. Mills argued that the early charters of the English king, granting lands to the unknown west, could not

³⁹ Mills, *Report on the Boundaries of the Province of Ontario*, 2.

⁴⁰ Mills, *Report on the Boundaries of the Province of Ontario*, 4-17.

⁴¹ Mills, *Report on the Boundaries of the Province of Ontario*, 28-57.

⁴² Mills, *Report on the Boundaries of the Province of Ontario*, 30-1.

establish sovereignty in areas unsettled by the English. But the English did not want France's possession of the west to limit their own expansion so, as the War of the Spanish Succession began, they attempted to solidify their claims through an alliance with the Iroquois, in which the English promised to protect their hunting-grounds. The Iroquois claimed their territory extended to Lake Nipissing, but when a British governor made a treaty with them in 1726, Mills noted from British and French archival sources, "France had not renounced her sovereignty over the country, and the rights of England under the Treaty of Utrecht could not be enlarged at the expense of France by any arrangement entered into with the savages thirteen years later."⁴³

As did the French, Mills rejected British claims to the area west of the Allegheny Mountains based on treaties with the Iroquois because he could not or would not accept their Aboriginal title to the land: these treaties, he noted, "depended upon the title of the Iroquois Indians to the country which they professed to cede." He admitted that the Iroquois had indeed "overrun the greater part of the country which they professed to transfer to the Crown of Great Britain." The difficulty was, however, that "the adventurous explorers from France had already visited the greater part of the country claimed by the Five Nations, and taken possession on behalf

⁴³ Mills, *Report on the Boundaries of the Province of Ontario*, 31.

of the King of France."⁴⁴ Mills went on to utilize arguments that resurfaced in the *St. Catherine's Milling* case:

These warlike Indians obtained no fixed possession of the regions which they professed to have wrested from neighbouring tribes. Nor is it easy to perceive what way their conquests could have affected any right which the French had acquired, according to the usages of civilized nations. To argue that the warlike invasions of the Five Nations of the countries of the various tribes of Indians between the Ottawa and the Mississippi Rivers effected a permanent transfer of the country, is to ascribe to them a consequence not ascribed by public law to similar invasions by the armies of civilized states.⁴⁵

Mills cited for this last statement a United States Supreme Court decision that "Conquest does not *per se* give the conqueror *plenum dominium et utile*, but a temporary right of possession and government."⁴⁶

If Aboriginal title did not convey the land, neither did grants from the king, however. Mills had little regard for the weight of royal charters as land-granting devices or as bases of claims of sovereignty. Rather, he based sovereignty on the discovery and actual possession of the land, a foundation for his arguments about the validity of the French claim to Canada and the Hudson's Bay Company region. Mills went on at some length on the topic, and his

⁴⁴ Mills, *Report on the Boundaries of the Province of Ontario*, 34-5.

⁴⁵ Mills, *Report on the Boundaries of the Province of Ontario*, 35.

⁴⁶ 2. Dallis's U.S. Sup. Court, Rep. 486, in Mills, *Report on the Boundaries of the Province of Ontario*, 35.

comments are worth extensive quotation. Charters merely encourage exploration, he noted, and do not provide title to the land:

Such grants add nothing to the title of the Government, and were useful only in so far as they served to promote early discovery and settlement. The respective rights of the two Governments were, apart from the fortunes of war, defensible only upon grounds of prior discovery, followed by occupation in some way or by some other act which, according to the usages of nations and the moral sense of mankind, creates a superior claim to the sovereignty of the country in dispute. Can it for a moment be supposed that the King of England could lock up the country within the western borders of Canada by a charter granted to some of his subjects who, for a hundred and thirty-five years, never visited the country?

Whoever has taken the trouble to look into the policy of granting charters like this, must be aware that they were not usually given because the country belonged to the Government or sovereign that made the grant, but ... that it might become theirs or his by the subsequent diligence of those to whom the grant was made. In the history of English colonization, there are many instances of prospective grants of this kind; but their validity as against any foreign prince or his subjects, must depend on this - who first performed those acts which by the law of nations are held to constitute a title to the sovereignty of the country? The charter must be put out of view. Its contents signify nothing in the discussion. It is simply an act of one of the parties which, in itself, is not even an element which goes to make up the rights of sovereignty.

The usual policy in granting charters of this kind was to convey the widest possible extent of territory; not because it was an act which limited in any way the right of acquisition by another sovereign; not because another could be estopped from conveying in like manner a title equally valid to his subjects; but for the purpose of extending his dominions by stimulating those to whom the grant was made, to explore the country, and to take possession of it, by the sovereign's authority, and on his behalf. [Both France and Britain granted such charters, but the French pressed on into the interior while the] English adventurers ... slept upon their prospective rights. ... The whole of the north-west, was, to the Hudson's Bay Company and to the British people and Government, an unknown land. ... There had been no act of any kind, formal or informal, of any Englishman, which gave, or could give, to the Crown of England any grounds upon which it could found a claim to the sovereignty of

the north-west, prior to its cession by the Treaty of Paris.⁴⁷

On the basis of such arguments, Mills stated that the Hudson's Bay Company Charter did not grant territory to the Company. Furthermore, the Charter notwithstanding, France had a valid claim to Hudson Bay owing to its actual possession of the region. Mills documented the French claim that New France included Hudson Bay with an account of French exploration. He cited the expedition of discovery to the Pacific by Vaudreuil, whose emissary La Noue got at least as far as Rainy River country where he set up a post, and a description of La Vérendrye's expedition, which went through the Lake of the Woods region in the 1730s. By 1743, one of La Vérendrye's sons had reached the Rockies, which Jacques Legardeur de Saint Pierre also reached in 1752. Mills cited as well a memoir of trading posts written in 1757 by Louis Antoine de Bougainville, Aide-de-camp of General Montcalm.⁴⁸ In his summation of his argument thus far, Mills noted that he wanted to show through this accounting of the French explorers that the northwest regions "were actually occupied by the French merchants, traders, and soldiers, from the period of their discovery as part of Canada, and subject

⁴⁷ Mills, *Report on the Boundaries of the Province of Ontario*, 120-21.

⁴⁸ Mills, *Report on the Boundaries of the Province of Ontario*, 22-6.

to the authority of its Government, until the period of its conquest." This area was "ceded by France as a part of Canada."⁴⁹

The question of the extent of the Hudson's Bay Company territory, and by inference the coverage of Rupert's Land, the Indian Territory and Quebec, were argued extensively before the Privy Council in the 1884 reference on the western boundary of Ontario. Mills recognized, of course, that claims to the Hudson Bay region had been a cause of dissension between Britain and France from the granting of the Hudson's Bay Company Charter to the Treaty of Utrecht.⁵⁰ As well as establishing French possession as the basis for Ontario's claim in the Ontario-Manitoba Boundary Dispute, Mills sought to establish the boundaries of the Hudson's Bay Company territory in relation to the province of Ontario. For the northern boundary, he argued that the

location of the boundary line between the Province of Ontario and the Hudson's Bay country can be determined only by the proper construction of the 10th article of the Treaty of Utrecht, and of the Order in Council of August, 1791. They must be interpreted in the light of contemporaneous events, and in accordance with the recognized principles of Public Law.⁵¹

⁴⁹ Mills, Report on the Boundaries of the Province of Ontario, 28.

⁵⁰ Mills, Report on the Boundaries of the Province of Ontario, 122-185.

⁵¹ Mills, Report on the Boundaries of the Province of Ontario, 122. This Order in Council, not the Constitution Act, 1791 itself, divided the Province of Quebec.

These "contemporaneous events" were the various voyages of discovery from England, including Cabot in 1517, Frobisher (1576, 1577 and 1578), Frederick Anshild of Denmark, Hudson (1608-10), Button et al (1612, 1631); the Treaty of St. Germain-en-Lay (1632), by which Britain "gave up all places in New France, Acadia and Canada," including "the whole country about Hudson's Bay";⁵² further events relating to the British, such as the voyages of Des Groselliers (1666), Gillam (1667), Capt. Newland (1669), and the Hudson's Bay Company Charter (1670); and events relating to France, including the charter of 1626 to the Company of New France; and the voyages of Bourdon (1656), Fr. Dablon (1661), Sieur de la Couture (1663), Duquet and L'Anglois (1663), and Radisson and Des Groselliers (1666-67).⁵³

In addition to these early voyages and treaties, Oliver Mowat, Ontario's lawyer, listed further acts and treaties relating to the boundary question: the *British North America Act*, 1867; *Union Act*, 1840; *Constitutional Act*, 1791; *Quebec Act*, 1774; *Treaty of Paris*, 1763; and the *Royal Proclamation of 1763*, upon which, he stated, nothing turned with regard to the boundaries, since the *Royal Proclamation* "only referred to a very small portion of the ceded territory." Mowat argued that the *Quebec Act* covered a much larger area than the *Royal Proclamation*, extending the province of Quebec

⁵² Mills, *Report on the Boundaries of the Province of Ontario*, 126.

⁵³ Mills, *Report on the Boundaries of the Province of Ontario*, 122-85 passim.

to include the 'Province of Canada', i.e., French Canada, which he contended extended to the Rockies and north to the Saskatchewan and Hudson's Bay posts. Before 1774, the Hudson's Bay Company was "confined ... to the margin of the Bay."⁵⁴

Following Mills' reasoning, Mowat argued before resistive members of the Privy Council that the Charter's grant of territory "was to be commensurate only with their actual appropriation and possession."⁵⁵ The Hudson's Bay Company territory was limited to the area the Company actually occupied, with the remainder belonging to France on the basis of occupation. The core idea was that the term 'granted' in the Charter meant 'effectually granted'; i.e., settled or occupied. Since the Lord Chancellor found this limitation of the Hudson's Bay Company grant an "extraordinary idea," Mowat explained that his argument was only intended to show that Hudson's Bay Company land did not extend south to the Disputed Territory.⁵⁶ Furthermore, Mowat asserted that Hudson's Bay Company claims were based only on international law.⁵⁷

The argument evolved into the question of whether or not the area outside of Hudson's Bay Company territory was in fact Canada.

⁵⁴ Ontario, Legislative Assembly, *The Proceedings Before the Judicial Committee of Her Majesty's Privy Council Respecting the Westerly Boundary of Ontario ... 1884* (Toronto, 1889), 35-6.

⁵⁵ Ontario, *Westerly Boundary of Ontario*, 51.

⁵⁶ Ontario, *Westerly Boundary of Ontario*, 57-8.

⁵⁷ Ontario, *Westerly Boundary of Ontario*, 62-3.

Although their Lordships disagreed, Mowat argued this area was Canada, thereby helping his argument that the Disputed Territory was part of 'Canada' and so included in Upper Canada.⁵⁸ He cited in support a letter of August 17, 1791, from Henry Dundas to the Lord President of the Council regarding the division of Quebec into Upper and Lower Canada, where the line was drawn from Lake Timiskaming to the boundary of Hudson's Bay.⁵⁹ Mowat argued that the *Constitution Act, 1791* confirmed this northerly boundary.⁶⁰

The Dominion Government disagreed with Ontario on numerous points, including whether or not the *Rupert's Land Act*, settled the question of the extent of the Hudson's Bay Company Charter. D'Alton McCarthy, the lawyer for the federal government, described the pre- and post-Confederation questioning of the validity and geographic extent of the Hudson's Bay Company Charter. He asserted that the *Quebec Act* if not the *Rupert's Land Act* settled the boundary.⁶¹

The preceding review of the arguments reveals not so much the superiority of Ontario's arguments but the superiority of its preparation. The federal government clung to the *Quebec Act* as the definitive statement of the extent of Ontario. Unfortunately, the Act's boundary description created difficulties of interpretation

⁵⁸ Ontario, *Westerly Boundary of Ontario*, 67.

⁵⁹ Ontario, *Westerly Boundary of Ontario*, 46-7.

⁶⁰ Ontario, *Westerly Boundary of Ontario*, 47-51.

⁶¹ Ontario, *Westerly Boundary of Ontario*, 4.

since it denoted the southern and western boundaries of the enlarged province as running "along the Bank of the [Ohio] River, Westward, to the Banks of the *Mississippi*, and Northward to the Southern Boundary of the Territory granted to the Merchants Adventurers of *England*, trading to *Hudson's Bay*."⁶² The term 'Northward' received a great deal of discussion and its interpretation made a critical difference in estimates of the extent of the Disputed Territory. Construing the term to mean 'due north' from the confluence of the *Mississippi* and *Ohio* Rivers, the federal government argued for a restricted border of the old province of *Quebec* and thus of *Ontario*. Had the federal government read the Act more liberally, and accepted the word northward as along the banks of the *Mississippi*, as Governor *Carleton's* instruction a few months later read, they could have gained more credence. Such a reading would have recognized the intention of the *Quebec Act* to provide a government for the large area ceded by *France* in 1763, while still allowing the federal government to claim a northern boundary for *Ontario* along the height of land.⁶³ The federal government failed to challenge either the extensive exploration *Mills* claimed for the French or the wording of the *Constitution Act*, which stated that the boundary between the two

⁶² Adam Shortt and Arthur G. Doughty, *Documents Relating to The Constitutional History of Canada, 1759-1791* (Ottawa, 1918), "The *Quebec Act*," 1:571. Emphasis in original.

⁶³ Various weaknesses in the arguments mentioned here are discussed at length in the "Ontario-Manitoba Boundary: Resume of Differences," NAC, Records of the Department of Justice, RG 13, B 6, White Papers, vol. 889, file 9(b), p. 28.

Canadas proceeded north to the boundary of Hudson Bay. The federal government should also have had an experienced cartographer to review the maps placed before the Privy Council, as several were seriously flawed.⁶⁴ Perhaps the single most serious disadvantage of the federal lawyers was having to proceed to trial after only seven months of preparation when their opponents had been preparing for twelve years.⁶⁵

3.5: The Boundary Dispute and Ownership of Resources in the Disputed Territory

As the Dominion lost out on the question of the location of Ontario's boundaries, it turned its attention to the question of ownership of the resources of the Disputed Territory. John A. Macdonald had claimed these resources for all the people of Canada, not just those of Ontario, in an election speech of 1882. He premised this assertion on Aboriginal ownership of the soil, by which the Ojibway had ceded their land to the Dominion through the 1873 treaty. When the *St. Catherine's Milling* case ended that attempt to claim the area for the Dominion, the focus shifted to the control of resources on Indian lands. The responsibilities of the Dominion government under section 91(24) of the BNA Act for 'Indians and lands reserved for Indians' met the notion that the

⁶⁴ NAC, RG 13, B 6, White Papers, vol. 889, file 9(b), p. 35.

⁶⁵ NAC, RG 13, B 6, White Papers, vol. 889, file 9(b), p. 39.

gold and silver in the ground were royal metals that Indians could not pass when they ceded the land. A land cession had nothing to do with cession of subsurface rights, especially if the Aboriginal 'owners' of the land were seen, as *St. Catherine's Milling* decided, as never having had a full proprietary interest in the land. Even if they had owned the land in a fee simple sense, this did not mean that they necessarily had an interest in the precious metals. Add to this the right Ontario had gained through the *St. Catherine's Milling* case to have a voice in the selection and surveying of reserves in Treaty #3, and the agreement between the two governments that the Ojibway should be kept off 'known mineral lands', and the potential for conflict is readily apparent. The disputes between the two levels of government operated, then, in both 'macro' and 'micro' fashions. They embraced the area as a whole and, once that had been settled, they turned on questions relating to specific situations, but with implications for all three parties, federal, provincial and Native.

These disputes meant that economic activity operated almost in an administrative vacuum as politicians, lawyers and judges debated the extent of federal and provincial powers under the BNA Act. One result was confusion and uncertainty among the various business interests attempting to open up the region. Complaints were lodged, for example, by business bureaus even as they tried to promote investment. The cutting of timber without proper authorization was rife, especially as the railway was being built. Men were cutting

on any pretext of authority, legitimate and illegitimate. Mining and lumbering interests conflicted over rights to resources. The administrative confusion reached a climax in the early 1880s, after the passage of the *Manitoba Boundary Extension Act*, when both Ontario and Manitoba attempted to assert jurisdiction over Rat Portage. These problems often operated to the detriment of the Ojibway, whose treaty rights were generally neglected during the federal/provincial disputes and whose own economic activities and adaptations were constricted.

Even after the Boundary Dispute was resolved by the *Canada (Ontario Boundary) Act* of 1889,⁶⁶ jurisdictional questions relating to economic development continued to plague the area. Because the Disputed Territory was covered by a treaty with the Aboriginal inhabitants, these jurisdictional questions turned frequently on notions of just what the Ojibway had ceded by the treaty. Although these questions were not the only front on which the Provincial Rights movement was engaged, it is the front which interests us here.

The *St. Catherine's Milling* case turned in part on the question of the nature of Indian title, the Privy Council in its 1888 decision bringing into the Canadian common law a concept of Aboriginal title as "a personal and usufructuary right based on the goodwill of the

⁶⁶ The *Canada (Ontario Boundary) Act*, 1889, 52-53 Vic., c. 28. See Ollivier, *British North America Acts*, 115-6.

Crown" that is still acceptable to certain justices in this country.⁶⁷ That case was a direct result of the Boundary Dispute, a response to the federal granting of timber licences in the area. Through D'Alton McCarthy, a Conservative M.P. whom the federal government arranged to be the company's lawyer, Macdonald used the St. Catherine's Milling & Lumber Company as a proxy. McCarthy argued Macdonald's notion, put forward publicly in 1882, that the Dominion owned the area by right of its negotiation of the treaty with the Ojibway, the Aboriginal "lords of the soil" who ceded their land to the Dominion. Macdonald had borrowed one of the themes in colonial dealings with Aboriginal peoples. Ontario had been successful in four courts in arguing the other, more prevalent side of the historical view of Aboriginal title, that the Crown owned the land by right of occupation and conquest, the Indian title being a "mere burden" on the Crown right, which became a full title ("plenum dominium") once the Aboriginal title had been extinguished by treaty. The Dominion had been a mere agent of the Crown in its role as negotiator, argued the lawyers for Ontario,

⁶⁷ For example, Justice Steele of the Ontario Supreme Court in *Bear Island* and Chief Justice MacEachern of the Supreme Court of British Columbia in *Delgam Uukw*. See also Sydney Herring's overview of *St. Catherine's Milling* and the cases in Ontario that led up to it: "The Liberal Treatment of Indians': Native People in Nineteenth Century Ontario Law" *Saskatchewan Law Review* 56, no. 2 (1992): 297-371. *St. Catherine's Milling* is only now being overturned in the courts: a recent Australian decision asserts that the Crown cannot claim Aboriginal lands by the doctrine of *terra nullius* and that acquisition of sovereignty does not extinguish the Aboriginal title to the land. See *Eddie Mabo and Ors v. The State of Queensland*, High Court of Australia, June 3, 1992; a summary appears in *Aboriginal Law Bulletin* 2, no. 56 (June 1992): 22-3.

and by Section 109 of the BNA act of 1867, the benefits of the treaty passed to the province.⁶⁸

Unfortunately, *St. Catherine's Milling* left more undone than it resolved. Lord Watson had suggested in his decision in the case that, since Ontario got the benefit of the signing of the treaty while the federal government bore the costs of Indian affairs, Ontario should compensate the Dominion in some proportion for these costs.⁶⁹ This stipulation, which the Privy Council could in no way enforce and was in any event an obiter dictum, resulted in the Treaty #3 Annuities Case, *A.G. Ontario v. A.G. Dominion*⁷⁰, the second such case, the first having involved the Robinson Treaties of 1850. *Ontario Mining Co. v. Seybold et al.*⁷¹ resulted from years of dissension among a number of claimants to the gold mines of Sultana Island in Lake of the Woods, part of I.R. 38B that had been surrendered by the Ojibway in 1886. At issue in this case was the right of a government to grant a gold mining licence on an Indian Reserve on Ontario lands. The province argued that, according to *St. Catherine's Milling*, the lands covered by Treaty #3 belonged to Ontario, hence the Reserves were carved out of Ontario lands and any precious metals found belonged to the Crown, i.e., the

⁶⁸ For a fuller treatment of this aspect of the case, see Cottam, "An Historical Background of the *St. Catherine's Milling Case*," 73-75; 88ff.

⁶⁹ 14 App. Cas. 46 at 60.

⁷⁰ [1910] A.C. 637, affirming 42 S.C.R. 1.

⁷¹ [1903] A.C. 73.

province. Results of the action included delays for mine developers in acquiring title to remove the gold, discouraging investment in the area, and delays in the final settlement of Indian Reserve locations and the surveying of their boundaries, which slowed the Ojibways' process of adaptation to the treaty. These are relevant instances of how regional economic activities were affected negatively by the overriding agendas of the metropolitan centres.

3.6: Conflicting Ambitions in the Metropoles: Toronto and Ottawa

The political and economic elites of the federal and provincial capitals, Ottawa and Toronto, had competing visions of the new Confederation and the opening of the west. The agenda of the interests in Toronto included the opening up of the west and all its resources. Here it coincided with the wishes of Ottawa, that the west be developed and the new nation expand from sea to sea. Yet extensive divergence marked approaches to this goal and who the beneficiaries of meeting it should be. For the government of Ontario, the west was virtually a birthright that the Dominion was attempting to keep for itself. Ontario's Boundary Commissioner had argued, in 1872 and again in 1877, that Ontario extended to the Rocky Mountains, being no less than the inheritor of the territory of France in 1760; the Dominion's newly acquired North West Territories amounted to an area that ringed Hudson Bay, which, in the mind of the Commissioner, was all that the British could lay claim to through the charter of 1670. Thus, far from joining in

with the spirit of nation-building advocated by the government of John A. Macdonald, Ontario entertained notions of being compensated for land lost when Manitoba was formed.

This goal of aggrandizement was resisted head on by a federal government that sought to control the size of a province already the most powerful, although, strictly speaking, not the largest, in the new Dominion. Macdonald's reasons for this were his quite natural desire to avoid a preponderantly large province and to contain Quebec, which, he believed, could wreak havoc on the new confederation if it physically cut a swath across the country. The federal dream to build a continent-wide nation was hastened by the 1870 rising of Louis Riel and the Métis, which necessitated the rapid deployment of a force in the northwest. The realization that the best route at the time lay through the United States created a sufficient sense of vulnerability and nationalist shame that the desire to build a road through the Canadian northwest was increased sharply. The old Dawson Route sorely tested Colonel Wolsley's troops, who "roundly cursed old Dawson," and so a better means was sought. But there were people living in the area already, who were known, thanks to reports from Dawson himself, to be not only increasingly anxious about the traffic through the area, but also increasingly anxious to reach some kind of agreement with the federal government.

No thought appears to have been given at the time to Ontario's considerations regarding a treaty with Indians in an area that Ontario was beginning to consider its own. Ontario would rectify this in the next major treaty in the province, Treaty #9 in 1905⁷², but at the time, it had nothing to say about the signing of Treaty #3. The reaction was merely delayed, however, for once this oversight was recognized, the Ontario government claimed the maximum from the area with a jealous tenacity. One result was the beginning of provincial encroachment into federal responsibilities for 'Indians and lands reserved for Indians'.

The fact that the lands surrendered by the Ojibway were now considered legally to be part of Ontario had profound implications, for the Ojibway themselves and for the growing non-Native population that was attempting to develop towns and industries in the region. In a period of optimistic boosterism, the lingering issues left over from the Ontario-Manitoba Boundary Dispute were sufficient to help cripple development in an area justifiably confident of its potential.

3.7: Local Impacts: Settlement

Elizabeth Arthur has shown that the people of northwestern Ontario were limited in their control over the area by the larger agenda of

⁷² See James Morrison, "Treaty Research Report: Treaty Nine (1905-1906): The James Bay Treaty," (Ottawa: Treaties and Historical Research Centre, 1986).

the more powerful groups in centres such as Toronto, Ottawa, and, during the days of the fur trade, Montreal.⁷³ Settlement came relatively slowly to the area, for reasons that predate the Boundary Dispute, and was held back by the dispute itself, which created great uncertainty over titles to land.

Although the fur trade began in the region two centuries earlier, Kenora on Lake of the Woods traces its beginnings to a post established by the Hudson's Bay Company in 1836. As awareness increased of the potential resources of the area, however, settlements began to develop.⁷⁴ Their colourful history is evocative of the hardships, dangers and determination of those who decided to stay, as well as revealing of their relations with the Aboriginal inhabitants, who were often marginalized so that Eurocanadian activities could take precedence.⁷⁵

The history of the settlement of the Kenora area, the main urban development in the Treaty #3 region, has been divided into three

⁷³ See especially Arthur, "Orientation and Disorientation," 195-218.

⁷⁴ Elizabeth Arthur discusses the opening of Ontario north of Lake Superior in "Beyond Superior: Ontario's New-Found Land," in *Patterns of the Past: Interpreting Ontario's History: a collection of historical articles published on the occasion of the centenary of the Ontario Historical Society*, ed. Roger Hall, William Westfall and Laurel Sefton MacDowell (Toronto & Oxford: Dundurn Press, 1988), 130-149.

⁷⁵ An example of a local study of development of settlement in the Shield country is Elinor Barr, *The Frontier As Experienced on the Precambrian Shield: A Study of Ignace, Ontario From 1883 to 1908* (Thunder Bay: Lakehead Centre for Northern Studies, [1991]).

periods: pre-1877, prior to any development other than a small but important Hudson's Bay Company post; 1877-1905, a boom period inaugurated by the coming of the railway and marked by the rapid success and decline of the lumbering, mining, and fishing industries, the development of hydro-electricity and flour milling and the beginnings of tourism; and post-1905, when Kenora was subjected to cycles of economic activity, with pulp and paper being the major industry.⁷⁶

At the time of the signing of Treaty #3 in 1873, the only 'settlement' at Rat Portage, as Kenora was then known, were the two buildings comprising the post which had been established there in 1836. Although small, this post was the centre at which furs from the areas to the north were prepared for shipping to England.⁷⁷ On his trip through the area, Hind noted the "'beautifully situated [Fort] on an island at one outlet of the Lake of the Woods'" and was impressed enough to make sketch of it.⁷⁸ Indian Agent R.J.K. Pither left an account of the relocation of the post to the mainland in 1861 and geologist Robert Bell noted in 1872 that Rat Portage consisted of the post, which had only two buildings, a

⁷⁶ Ryan, "The Kenora-Keewatin Urban Area," 57-8. The middle "dynamic" period of 1877-1905 is of most interest here.

⁷⁷ Ryan, "The Kenora-Keewatin Urban Area," 64.

⁷⁸ Quoted in Ryan, "The Kenora-Keewatin Urban Area," 64-5, with a reproduction of the sketch.

store and living quarters."⁷⁹ The Company expanded its land base that year from 50 to 640 acres, taking advantage of the terms of the *Rupert's Land Act*, which gave the Company title to the land around its posts. Ryan speculated that the Company believed the railway was to be built through Rat Portage, and this was indeed the case.⁸⁰

The coming of the railway enabled the rapid development that characterized the years between 1877 and 1905. An heroic achievement despite its drawbacks, the Dawson Route had always been inadequate and was displaced a few years after its completion by the Canadian Pacific Railway, the building of which through the region began in 1877. No significant population growth occurred until after the CPR railway came through in 1877. Ryan argued that the location of the railway through the site of Rat Portage was a function of geography: it would have happened if the town had not been there.⁸¹ The CPR was constructed to both east and west of Rat Portage, and the town took a sudden leap in growth as contractors and workmen moved in, attracting new businesses to serve them.⁸² The line to Winnipeg was finished in 1882, with the first train from Winnipeg arriving in Rat Portage on June 11. The eastern

⁷⁹ Both accounts cited by Ryan, "The Kenora-Keewatin Urban Area," 66.

⁸⁰ Ryan, "The Kenora-Keewatin Urban Area," 68.

⁸¹ Ryan, "The Kenora-Keewatin Urban Area," 70.

⁸² Ryan, "The Kenora-Keewatin Urban Area," 71.

section took longer to build; the first train to Rat Portage from Fort William arrived May 17, 1885. By then, the town's population had reached 720 people.⁸³

By 1901, the towns of Rat Portage and Keewatin counted 6358 people between them.⁸⁴ Keewatin was home to a stable flour milling industry, the only industry in the town, constructed in 1886-88 by the Montreal syndicate that built the CPR to grind wheat shipped from Manitoba by rail into flour for eastern Canada.⁸⁵ This industry encouraged only a slight but steady increase in population, with the numbers less than doubling by 1962.⁸⁶ The population of Kenora, on the other hand, fluctuated wildly. The decline in economic activity after 1905 resulted in a loss of population by 1918 over the 1901 figures, with recovery during the 1920s as economic conditions improved.⁸⁷

Ryan noted a high degree of ethnic diversity: "almost every ethnic group found in considerable numbers in Canada is represented in the

⁸³ Ryan, "The Kenora-Keewatin Urban Area," 73.

⁸⁴ Ryan, "The Kenora-Keewatin Urban Area," 127.

⁸⁵ A. Ernest Epp, "The Lake of the Woods Milling Company: An Early Western Industry," in *The Canadian West: Social Change and Economic Development*, ed. Henry C. Klassen (Calgary: University of Calgary, 1977), 147-62.

⁸⁶ Ryan, "The Kenora-Keewatin Urban Area," 127. The population rose from 1156 in 1901 to 2201 by 1962.

⁸⁷ Ryan, "The Kenora-Keewatin Urban Area," 127. The numbers he offers are: 1901: 5202; 1918: 4794; 1929: 7786.

Kenora-Keewatin urban area."⁸⁸ About half the population according to 1961 census figures was British, i.e., English, Irish, Scottish or Welsh; the next major groups were Scandinavians, with six times the proportional representation as in the country as a whole, followed by French, Ukrainians, Slavs and Poles.⁸⁹

3.8: Local Impacts: Indian Reserves

The proximity of reserves to settlements created problems in this area as it did in others. Hoyle argued that the Ojibway had a good deal more control over the choice of their reserves than did either of the governments with an interest in their location.⁹⁰ While the Ojibway were able to indicate the location of reserves, generally selecting the sites at or near the mouths of rivers that represented their traditional fishing grounds and the location of their gardens, Hoyle's conclusion is somewhat generous. It ignores a number of factors, including the agreement between the Dominion and Ontario to keep reserves 'out of the path of settlement and off known mineral lands'; the desire of Ontario to confirm the location and boundaries of the reserves; and the long history of the administrative difficulties resulting from the jurisdictional

⁸⁸ Ryan, "The Kenora-Keewatin Urban Area," 132.

⁸⁹ Ryan, "The Kenora-Keewatin Urban Area," 132-4.

⁹⁰ Allan L. Hoyle, "Ojibwa Adjustment to Changing Conditions in the Boundary Waters Area, 1763-1873," (M.A. thesis, York University, 1986), 159.

disputes between the governments. Nonetheless, his observations as to the actual locations of the reserves are correct.

The ability of the Ojibway to choose their lands well was used against them, however, both in Toronto and Rat Portage. In his examination of the reserve lands of Treaty #3 for the Mowat government in its preparation of the Annuities case, E.B. Borron argued that they had received the prime land of the area. He went on to contend that these lands were underutilized by the Ojibway, who had in any event received more acreage than the treaty allowed. Borron echoed a familiar complaint, that lands reserved for Indians, much like lands reserved for schools, churches and railways, interfered with the pattern of settlement.⁹¹

The people of Rat Portage had their own views on this issue. In 1897 they petitioned Ontario Mining Minister J.W. Gibson to have the Rat Portage Band removed from I.R. 38B so that they would not be demoralized by mining activities. Gibson turned for help to Clifford Sifton, the Superintendent General of Indian Affairs, who replied that the question of Indian Reserves generally in the disputed territory would have to be resolved before removal of the Rat Portage Band could be seriously considered. Furthermore, the

⁹¹ AO, Irving Papers, Mu 1469, 31/37/5, "North West Angle of No. 3 Indian Treaty[.] Outstanding Accounts[.] Claims of the Dominion on the Province of Ontario in Respect Thereof. Memorandum by Mr Borron," March 25, 1893.

Band would have to consent to be moved.⁹² These instances reflect the attitude that the Ojibway had rights to the land that were inferior to those of whites, who would put the land to fuller use. Chapter Four is the first of two chapters that explore that use by lumbering and mining interests.

⁹² INAC, RG 10, file 487/30-2-1, J.W. Gibson to Clifford Sifton, May 3, 1897; Sifton to Gibson, May 25, 1897.

CHAPTER IV: THE DEVELOPMENT OF NATURAL RESOURCES: TIMBER

While the Ontario-Manitoba Boundary Dispute was ostensibly about the common boundaries of the two provinces, in fact it was concerned with the expansion of Ontario into lands the Dominion believed were its own. With the extension of Manitoba's boundaries as far east as Fort William in 1881, the Dominion had a proxy in its struggle with Ontario. Although Manitoba proved in the end to be a reluctant player, the factor that made its role possible was the control the Dominion exerted over Manitoba's resources. The erection of the prairie provinces in a way was a fulfilment of Macdonald's idea of confederation, that a strong central government would control municipal-style provincial governments. Until 1930, when the Natural Resources Transfer Acts gave ownership of natural resources to the three prairie provinces, the Dominion owned the resources of the old Northwest Territories. The focus on boundaries clouded the true nature of the competition: as the Dominion's position on the northern and western boundaries of Ontario became increasingly untenable, it shifted emphasis to the control over resources. The first of these was timber.

Timber was of importance for a number of reasons: it was an essential building material for settlement and the railway; other resources, such as minerals, were only beginning to be discovered; the Ontario lumber industry was outgrowing its southern timber lands; and timber covered large areas of ground. This latter rather

obvious fact takes on new importance in light of John A. Macdonald's shift in strategy for the boundary dispute after 1882. Having incurred defeat in 1878 before a Board of Arbitrators on the Dominion's assertions of the extent of Ontario and with the issue of the northern boundary of the province coming up as a special case before the Judicial Committee of the Privy Council, Macdonald realized at last that he could mount a claim to the resources of the region through the extinguished Aboriginal title. The Dominion had negotiated the treaty with the Ojibway in 1873 and by that treaty, he reasoned, the lands and their resources passed to the Dominion.

Macdonald began to exercise that right through patronage in the form of timber limits. One result was the chaotic conditions that ensued in the disputed territory. Another result was the *St. Catherine's Milling* case, for Ontario took vigorous exception to Macdonald's challenge. This chapter examines the timber industry in the region, outlining through the careers of various lumbermen the vicissitudes of timber activity and showing how these issues affected the Ojibway as well.

4.1: The Timber Industry in the Disputed Territory

The construction of the railway opened up further possibilities regarding settlement than those noted at the end of Chapter III. It had a strong but mixed influence on resource extraction that would

have been profound without the additional complications of the boundary dispute. The demands of the growing towns and of the railway itself for building materials and the railway's access to the western market for lumber helped open up the forests to exploitation. Sawmills were erected, the first by Keewatin Lumber and Milling Company in 1879-80, built on one of the western outlets of Lake of the Woods. A second mill was built two years later. By 1890, five more mills were productive.¹

Initially, the lumber came from the stands of red and white pine along the Rainy River on both sides of the border. Stiff competition in the lumber business forced six of the mills to amalgamate in 1893 as the Ontario and Western Lumber Company, only the Keewatin Company remaining independent.² Eight years later, however, the boom years in lumbering were over for the Rat Portage region, as the opening of the Canadian Northern Railway in 1901, which provided a route from Port Arthur to Minnesota, drew the U.S. logs away from the Rat Portage mills.³

As the Ontario-Manitoba Boundary Dispute developed and the lumber industry outgrew southern Ontario timber lands, the timber in the Boundary Lakes region became increasingly attractive to business and political interests. These interests were meshed in the

¹ Ryan, "The Kenora-Keewatin Urban Area," 76-7.

² Ryan, "The Kenora-Keewatin Urban Area," 78.

³ Ryan, "The Kenora-Keewatin Urban Area," 80-1.

nineteenth century in ways that have become questionable today. The concept of stewardship of resources was in its infancy;⁴ the conservation movement, then in its opening stages, was premised more on the concern that present and future needs of a harvestable resource be balanced rather than on any notion of the value of keeping it untouched in its natural state.⁵ Furthermore, politicians and lumbermen approached the forests with a shared vision of their value as a merchantable product. The former saw sources of revenue from timber limits, ground rents and bonuses, while the latter saw sources of profit in cut logs.

By the time the Boundary Dispute was in progress, the provincial system for disposing of Crown timber lands had been refined into a scheme acceptable to both sides. This system had taken some decades to develop, with public auctions of timber limits being a fairly recent innovation, at first spurned by the lumbermen, who quickly adapted to it once they saw how much it could work to their as well as the government's advantage. Ontario Crown Lands policies did not grow in a vacuum; the Crown Lands Department actively solicited the

⁴ Two highly vocal critics of federal government timber licensing procedures, Liberal M.P.s John Charlton and M.C. Cameron, used the concept of stewardship to little apparent avail in their revelations of federal patronage in the Disputed Territory. See House of Commons *Debates*, May 4, 1886, pp. 1030-1075, and May 27, 1886, pp. 1574-1583.

⁵ George Altmeyer, "Three ideas of nature in Canada, 1893-1914," *Journal of Canadian Studies* 11, no. 3 (August 1976): 27-9.

views of lumbermen on a variety of issues.⁶ The decade before the Boundary Dispute became deeply embittered - the 1870s - was a period of experimentation and restructuring of the system as the new Ontario government attempted to live down the excesses and inefficiencies of the colonial past. The next decade witnessed, however, an increase in the stakes involved in the dispute, as the federal government turned to the forest resources as a means of gaining control over the Disputed Territory.

During the Boundary Dispute, the system was strained, however, as Manitoba, Ontario and the Dominion vied for jurisdiction. Each government had a different way of going about the struggle, a factor that complicated the lives of those attempting to do business of any sort in the Disputed Territory, not just in the timber industry, and complaints from the business community about the Boundary Dispute were rife.⁷ As well as the various governments vying for jurisdiction, the railway, as represented by the Syndicate, was a power - although perhaps it could be counted on

⁶ Ontario Assistant Commissioner of Crown Lands Aubrey White corresponded routinely with lumbermen regarding surveys of timber cutting practices, fire ranging requirements, culling, etc. Examples can be found in NAC, Bronson (E.H.) Papers, MG 28 III 26, vol. 707, and Mossom Boyd Papers, MG 28 III 1, vols. 131 (1887-89), 132 (1890-95), 133 (1896-1913).

⁷ The Ontario government complained regularly to the Dominion that the Boundary Dispute was slowing progress in the region; see, e.g., L.-G. John Beverly Robinson's Memorandum to the Secretary of State in NAC, RG 15, vol. 322, file 76195-2, Dec. 31, 1881, and Oliver Mowat's Memorandum to the Secretary of State in *Ontario Sessional Papers*, #73 (1888), item 35, Memorandum by the Attorney-General of Ontario, May 28, 1887, p. 26.

the federal side - in its own right. An additional complication was the presence of the numerous Indian Reserves formed after the signing of Treaty #3.

The exploration of these entanglements begins with an overview of the lumber industry in the Disputed Territory. Its focus on the individual men and companies enables observations to be made regarding the politics of the Disputed Territory. The relationship between lumbering and mining will also be drawn, focusing in particular on the conflict over leases to Sultana Island, part of I.R. 38B in Lake of the Woods.

4.2: The Lumbermen and the Industry in the Disputed Territory

In 1882, Macdonald asserted publicly that the federal government would lay claim to the Disputed Territory on the basis of the former Indian title. His practical method for solidifying the claim was to hand out timber limits to his "political friends." Many never took up the claims⁸ for, apparently, it was enough for Macdonald's purposes that the limits were distributed. The focus here is on those who did take up their limits and cut timber in the Disputed Territory. George Burden, sent there as a commissioner to

⁸ Charlton and Cameron produced hundreds of orders in council naming Tories and Tory sympathizers who had received licences; Charlton noted later in his diaries that these orders, which covered 25,000 square miles of the Disputed Territory, "lapsed after the change of ownership took place, and this great swindle failed to be consummated." Roberts Library, Fisher Rare Book Room, John Charlton Papers, Item 17, Autobiography, p. 500.

guard Ontario's interests, indicated just how high the stakes were in the contest. He estimated the Disputed Territory to have 20,000 square miles of timber limits, or 12,800,000 acres with an average yield of 2000 feet per acre worth a total of \$150 million to the Ontario government. The lumber industry was better off than others during the Boundary Dispute, he noted, and its "prospects" were "encouraging." His positive assessment notwithstanding, Burden had much to say regarding the effects of Macdonald's aggressive policy.

An early indication of that policy is contained in statistics compiled at Macdonald's request in 1882 by A.M. Burgess, his chief clerk and secretary. Burgess compared the disposal of timber lands by the Macdonald and Mackenzie administrations: Mackenzie's raised a mere \$6160 in dues whereas Macdonald's raised \$100,000. The former sold 605 square miles by private sale (of which 200 square miles were afterwards made inoperative) and none by auction. The Conservatives sold 1546 square miles privately and 746.5 by public auction.¹⁰

Burgess's numbers cannot stand on their own, however, for the Boundary Dispute and the exigences of the industry combined to create further problems for the lumbermen. In the absence of clear jurisdiction, it was difficult for governments to make costly

* Burden, *Disputed Territory*, 19-20.

¹⁰ NAC, Macdonald (Sir John A.) Papers, MG 26 A, vol. 112, pp. 45437-43, A.M. Burgess to Macdonald, March 8, 1882.

decisions in favour of the industry. One example was the need for lumber roads to replace the dangerous winter ice roads. W.D. Lyon, an Ontario Stipendiary Magistrate based in Fort Francis in 1882, encouraged Mowat to have a lumber road built between Fort Frances and Long Sault. The Ontario government was prepared to spend \$6,000 on it but nothing had been done; the lumbermen would have saved thousands of dollars if it had been built the previous summer, Lyon asserted. Worse, loads and teams had been lost during the winter of 1881-2 since the river ice was not strong enough to hold them.¹¹

Roads were a problem of infrastructure, an expensive proposition in northern Ontario; even more serious were the uncertainties around the question of title. Lyon noted that the "boundary dispute retards the improvement of the territory, every thing is surrounded by uncertainty and doubt." Settlers did not know what was required of them and those who had cleared their lands along the river of timber had to pay dues to the Ontario government. Steamboat operators who moved into the area before the Boundary Dispute began were faced with double dues if they did not get licences to cut timber on their lands from the Manitoba government.¹² Although those who had put up the cost of exploring and surveying timber limits could not get good title, "some of the favored ones are treated differently ... they chalk out their limits on a map

¹¹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Dec. 25, 1882, p. 4.

¹² AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Dec. 25, 1882, p. 7.

without a survey and send in their men and teams to carry off timber that was explored[,] discovered and surveyed by other persons, and there is no redress."¹³ Lyon's solution was to encourage the Ontario government to act in the same manner!

The reports by Lyon and Burden provide important evidence of lumbering activity in the Disputed Territory. Little is known of some of these men mentioned, however, and the account here will move from those in obscurity to those about whom a good deal more information is available.

4.2.1: Bailey, Bulmer & Co.

Among the "favored ones" listed by Lyon was a Nova Scotian, H.H. Bailey, of Cookshire, Quebec. Lyon reported that Bailey had "got a permit to cut timber and is slashing away at will."¹⁴ Burden provided more detail on the political and family connections: Bailey was from Sherbrooke (Bulmer lived in Montreal) and a nephew of John Henry Pope, the Minister of Agriculture,¹⁵ "and by

¹³ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Dec. 25, 1882, p. 9.

¹⁴ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Dec. 25, 1882, p. 9.

¹⁵ Pope's family farm was outside Sherbrooke. Pope and Macdonald met in 1849 and were friends and political allies until Pope's death in 1889. A prominent and influential member of Macdonald's cabinets, Pope was Minister of Agriculture in 1871-73 and 1878-85, and Minister of Railways and Canals from 1885-89. He was a staunch supporter of the Pacific railway which was built through northwestern Ontario in the early 1880s. See P.B. Waite,

consequence, a connection of Mr Joes [sic] M.P. for Richmond and Wolfe." The permit these men claimed to have was "obtained," Burden alleged, "since the Department of the Interior announced that no more would be granted."¹⁶ Burden could not find proof that the permit actually existed, however; rather, Bailey's company seemed to "have a sort of roving commission to cut timber where they can find it, and ... this commission is contained in a letter from the Hon. Mr. Pope."¹⁷ Nonetheless, the Crown Timber Agent in Winnipeg "recognizes their right to cut." Bailey, Bulmer & Company expected to produce 9-12 million feet and were constructing a saw mill in the vicinity of Rat Portage and Keewatin, near the railroad.¹⁸

4.2.2: Manning, McDonald & Co.¹⁹

Although the extant evidence permits only a brief description of the activities of this company, it illustrates the nature of lumbering activities in the Disputed Territory. Manning & Co. were

"Pope, John Henry," *Dictionary of Canadian Biography*, 11:705-7. Pope had lumber interests in the Eastern Townships, but no mention of Bailey is made in Waite's biography.

¹⁶ AO, Irving Papers, Mu 1475, 37/37F/02, G. Burden, Rat Portage, to O. Mowat, Nov. 21, 1882, p. 15.

¹⁷ Burden, *Disputed Territory*, 21. Burden used the same phrase in his earlier private report to Mowat; AO, Irving Papers, Mu 1475, 37/37F/02, G. Burden, Rat Portage, to O. Mowat, Nov. 21, 1882, p. 15.

¹⁸ AO, Irving Papers, Mu 1475, 37/37F/02, G. Burden, Rat Portage, to O. Mowat, Nov. 21, 1882, p. 15.

¹⁹ The documentation contains variations on the company name, but the company is treated here as a single entity.

railway contractors for section 16 with a saw mill at Eagle Lake. Lyon informed Alexander Mackenzie that the company was cheating the Dominion government by falsely reporting that railway ties being cut at Eagle Lake were imported from Minnesota.²⁰ Two months later, Lyon mentioned Manning, McDonald & Company's saw mill at Eagle Lake again, this time to Oliver Mowat. He reiterated the charge that, in order to boost the rate, the company had told the Dominion government that no timber was available in the area and would have to be imported from Minnesota. Furthermore, Timber Agent McCarthy was also working as their engineer.²¹ Burden reported that on May 15, 1881, section B contractors had received a mill permit which produced profits for Manning, McDonald, McLaren & Co.²² A mill site at Rat Portage was acquired on September 15 of that year.²³

Lyon reported in 1883 that Manning, McDonald & Co. had five shanties in operation. The efforts of these and other large contractors had the result that "the valuable timber in this part of the Disputed Territory is being rapidly carried off." It resulted as well in dissatisfaction among less successful lumbermen, who complained about these contractors when told by the

²⁰ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Rat Portage, to Alexander Mackenzie, Sept. 30, 1881.

²¹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Nov. 11, 1881.

²² Burden, *Disputed Territory*, 20.

²³ AO, Irving Papers, Mu 1480, 42/42/1(1), E.F.B. Johnston to A.-G. [Mowat], Jan. 9, 1889.

Dominion timber agent at Winnipeg, Stephenson, that permits were not being granted.²⁴

These successes did not mean that the relationship with the federal government was always smooth, however. Macdonald may have got wind of their Minnesota ploy, for he was notably unsympathetic to them a few years later. John Shields and Manning, McDonald & McLaren sent separate telegrams to Macdonald in December 1887, complaining that the Syndicate was issuing its own timber permits on the company's limit east of Rat Portage, with the result that the Syndicate had taken over their operation. Macdonald reminded them promptly and tersely that their "firm was authorized to locate a section on which Government would grant a permit. You neglected to do this and therefore have no cause of complaint."²⁵

4.2.3: Stephen H. Fowler

The little that is known of Fowler is revealing of federal government practices in the Disputed Territory. Fowler was an early recipient of federal largesse, in his case from the Mackenzie administration. J.P. Macdonell, who in 1888 was researching the question of Dominion government timber limits in the Disputed

²⁴ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Fort Frances, to O. Mowat, Jan. 23, 1883.

²⁵ NAC, Macdonald Papers, vol. 379, pp. 177385-91, telegrams from John Shields and Manning, McDonald & McLaren to Macdonald, Dec. 20, 1887.

Territory for the Ontario government, reported to Mowat that Fowler's was one of only four leases or licences to be granted in the Disputed Territory prior to the 1878 Boundary Award. Two went to Macauley and one went to Fuller & Co.²⁶ These leases had been granted as early as 1875.²⁷ Fowler had discovered that his lease included unattractive stands of timber and was allowed to substitute 25 square miles of better timber, a privilege also granted to Macauley.²⁸ Fowler sold out to Hugh Sutherland, a Liberal, whose Rainy Lake Lumber Company was planning to remove 30 million feet of timber in the 1882 cutting season.²⁹

4.2.4: Hugh Sutherland

Hugh Sutherland was involved with developments northwest of Lake Superior early on, having supervised the blasting for a ship canal being built along the Dawson Route sometime between 1873-76.³⁰ Sutherland seems to have been a man with a capacity for making enemies on both sides of the political fence. Thomas Mayne Daly

²⁶ AO, Irving Papers, Mu 1468, 30/36/5, J.P. Macdonell to O. Mowat, March 1889.

²⁷ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Fort Frances, to O. Mowat, Dec. 7, 1882.

²⁸ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Rat Portage, to O. Mowat, Oct. 17, 1881.

²⁹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Fort Frances, to O. Mowat, Dec. 7, 1882.

³⁰ NAC, Malhiot Papers, "Seventy Years of Growth with Canada," 108.

(perhaps not the most objective observer) described him in 1883 to Macdonald as a "shrewd, calculating, deep[?], crafty Grit - Hugh Sutherland first, the party next & the country all it can yield his capacious pocket." Sutherland had close connections with Alexander Mackenzie at this time, being "allied" with William Buckingham, Mackenzie's former secretary. Buckingham and Sutherland's Winnipeg newspaper had been a visible opponent during a recent election.³¹ Sutherland was willing to continue this tactic on behalf of the Ontario government, whose supporters in Kenora were exploring early in 1883 the possibility of creating a weekly newspaper that would counter that of the opposition.³²

Political affiliations change, however, and Sutherland's activities bear out Daly's assessment. Apparently, Sutherland linked up with the Conservatives because they were better able to serve his interests than the Liberals. Burden revealed, for example, that Sutherland had sought timber limits on Indian Reserves on Lake of the Woods that were estimated to hold 100 million board feet of good timber: "there are persons who are unkind enough to say that, in return for those limits, he was not indisposed to help Sir John in his anti Ontario policy."³³ Burden believed that Sutherland's

³¹ NAC, Macdonald Papers, vol. 391, pp. 185985-92, T.M. Daly to Macdonald, July 6, 1883.

³² AO, Irving Papers, Mu 1475, 37/37F/02, G. Burden to O. Mowat, March 21, 1883.

³³ AO, Irving Papers, Mu 1476, 38/37F/4, G. Burden, Rat Portage, to T.B. Pardee, Aug. 17, 1883.

"interests, undoubtedly, lie either in the prolongation of the Boundary dispute, or in Manitoba's getting the awarded territory."³⁴ Five years later, according to Macdonald, Sutherland believed the Conservatives were better able to support his Hudson Bay Company Railroad than the Liberals.³⁵

Apart from personality traits that are difficult to assess, other factors conducive to Sutherland's switch in politics can be gleaned. The Mackenzie government, as noted above, was parsimonious in its grants of timber limits in northwestern Ontario and Sutherland had been a recipient of the 200 square miles later declared inoperable.³⁶ A second factor in Sutherland's switch, no doubt, was the burning of his saw mill. "As we surmised," Aubrey White noted to T.B. Pardee, Ontario Commissioner of Crown Lands, "the fire here has flattened out Sutherland and its only a question of time with his Company." With the economic losses came the loss of Sutherland's ability to bring in votes, yet his "untiring energy

³⁴ AO, Irving Papers, Mu 1476, 38/37F/4, G. Burden, Rat Portage, to T.B. Pardee, Aug. 17, 1883. According to Burden, S.J. Dawson was a director of the Rainy Lake Lumber Company. This may have helped as far as timber limits on Indian Reserves is concerned. As for the Boundary Dispute, Dawson was in a minority position of seeking a separate province in the north. See Arthur, Dawson, 20-1.

³⁵ NAC, Macdonald Papers, vol. 420, pp. 204218-221, J.S. Tupper to Macdonald, Oct. 29, 1888; Scarth (William Bain) Correspondence, 1878-1891, M752, Macdonald to Scarth, July 31, 1889, and June 30, 1890. Macdonald had supported Scarth against Sutherland in the 1887 election; Zenon Gawron, "Scarth, William Bain," *Dictionary of Canadian Biography*, 13:930.

³⁶ NAC, Macdonald Papers, vol. 112, pp. 45437-43, A.M. Burgess to Macdonald, March 8, 1882.

would play the devil" if he switched sides.³⁷ Sutherland had been communicating with Pardee about the Boundary Dispute at the time of the fire, encouraging either Pardee or Hardy to come up to Kenora before the election, and had indicated that he would like to see Burden removed:³⁸ yet White appears to have suspected that Sutherland was thinking of switching sides and his actions following the fire indicate that this was a major influence in that decision.

4.2.5: R.J. Short

R.J. Short was a Winnipeg lumberman involved with the construction of the railroad through northern Ontario - a member of the group referred to rather cryptically as the 'Syndicate'. He was also a connection of Senator Macpherson, who had taken over as Minister of the Interior from his ailing friend, John A. Macdonald, in 1881.³⁹ According to Lyon, Short was involved in a scheme hatched by the

³⁷ AO, Irving Papers, Mu 1476, 38/37F/4, Aubrey White, Rat Portage, to T.B. Pardee, Sept. 8, 1883, p. 7.

³⁸ AO, Irving Papers, Mu 1476, 38/37F/4, Hugh Sutherland, Rat Portage, to T.B. Pardee, Aug. 20, 1883.

³⁹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Fort Frances, to O. Mowat, Dec. 25, 1882, p. 9. Upon Macdonald's recovery, the two men shared the responsibilities of the Department of the Interior, Macpherson overseeing Dominion lands policy and Macdonald Indian Affairs, until October 17, 1883, when Macpherson became Minister of the Interior. As President of the Privy Council, Macdonald retained the Indian Affairs superintendancy until 1887, when it passed back to the Minister of the Interior. Public Archives of Canada, *Guide to Canadian Ministries since Confederation* (Ottawa, 1974), 16; Ken Cruikshank, "Macpherson, Sir David Lewis," *Dictionary of Canadian Biography*, 12:686.

Syndicate to produce a million railway ties without paying timber dues to the federal government.⁴⁰ In the winter of 1881, Short had a hundred men in the woods working on this project, "a dreadful onslaught" on Ontario's timber, Lyon informed Mowat.⁴¹ Lyon had been told by the Timber Agent McCarthy that Short did not have a permit for this activity.⁴² A year later, Short was still engaged in this activity, cutting outside the railway's twenty mile limit on a fifty square mile limit he had received, according to Burden, from the federal government, although the Deputy Minister of the Interior denied it. Short anticipated a cut of 10 million feet.⁴³ Rat Portage mills were taking timber from wherever they could find it, Burden reported, "with the evident connivance of Dominion government authorities and officials."⁴⁴

Short continued to exploit his political connections; Burden informed Mowat in the fall of 1883 that Short had returned recently from Toronto and Ottawa with "permission from somebody" to have a survey made of "an extensive timber limit on the Lake for operating next winter." O.B. Davidson, a Dominion Land Surveyor and "about as

⁴⁰ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Rat Portage, to Alexander Mackenzie, Sept. 30, 1881.

⁴¹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Nov. 11, 1881.

⁴² AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Nov. 11, 1881.

⁴³ Burden, *Disputed Territory*, 21.

⁴⁴ AO, Irving Papers, Mu 1475, 37/37F/02, G. Burden to O. Mowat, Nov. 27, 1882.

pestilent a Tory as can be found in the whole of the North West," was planning to take two months to conduct the survey, so the limit must have been large. The relative size of Short's operations can be measured by a simple statistic: of almost \$94,000 collected by the Dominion government in the Disputed Territory up to February 1885, Short paid over \$20,000. The other operation to pay that much was the Keewatin Lumbering Company, one of the largest businesses in the area.⁴⁵ Activities such as these underscored the need for a Timber Ranger, an appointment for which Burden had been pushing.⁴⁶

4.2.6: The Railway Syndicate

The Syndicate was a powerful presence in the Disputed Territory for at least the decade following the late 1870s. The Macdonald administration had granted a contract to the CPR in 1879, following railroad surveying along the Dawson route in 1874-76.⁴⁷ It appears

⁴⁵ AO, Irving Papers, Mu 1480, 42/42/14, [1886] "Schedule shewing the names of parties from whom dues have been collected for timber cut in that part of the Dominion of Canada lately declared ... to be within the Province of Ontario, and the several amounts collected; in compliance with an Order of the House of Commons dated 4th, February, 1885, and numbered 19." Total dues paid was \$93,801.59. To offer another perspective, amounts paid were as low as \$3.00.

⁴⁶ AO, Irving Papers, Mu 1476, 38/37F/4, G. Burden, Rat Portage, to T.B. Pardee, Aug. 17, 1883, p. 10.

⁴⁷ NAC, Malhiot Papers, "Seventy Years of Growth with Canada," 108-9. The CPR contract for the railway to the Pacific was signed on October 21, 1880, so either Malhiot was out by a year or this was a separate deal.

to have operated there with a degree of ruthlessness and self-interest. Lyon linked the activities of the Syndicate with the Dominion government's goal of solidifying its claim to the Disputed Territory through control over resources. With its enormous appetite for timber as it stretched through the Disputed Territory and into the relatively timberless prairies and its funding from the Dominion government, the railroad was a logical ally in this scheme. The extensive activity on behalf of the Syndicate "in the woods all the way from Rat Portage to Fort Francis" was evidence for Lyon of "the course being pursued [sic] by the Government at Ottawa, to give the timber and every thing of value to their friends, and allow Ontario and Manitoba to contend for what remains, with a promise to Manitoba of a good subsidey [sic] to maintain peace and order in the territory."⁴⁸

The Syndicate appears to have been working in harmony with the Manitoba government, which was a proxy for the federal government, owner of that province's resources. The federal government expected Manitoba to assert its jurisdiction in the Disputed Territory even while it was giving those resources away. Lyon painted a cosy picture of the relations between the Syndicate and the Manitoba government, whose magistrates arrived together in Rat Portage in 1881 along with many other people from Winnipeg, "apparently with a view to take possession of the territory. Some have selected

⁴⁸ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to Adam Crooks, [Acting] A.-G, Aug. 17, 1881.

Islands for summer residences and others for public resorts, and all treat the claims of Ontario with indifference if not with contempt."⁴⁹

The Dominion government encouraged the Syndicate's activities by creating new regulations allowing it to cut ties in the Disputed Territory. The Syndicate's contract allowed it a twenty mile limit along the railroad and, in the winter of 1881, an additional 400,000 ties were to be cut outside this limit.⁵⁰ This generosity appears not to have been enough for the Syndicate which, as noted above, planned to remove one million railroad ties without paying the Dominion government.

In the early 1880s, these activities were conducted with impunity and Lyon and Burden made similar observations of the wide open character of the timber cutting. Lyon's trip through Lake of the Woods and Rainy River to the Fort Frances area revealed the extent of cutting for railway use out west. He characterized three types of "offenders, or timber thieves": those with Dominion government permits, those with Syndicate permits, and those with no permits.⁵¹ Burden reported learning in April, 1882,

⁴⁹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to Adam Crooks, [Acting] A.-G, Aug. 20, 1881.

⁵⁰ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, Nov. 19, 1881.

⁵¹ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon to O. Mowat, April 15, 1882.

that large quantities of firewood, telegraphy poles, piles, saw-logs and ties [were awaiting] shipment by the C.P.R. westward. Some of the parties cutting claimed to have had permits from the Dominion Government, or from individual Cabinet Ministers; others from the Syndicate; while others had, apparently, been cutting without any show of right whatever.⁵²

Minor players followed behind the larger lumbermen, having Syndicate contracts to cut within the 20 mile limit, although they often found it easier to "cut timber thirty and forty miles from the Railway and wriggle through to their own satisfaction."⁵³

Curiously, the Ontario government made little response in spite of encouragement from various quarters to act. Another early informant of Dominion government activity regarding timber in the Disputed Territory was William Margach, who in 1881 was based at Prince Arthur's Landing, where he oversaw colonization roads for Pardee.⁵⁴ Margach had informed Pardee that a man named Marks was preparing to survey timber on "Lake Lake ma Lake [sic] on the height of land 70 Seventy Miles from hear [sic]." He had applied to the Dominion government for a limit and was told to survey it.⁵⁵ Pardee informed

⁵² Burden, *Disputed Territory*, 12.

⁵³ AO, Irving Papers, Mu 1476, 38/37F/8, W.D. Lyon, Fort Frances, to O. Mowat, Dec. 25, 1882, p. 9.

⁵⁴ AO, Irving Papers, Mu 1476, 38/37F/8, T.B. Pardee to O. Mowat, Sept. 14, 1881.

⁵⁵ AO, Irving Papers, Mu 1476, 38/37F/8, Wm Margach, Prince Arthur's Landing, to T.B. Pardee, Sept. 5, 1881. Marks & Co. was on Malhiot's list of subcontractors to the CPR for the 116 mile stretch of railroad contracted by the Macdonald administration in 1879; NAC, Malhiot Papers, "Seventy Years of Growth with Canada," 111.

Mowat in a manner suggesting this was the first he had heard of such action by the Dominion government. He encouraged Mowat to consider what the Ontario government should do about "the various applications now pending before it for mineral and timber lands."⁵⁶

Mowat received exhortations to action from Alexander Mackenzie, to whom Lyon had written about the situation in the Disputed Territory. Mackenzie encouraged Mowat to take action at least against the Syndicate's road which was then being built north of Lake Superior: "That at least is Ontario and it occurs to me you could shew a vigorous hand in that quarter."⁵⁷ The Ontario government did not heed this advice, however, and Burden noted that the road from Lake Superior to Rat Portage would be given to the Syndicate by the Dominion government on May 10, 1883.⁵⁸

4.2.7: Henry Bulmer, Jr.

The Bulmers were key players in the lumber and mining industries in the Disputed Territory. Henry Bulmer was a candidate for Montreal West in the 1882 federal election and enjoyed a positive reputation

⁵⁶ AO, Irving Papers, Mu 1476, 38/37F/8, T.B. Pardee to O. Mowat, Sept. 14, 1881; Margach's information "would seem to indicate that the Dominion Govt intend dealing with the timber in the disputed territory."

⁵⁷ AO, Irving Papers, Mu 1476, 38/37F/8, A. Mackenzie to O. Mowat, Oct. 13, 1881.

⁵⁸ AO, Irving Papers, Mu 1475, 37/37F/02, G. Burden to O. Mowat, April 20, 1883, p. 10.

for his successful businesses.⁵⁹ He was also one of the "popular municipal politicians" defeated in Montreal mayoralty contests by Jean-Louis Beaudry between 1881-85.⁶⁰ In 1890, he was elected chairman of the Montreal Harbour Commission, which was under federal jurisdiction.⁶¹

His sons were partners in Bailey, Bulmer & Co., which had the "roving commission" to cut timber in the Disputed Territory noted above.⁶² As with others working in the Disputed Territory, the Bulmers had difficulty gaining clear titles to their limits. Bulmer believed he had influence in both Toronto and Ottawa, and the evidence shows he tried to use it. In the summer of 1885, he visited Aubrey White, Assistant Commissioner of Crown Lands for Ontario, in an attempt to gain White's influence with Macauley, another lumberman with interests in the Disputed Territory for whom White had worked some years before. Macauley was said to hold a lease from the Ontario government, a rumour White dispelled. White informed Bulmer that the Ontario government could not help him with

⁵⁹ Metropolitan Toronto Central Library (hereafter MTCL), Baldwin Room, Matheson (Alexander) Papers, file 1886-9, Oct. 24, 1889; three notes of Nov. 7, 1888, June 25, 1889, and Sept 14, 1889, from Dun, Wiman & Co., indicated that Henry Bulmer Jr was in reasonable financial shape, had experience, and was regarded well in business circles.

⁶⁰ Lorne Ste. Croix, "Beaudry, Jean-Louis," *Dictionary of Canadian Biography*, 11:62.

⁶¹ D. Suzanne Cross, "Robertson, Andrew," *Dictionary of Canadian Biography*, 11:758.

⁶² Burden, *Disputed Territory*, 21.

Macauley.⁶³ A year later, Bulmer's Ottawa solicitor, Alexander Ferguson, wrote to Macdonald in support of Bulmer's efforts to have his timber limit renewed; Bulmer was anxious to receive it, having spent \$60,000 on mills. Ferguson sought negotiations, holding out that Bulmer believed "they could bring some influence friendly to Ontario to bear so as to probably get their titles admitted."⁶⁴ The veiled threat seems to have been ineffective. In 1887, J.P. Macdonell investigated Bulmer's leases for the Ontario government and wondered whether the Ontario government should wait until the title question had been resolved before acting on Bulmer's request, especially since the licences had lapsed for 18 months by that time.⁶⁵ The already complex situation of titles in the Disputed Territory was probably worsened by Bulmer's original licences having been granted, not under provisions of the 1874 Agreement as the Dominion government had claimed, "but by virtue of the Dominion claim under the Indian title."⁶⁶

⁶³ MTCL, Baldwin Room, Matheson Papers, file 1884-86, Aubrey White to A. Matheson, July 20, 1885.

⁶⁴ NAC, Macdonald Papers, vol. 427, reel C-1776, pp. 208175-8, A. Ferguson to Macdonald, June 1886.

⁶⁵ AO, Irving Papers, Mu 1480, 42/42/12, J.P. Macdonell to A.-G., June 30, 1887.

⁶⁶ AO, Irving Papers, Mu 1480, 42/42/12, J.P. Macdonell to A.-G., June 30, 1887.

4.3: Lumbering and Mining in the Disputed Territory

The section above indicates some of the characteristics and problems of the lumber industry in an area opening up to development. The difficulties in establishing an industry in a new region are serious enough without the added complexities of proximity to the United States, the presence of Native peoples, and disputes over jurisdiction. The collision of interests between lumbermen and miners must be added to the mix as well. These groups met head to head on Sultana Island, where an old lumber lease interfered with mining leases. Untangling this additional complication provide further insight into the complications faced on the disputed frontier.

4.3.1: The Fuller Lease and the Keewatin Lumbering Company

On July 22, 1875, K.W. Scott, Secretary of State, and A.E. Meredith, Deputy Minister of the Interior, signed a lease under the *Dominion Lands Act* (subject to Sec. 51) covering "all the Islands in the Lake of the Woods lying North of the steam boat channel leading into the North West angle of the said lake including the Islands in White Fish Bay" and eighteen square miles on the mainland, for a total coverage of sixty square miles. The lease was for twenty-one years; the last of its eight stipulations provided that it could be extended another twenty-one years if the lands were not needed for settlement. It was made out to Richard Fuller,

John Ross and John Dennis, who paid a bonus of \$900.00. The three men were lumber merchants at Lake Winnipeg, operating as Fuller & Co.⁶⁷

Fuller & Co. had been granted a timber limit on the east side of Lake Winnipeg, near Swan River, on January 22, 1872, but the area did not contain a sufficient quantity of suitable timber. On November 29, 1872, the company applied to the Secretary of State for the lease to the Lake of the Woods islands.⁶⁸ On the recommendation of the Minister of the Interior, David Laird, who was also Superintendent General of Indian Affairs, an order in council was issued on February 17, 1873, granting the lease, but only once the consent of the Ojibway in the area was obtained. Treaty #3 was signed in October 1873, and Fuller wrote to the Minister of the Interior in December enquiring whether "there was any further obstacle to his taking possession of the limits" granted. He included the \$900.00 bonus payment with this letter.⁶⁹ A second order in council of March 2, 1874, authorized the surveying of any islands in the area of the lease containing

⁶⁷ MTCL, Baldwin Room, Matheson Papers, file 1861-76, July 23, 1875.

⁶⁸ Queen's University Archives (hereafter QUA), A.R.M. Lower Papers, box 63, file F94, "Timber Trade - Keewatin Lumbering & Mfg Co. Ltd," D. McLeod, "Memorandum re Keewatin Lumbering and Manufacturing Company Limited and Their Operations at Keewatin, Ontario 1879 to 1906 (January, 1943)," 1.

⁶⁹ NAC, RG 10, vol. 3824, file 60008, Memorandum to the Deputy Minister of Justice, March 10, 1890. The documents cited in the remainder of this paragraph were copied into this memorandum.

commercial timber. The lease would be issued once the survey had been made and the Ojibway had given their consent regarding any islands that might be reserved to them under the Treaty. According to a document bearing the names of five Ojibway chiefs, such consent was obtained on July 13, 1874, by the company itself, "'at considerable expense and inconvenience in order to meet fully the agreement'" known as Treaty #3. The chiefs who signed included Mah-wan-doh-pee-hass, Pow-wee-wa-sang, and Kay-tay-kee-pin-ness, who were signatories of that Treaty.⁷⁰ The document was witnessed by one Joseph Monkman and Fuller claimed to have been there himself.

Being in the Disputed Territory, the area covered by this lease fell under the Provisional Boundary Agreement of 1874, which was an agreement between the Dominion government and Ontario government regarding the sale of lands in the Disputed Territory. It provided for a Conventional Boundary line that would be adjusted once the Ontario-Manitoba Boundary Dispute was settled. According to this Agreement, any lands sold by the Dominion government west of the Conventional Boundary and by the Ontario government east of it had to be confirmed by both governments once the true boundaries of Ontario were established. In 1878, the Agreement was revised to include "'all leases and licenses, and applications therefor'" in

⁷⁰ This is the spelling of the copy the document in the memorandum to Justice; it varies from that of the legal text of Treaty #3.

the Disputed Territory.⁷¹ The Fuller lease had been granted by the Macdonald administration and was ratified by the Mackenzie government only because, according to Burden, the original "promise [of the lease] took the form of a covenant under which the parties had acquired vested rights."⁷² The Ontario government's own analyst of the Fuller lease found that the Ontario government was bound by it.⁷³

Ross and Fuller each held one-fourth interests in the lease, with the remaining two-fourths held by Dennis. Late in 1878, Ross sold his interest to John Mather and E.H. Bronson, an Ontario Liberal M.P. and lumberman; Dennis sold half his interest to Mather in 1879. Fuller, Dennis, Bronson, John Mather and his son Robert A. Mather formed the Keewatin Lumbering and Manufacturing Company (Ltd) under the Dominion Joint Stock Act, with John Mather as manager. The company was incorporated at Keewatin by Canada letters patent on July 10, 1879, with supplementary letters patent on September 28, 1887.⁷⁴ By 1882, the company had spent \$60,000 on saw mills at Rat Portage. These were supplied in roughly equal amounts

⁷¹ AO, Irving Papers, Mu 1480, 42/42/2(3), Oct. 30, 1885; Morrison, "Oliver Mowat," 114-15.

⁷² AO, Irving Papers, Mu 1476, 38/37F/6-1, G. Burden, Rat Portage, to A.S. Hardy, June 11, 1883.

⁷³ AO, Irving Papers, Mu 1480, 42/42/1(2), "Memo re Keewatin Lumbering and Manufacturing Company's Lease and License," April 10, 1889.

⁷⁴ AO, Company Charters, RG 55, 1889-1900, Keewatin Lumbering & Manufacturing Co.

by Canadian logs and logs from Minnesota. The company turned to the U.S. when it discovered that much of the timber on the islands was too small for railway trestles and bridge construction.⁷⁵ Nonetheless, one estimate stated that by 1905, about 102,677,000 feet were cut from the islands and mainland covered by the 1875 lease, with only about 30 million feet being provided by leases later granted by the Ontario government. The islands were exhausted of commercial timber by November 1901.⁷⁶

4.3.2: The Keewatin Company and Development in the Disputed Territory

As the Disputed Territory opened up, settlement and resource development - in particular, lumber and mining - began to interfere with each other. The coming of the railroad stimulated all three activities, leading to an increase in lumbering to satisfy the railroad builders' voracious needs. This created jobs and a transportation infrastructure that encouraged the growth of settlement, and lead directly, through the surveys and line construction, to the discovery of mineral sources. The Keewatin Company began to feel the squeeze of settlement and mining as gold was discovered on Sultana Island in Sabaskong Bay and town lots began to creep onto the mainland side of their timber limits.

⁷⁵ QUA, Lower Papers, McLeod, "Memorandum re Keewatin Lumbering," 4.

⁷⁶ QUA, Lower Papers, McLeod, "Memorandum re Keewatin Lumbering," 5.

As these pressures increased, the Keewatin Lumbering Company turned for legal advice on the rights it had under the old Fuller lease. Its lawyers were Edward Blake, whose firm would come to handle the Ontario side of the *St. Catherine's Milling* case, and D'Alton McCarthy, who handled the Dominion side. Perhaps the fact that the former was a prominent Liberal politician and the latter a prominent Conservative, both deeply involved with federal politics, is a commentary on how business had to be done during the Ontario-Manitoba Boundary Dispute. Keewatin Lumbering Company put a dozen questions to McCarthy, who sent his replies to the Provincial Secretary on February 26, 1883.⁷⁷ The questions posed by the Company reflect the uncertainties swirling around business investments during the Ontario-Manitoba Boundary Dispute. This uncertainty was shared by governments as well, for jurisdictional and regulatory decisions were being hammered out by relatively young and small bureaucracies over questions that were complex enough without the additional havoc created by the Boundary Dispute. McCarthy went to some length to resolve these questions, some of which are germane to this discussion and will be examined in detail here.

The first concern the Keewatin Lumbering Company had was whether any of the three governments involved in the Ontario-Manitoba Boundary Dispute could "grant, sell or lease" any of the lands

⁷⁷ AO, Irving Papers, Mu 1476, 38/37F/6-1, "Memorandum for the information of the Hon. Provincial Secretary, Toronto," Feb. 26, 1883.

within the Keewatin Lumbering Company timber limits for other purposes, including mining and settlement. For purposes of analysis, McCarthy separated this into two questions, relating to federal and provincial powers, then broke the analysis down further, exploring government powers from the standpoints of whether or not the lease was in Ontario.

If one assumed the lease was not in Ontario, McCarthy reasoned, then the rights of the Manitoba government to the leased lands were easily dealt with: Manitoba had no rights since the lease predated the *Manitoba Boundaries Extension Act* of 1881, and that Act in any event provided that legislation predating it continued "to be in force ... as if the territory had not been added to Manitoba."⁷⁸ The lease was "a valid instrument" under the Provisional Agreement of 1874/1878, even if it covered land found to be in Ontario. The federal government had a right to deal with minerals within the leased lands only if the *Dominion Lands Act*, 43 Vic., c. 26, Section 7, provided the power to do so. That is, the federal government "can dispose of its reversionary estate but not so as to interfere with the tenancy for years which it has already granted." Whether or not section 7 applied to this lease was difficult to say, McCarthy observed. He reviewed the legislation affecting the question and found it ambiguous in its application to the lease. McCarthy concluded that if the leased lands were not within

⁷⁸ All quotations in this and the two following paragraphs dealing with McCarthy's analysis are from his memo, *ibid.*

Ontario, then the federal government could not do anything with the lands that would violate the rights of the lessees. If the leased lands were within Ontario, then section 7 would not apply. McCarthy was categorical in his assertion that under these circumstances, the lease was binding on the Ontario government, which could not interfere with the lands.

The Keewatin Lumbering Company had a number of other questions concerning the nature and interpretation of the lease and the Company's rights under it: Did it have greater-than-normal rights under this lease? Did the lease convey rights as absolute owners to the Company during its duration? Did the lease allow the Company to lay out town lots or rent lots for agricultural purposes? Did it allow the Company to expel squatters? Since jurisdiction was uncertain, how could the Company enforce its rights? Could people causing fires be punished under Dominion government law or only under civil action? Was the Company justified in use of force to keep people off its limit? What constituted sufficient public notice of these rights? Could the Company mine on leased land without any further licence? Could it sublet to other parties who want to mine? Mining companies have applied to the Ontario government; the Ontario government kept revenues from applications but the Dominion government did not. What do such applicants receive?

Not all of these questions need be addressed specifically here, but a recital of them indicates the range of concerns the company had. These questions developed for a number of reasons, some of which are hinted at within the questions themselves. The company was unhappy with the original lease, especially once the islands covered by it were found to contain less timber than had been supposed. But other matters were pressing as well. In addition to the jurisdictional issues raised by the Boundary Dispute, increasing settlement and mining activity resulted in a wide variety of trespass on the leased lands, from miners, pleasure boaters, other lumbermen, steamboat operators and people who wanted to use the land for agriculture and purposes relating to settlement. The Company wanted to know what its own rights were in regard to these activities and what rights it had to control others engaged in them. McCarthy concluded that "during the existence of the lease the Company's right to exclusive possession is, in my opinion undoubted."

Not content with the terms of the old Fuller lease, the Keewatin Lumbering Company applied to the Minister of the Interior in 1882 for a new one. Just what role McCarthy's analysis played in this decision is not clear. Amendments had been made to the *Dominion Lands Act* in 1883, producing disagreements between the Company and the Dominion over the terms of the new lease.⁷⁹ The Company sought

⁷⁹ AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 13.

to hold under the old lease, which was not subject to the 1883 amendments. This led to further negotiations, during which the Company continued to cut timber, which was then seized by the Department of Indian Affairs.⁸⁰

Finally, the Minister recommended that the original lease be suspended and a new one with a bonus payable of \$20/square mile be issued.⁸¹ Accordingly, a new agreement was reached between the Department of the Interior and the Company on October 17, 1883, and the seized timber was released.⁸² Under the terms of the new agreement, the Company received an annual licence to cut timber on islands in Lake of the Woods that now included those in Sabaskasing Bay. The condition for this agreement was that Fuller & Co. surrender to the Crown any rights granted under the original lease, other than the right to cut and remove timber.⁸³ The Department of the Interior waited ten months, however, before requesting an opinion from the Department of Justice regarding the Company's

⁸⁰ AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 15.

⁸¹ MTCL, Baldwin Room, Matheson Papers, file 1879-83, Minister of the Interior, Nov. 10, 1882.

⁸² AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 16, 18. Macdonell questioned the validity of this agreement, made after the abrogation of the Provisional Boundary Agreement; see p. 46.

⁸³ MTCL, Baldwin Room, Matheson Papers, file 1879-83, 2 page agreement re terms of new lease signed by A.M. Burgess, Deputy Minister of the Interior, and Richard Fuller, President of Keewatin Lumber Company, Oct. 16, 1883.

rights under the new lease.⁸⁴ Justice recommended confirmation of the October 17 agreement by order in council, but none seems to have been passed. The Judicial Committee of the Privy Council having decided in the meantime that the Disputed Territory was in fact Ontario, the Dominion government did nothing further regarding the lease.⁸⁵ The Deputy Minister of the Interior explained to Simon Dawson on December 10, 1886, that until the question of the Dominion government's rights to lands in the Disputed Territory was settled, it would not act on the agreement with the Keewatin Lumbering Company. It had been on the verge of stipulating that the company had no rights to the lands themselves, only the timber.⁸⁶

These two leases are of importance for a number of reasons. The Keewatin Lumbering Company was a major economic force in Keewatin and its environs. The company supplied timber to the young railroad, which was stimulating the development of settlement, and its sawmill was the first in the area.⁸⁷ By 1885, Mather noted, the company had spent \$150,000 building "Saw Mills, Planing Mills, Workshops, School House, Store, Post Office, and Twenty Dwellings

⁸⁴ AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 18-19.

⁸⁵ AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 19.

⁸⁶ AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 20.

⁸⁷ Ryan, "The Kenora-Keewatin Urban Area," 71, 76.

... [along] with other erections necessary for the business."⁸⁸
Between 1880 and 1905, the mills produced an annual average of 10,665,000 feet of timber, mostly for railway and other construction in the N.W.T.⁸⁹

Of more importance for the purposes here, the new lease granted in 1883 brought the Keewatin Lumbering Company into direct conflict with the mining interests on Lake of the Woods. The islands on Sabaskong Bay may have had the timber that the Keewatin Lumbering Company desired, but they contained as well the limits for gold mines that were of major economic significance in their own right. One of these mines was on Sultana Island, which was part of Indian Reserve 38B. The next chapter traces the development of this mine; the story to be told here is that of the conflict created when a powerful lumber company attempted to assert its rights after a mining licence had been granted that overlapped with its timber licence. The issues raised reveal the complex entanglements created by the collision of the Ontario-Manitoba Boundary Dispute, pressures to develop resources, and the rights of Aboriginal peoples.

⁸⁸ AO, Irving Papers, Mu 1480, 42/42/2(2), John Mather to O. Mowat, Oct. 20, 1885.

⁸⁹ QUA, Lower Papers, McLeod, "Memorandum re Keewatin Lumbering," 3, 6.

4.3.3: The Keewatin Lumbering Company and Sultana Island

Gold mining licences were granted by both Ontario and the Dominion to parts of Sultana Island after the Judicial Committee's decision in *St. Catherine's Milling*. The Dominion ignored that decision as far as Indian Reserves were concerned. The Ojibway had agreed to a surrender of Sultana Island for mining purposes in 1886 and in 1889 the Department of Indian Affairs issued letters patent⁹⁰ for two lots on I.R. 38B to the men who incorporated on August 2, 1889, as the Ontario Mining Company.⁹¹

On October 29, 1889, John Mather, manager of the Keewatin Lumbering Company, protested to the Department of Indian Affairs about the mining licences, arguing that as an island, 38B was covered by the Fuller lease. A week later, he rejected the Surveyor General's conclusion, delivered to the Department of Indian Affairs on October 22, that Sultana Island was part of the mainland. The Department replied to Mather on November 18th that Sultana was an Indian Reserve whether or not it was an island and therefore did not belong to Keewatin Lumbering Company.⁹²

⁹⁰ The information on patents is from NAC, RG 10, vol. 3696, file 15410, reel C-10122, J.D. McLean to the [Deputy Minister], Jan. 27, 1890. Locations 42X and 43X comprised 178 88/100 of the island's 520 10/100 acres.

⁹¹ NAC, RG 10, vol. 3799, file 48508, Petition of the Ontario Mining Company to Oliver Mowat, Clifford Sifton and J.M. Gibson, June 9, 1897, points 16 and 17.

⁹² NAC, RG 10, vol. 3824, file 60008, J. Mather to E. Dewdney, Oct. 29 and Nov. 5, 1889; DIA to Mather, Nov. 18, 1889.

Furthermore, the Department of Indian Affairs questioned the 1874 surrender to the Fuller Company on grounds that proper procedures, outlined in the Indian Act and dating back to the Royal Proclamation of 1763, had not been followed. With the invalidation of this surrender, the Keewatin Lumbering Company had no right to cut on Sultana Island, so Indian Agent Pither was ordered to seize the logs in February 1890, which he did. The Company refused to stop cutting, however. It believed the surrender was valid because the Minister of the Interior, David Laird, then also the Superintendent General of Indian Affairs, had granted the lease after examining the surrender document.⁹³

The tough stance of the Department was backed by regulations in the *Indian Act* that allowed it to fine and even imprison those who cut timber illegally on Indian Reserves. According to the Act, Indian Reserves were more than just the land; all trees and timber, as well as minerals and metals, were included. In addition to the penalties provided by the Act, Deputy Superintendent General of Indian Affairs Lawrence Vankoughnet recommended that "proceedings be taken" to force the company to stop cutting and to exact the penalties for the timber already removed. He argued as well that Sultana was not an island and so was not covered by the Fuller lease.⁹⁴

⁹³ NAC, RG 10, vol. 3824, file 60008, E. McColl to L. Vankoughnet, Feb. 14, 1890.

⁹⁴ NAC, RG 10, vol. 3824, file 60008, L. Vankoughnet to E. Dewdney, Feb. 15, 1890.

Vankoughnet's recommendations were not followed, however. Instead, the Department sought further information about the situation. The Department of Justice was asked for an opinion on March 10, and two days later letters went out to the Assistant Commissioner of Crown Lands, Aubrey White, raising questions regarding the role of the Ontario government, and to the Technical Branch of Indian Affairs, which was asked to comment on the island question."⁵ Two core issues were outstanding: whether Sultana Island was truly an island and not part of I.R. 38B; and the validity of the surrender of it to the Fuller Company by the Ojibway chiefs in 1874. Sultana would be covered by the revised lease if an island, but attached to the mainland it would be part of the Indian Reserve and the Indians would have the right to the timber."

The rights of governments and licensees hinged on this seemingly arcane issue of the definition of an island. The technical definition of the term 'island' was not the problem, however. The difficulty was created by the fact that Sultana Island was from time to time, depending upon the level of the Lake of the Woods, 'joined' to the mainland by a marsh. When it was initially surveyed in 1879, the marsh was visible, and the surveyor's report does not

⁵ NAC, RG 10, vol. 3824, file 60008, Memorandum to the Deputy Minister of Justice, March 10, 1890; DIA to A. White, March 12, 1890; Memorandum to Technical Branch, March 12, 1890.

⁶ Macdonell came to the conclusion upon further examination of the evidence that Sultana Island was a part of 38B and so Ontario government had no rights there; AO, Irving Papers, Mu 1480, 42/42/1(2), Macdonell, "Memo re Keewatin Lumbering," 50-1, marginalium.

mention an island. But the lake level rose following construction of the Rollerway Dam by the Keewatin Company and Sultana appeared to be a true island. The question of the submerged marsh continued to haunt discussion for years, however.

White replied that the Ontario government had done nothing about the timber license. The trouble lay with the Department of Justice, which had a different view altogether from Indian Affairs. One implication of the Privy Council decision in *St. Catherine's Milling* was that the Indian Reserves, many of which had been established and surveyed, were decided retroactively to have been carved out of Ontario land without the permission of the Ontario government. The Deputy Minister of Justice argued that the Fuller lease was valid under the 1874 Provisional Agreement since Minister of the Interior Laird had signed an order in council for it, that the Ontario government should ratify established Indian Reserves and that the Dominion government had no right to patent Indian Reserve 38B after the Judicial Committee's decision.⁹⁷

Keewatin Lumbering was not the only company asserting its rights to the timber on Sultana Island. The Ontario Mining Company required a certain amount of timber for its operations and protested that Keewatin was clearing Sultana Island of timber. The Dominion Lands Act provided that if minerals were discovered on a timber limit,

⁹⁷ NAC, RG 10, vol. 3824, file 60008, D.M.J. to L. Vankoughnet, April 18, 1890.

then the mining licensee would have the right to mine the minerals and have access to and egress from the mines, with adequate compensation to be paid to the timber licence holder.

This situation took a strange twist when the Keewatin Lumbering Company brought an injunction against the Ontario Mining Company. English investors, as represented by the Canadian Pacific Mining Company, and the Ontario Mining Company had reached an agreement in 1890 regarding the mine on Sultana Island. The injunction was the last straw for Canadian Pacific, which backed out of the deal and took its money to B.C. instead. The action was dismissed, however, and Keewatin Lumbering and Ontario Mining reached an agreement by which Keewatin Lumbering traded its interest in Sultana Island for shares in the Ontario Mining Company, to be held by Mather.⁹⁸

The Departments of Justice and Indian Affairs remained in disagreement over the question of Sultana Island being an island. By August 1892, the discussion had ground to a halt, perhaps because the federal government was a house divided and perhaps because the reality of being on the losing side in the Ontario-Manitoba Boundary Dispute had sunk in. The Department of Indian Affairs decided in the end that it could do nothing and the

⁹⁸ NAC, RG 10, vol. 3799, file 48508, Petition, Ontario Mining Company to Oliver Mowat, Clifford Sifton and J.M. Gibson, June 9, 1897.

Keewatin Lumbering Company was so informed."⁹⁹ In 1893, however, the Ontario government decided at last "not to assert any claim to Sultana Island."¹⁰⁰

⁹⁹ NAC, RG 10, vol. 3824, file 60008, Memo., Aug. 4, 1892; DIA to R.J. Pither, Aug. 5, 1892.

¹⁰⁰ NAC, RG 10, vol. 3799, file 48508, Petition, Ontario Mining Company to Oliver Mowat, Clifford Sifton and J.M. Gibson, June 9, 1897, citing the *Third Report of the Bureau of Mines, 1893*, 14.

CHAPTER V: THE DEVELOPMENT OF NATURAL RESOURCES: MINING

The issue of the ownership of minerals in the Disputed Territory was of as much moment to the Dominion and Ontario as the ownership of timber. Macdonald's generosity with the timber had, however, produced a lawsuit that seriously weakened the federal resolve to continue the Boundary Dispute. With the passage in 1889 of the *Canada (Ontario Boundary) Act* on the heels of its loss in *St. Catherine's Milling*, the Dominion was left with a focus on natural resources and precious metals in particular. The so-called 'base' metals were not an issue, these being considered to pass with the land as 'incidents of the soil'. Matters were less clear about gold and silver, however. These 'Royal' metals were in the property of the Crown and did not pass with the soil. With the settlement of the boundary dispute, the gold and silver of all the lands now considered to be Ontario were in the property of the Crown in right of the province. But parts of Ontario were covered by lands reserved to the Indians, and these came under section 91(24) of the *British North America Act*: the federal government had jurisdiction over 'Indians and lands reserved for Indians'.

Although the relationship between Indian lands and public lands had been discussed in *St. Catherine's Milling*, it was not clear just where jurisdictional matters lay once the reserves of Treaty #3 were decided to be Ontario lands. Ontario believed this gave it a right to minerals on Indian reserves and, in any event, gold and

silver belonged to the Crown and not to the Indians. The Dominion believed that the minerals were part of the reserved lands and as such came under the control of the Dominion, which was responsible for ensuring that the Indians received fair benefit for the minerals once they were sold. As discussed earlier, both governments acted on their positions and granted licences for gold to I.R. 38B. This chapter places this issue in the contexts of gold discoveries and mining in the region and in the boundary dispute.

5.1: Mining in the Disputed Territory

One of the most significant economic activities in the Boundary Waters region in the later nineteenth century was mining, especially for gold. The ancient rocks of the Shield contained gold deposits that, once discovered, changed for a time the course of development in the area. Although the popular image of gold fever in the 1890s has been formed by the great Yukon Gold Rush of 1896, the prime gold producing locale in Canada in the last decade of the nineteenth century was the Lake of the Woods region. Interest in the area's mineral resources had grown out of the observations of the men who went through it during the pre-Confederation evaluations of the west, on behalf of the Geological Survey of Canada, and during the construction of the Dawson Route and later the Canadian Pacific Railway. The expeditions of Hind and Palliser might be remembered primarily for their observations of the

agricultural potential of the prairies, but they contributed as well to knowledge of the Lake of the Woods region.

Knowledge of the geology of the Boundary Waters region was in its infancy at the time of the negotiation of Treaty #3, but discoveries of gold in the Lake Shebandowan district in 1871 had added to the urgency of achieving a treaty. Serious geological research into the region's mineral potential did not begin until the Geological Survey of Canada took an interest a decade later, however. Created in 1842 by the government of the Province of Canada, the Geological Survey was charged with the challenging task of mapping, among many other things, the geology of the new Dominion. Its primary reason for being, Zaslow asserted, "was its role of assisting the progress of Canadian mining."¹

One of the Survey's first geologists to explore the Lake of the Woods region, Robert Bell, took samples from quartz veins at Rat Portage in 1872, sending them to Ottawa for analysis. Although the results in this instance were negative, the "stage was now set for the discovery of the Lake of the Woods goldfields."² Bell headed a mapping expedition into the Lake of the Woods region in 1879 and noted that, while mining had not yet begun, prospectors were

¹ Morris Zaslow, *Reading the Rocks: The Story of the Geological Survey of Canada, 1842-1972* (Toronto: Macmillan of Canada & Dept. of Energy, Mines and Resources, 1975), 4.

² Greg Clark, "Lake of the Woods A Golden Heritage," Draft of Unpublished Paper, [March 1990], 3.

actively searching for gold.³ A sample he was given at the time assayed almost forty ounces of gold to the ton, a promising figure to which has been attributed a visit to the region from the Lieutenant Governor of Ontario in an attempt to solidify the province's interests.⁴ Geological Survey research became more systematic in 1882, when Bell and two assistants, A.C. Lawson and J.W. Tyrell, began geological and topographical studies of the Lake of the Woods/Lake Superior region. The fourth member of the team, Eugene Coste, checked the occurrences of gold at Lake of the Woods, Rainy Lake and Rainy River. Over the next few years, Lawson went on to make important discoveries that completely altered notions of the geology of the region.⁵

The construction of the Canadian Pacific Railway provided further opportunity to explore and note the potential of the region. On occasion, labour difficulties resulted in men leaving behind their CPR work to head into the bush and prospect.⁶ Zephraim Malhiot, a French Canadian engineer working on the railway lines through the area, noted the "inexhaustible supplies of iron, gold and silver" suggested by the geology of the Dawson Route:

³ Clark, "Lake of the Woods," 5.

⁴ Clark, "Lake of the Woods," 5.

⁵ Zaslow, *Reading the Rocks*, 184. Zaslow traced the development of Lawson's work, 185-9.

⁶ Clark, "Lake of the Woods," 4-5.

While exploring the country in connection with proposed Railway lines, I was constantly finding quartz veins of such evident value that I was inspired by the hope of suddenly encountering a positive mountain of the yellow metal. Stones impregnated with valuable mineral constituents were observed daily.⁷

5.2: Government Interest in Mineral Resources

As knowledge of resource potential grew, governments and powerful capitalists became more interested in the possibilities of resource development. While each of the three governments involved in the Boundary Dispute had its own agenda, the two powers in the dispute were Ontario and the Dominion. Their agendas conflicted directly as they each struggled for control and dominance in the Disputed Territory. Manitoba was no match for such major players.

5.2.1: Manitoba

The Manitoba government was shut out of the game until 1930 by federal ownership of the western provinces' resources, a decision taken initially for reasons of National Policy,⁸ but one that enabled the federal government to use the province to its own ends during the Boundary Dispute. With its involvement in the Dispute being manipulated by the Dominion, the Manitoba government proved

⁷ NAC, Malhiot Papers, "Seventy Years of Growth with Canada," 109.

⁸ Stevenson, *Ex Uno Plures*, 247.

a reluctant player, however. It readily admitted to the Ontario government that it had no real interest in the Disputed Territory.⁹

Although the Manitoba government was too weak to take much lead in the capital intensive, highly speculative business of mining, Winnipeg became a hub of mining activity as a number of mining companies established their headquarters there.¹⁰ This activity wore a number of faces, from the "black market" that can result from such wide open speculation¹¹ to the establishment in 1900 of the Central Canada Chamber of Mines, modelled on the highly successful organization established nine years earlier in Johannesburg, South Africa. Comparisons of the mineral potential of the Lake of the Woods region with that of South Africa were popular at the time. The Chamber's first annual meeting was addressed by F.H. Malcolm, past president of the Johannesburg Diamond Boring and Developing Company, who elaborated this comparison before what must have been an enthusiastic audience. The new Chamber was a prestigious affair, numbering among its five patrons the Earl of Minto, then Governor-General; Prime Minister Wilfrid Laurier; and Lord Strathcona and Mount Royal, who was, among other titles, Governor of the Hudson's Bay Company and Director of the CPR. A

⁹ AO, Campbell (Alexander) Papers, Mu 476, James Miller to Oliver Mowat, Dec. 7, 1883. For a succinct description of Manitoba's role in the Boundary Dispute, see Noel, *Patrons, Clients, Brokers*, 257-60.

¹⁰ Clark, "Lake of the Woods," 11.

¹¹ Clark, "Lake of the Woods," 8-9.

number of people who are in the cast of characters relevant here were members of the Chamber. Its solicitors were the Winnipeg firm of Ewart, Fisher & Wilson. John S. Ewart was later a defendant in *Ontario Mining Company v. Seybold*. Hugh John Macdonald, then premier of Manitoba, was an honorary president. Among its vice-presidents were C.W. Chadwick, past president of the Rat Portage Board of Trade, who applied for a location on Sultana Island. Its eight member Executive Committee included R.A. Mather, son of John Mather, whom R.A. replaced as manager of the highly influential Keewatin Lumber Company. R.A. Mather served as well on the General Committee (Winnipeg), which included Chadwick and H.J. Macdonald. These men were also Foundation Members, along with John H. Chaloner, Gentleman; George Drewry, Brewer; and S.S. Scovil, Physician & Surgeon, all of whom were involved with Sultana Island.¹²

¹² MTCL, Baldwin Room, Matheson Papers, file "Printed, Constitution of the Central Canada Chamber of Mines to 1890." The lists printed in the pamphlet exclude Representative and Associate members. The pamphlet does not include the full constitution, but does have fifteen "Objects of the Institution." These main goals were the gathering and dissemination of statistics and other information re mining in the region with a view to "advance, promote and protect the mining interests of Central Canada." Monthly statistics were to be published, as well as "a monthly report of all matters of mining interest, including a detailed record of the gold output." The organization would also act as a lobby group.

5.2.2: Ontario

The provincial government most concerned with development in the region was, of course, Ontario. The Ontario Bureau of Mines, established in 1891 following a Royal Commission into the state of mining in the province,¹³ was a culmination of the active interest in the resources of Lake Superior that the province had shown since Upper Canada days. The Director of Mines, Archibald Blue, discussed the region's mineral potential in annual reports that bore witness as much to the promise as to the actuality. But the north was to be the engine that would drive the economy of the province.¹⁴

5.2.3: The Dominion

Federal government interest was strong, as revealed by the shift in emphasis during the Boundary Dispute from the boundaries as such to the issue of ownership of resources. The question of ownership of resources was resolved generally once the lands were acknowledged to belong to Ontario. But the issue remained of moment on Indian reserve lands, with both the federal government and Ontario government claiming rights to the resources on and within them. The two governments agreed that the Indian Reserves provided for by

¹³ Nelles, *The Politics of Development*, 122.

¹⁴ Donald Swainson, ed., *Oliver Mowat's Ontario: Papers presented to the Oliver Mowat Colloquium* (Toronto: Macmillan of Canada, 1972), 4: "The exploitation of the wealth of the Shield has helped to mold the history of twentieth-century Ontario."

Treaty #3 should be kept "out of the path of settlement and off known mineral lands,"¹⁵ but the state of knowledge of the region's geology and the slow development of settlement made it unavoidable that resources desirable to government would be found on Indian Reserves. Should minerals be found on an Indian Reserve, however, the federal government was prepared to assert control on behalf of its Indian wards, even of the precious or 'Royal' metals. The lines were drawn for the next phase of the intergovernmental struggle.

5.3: Gold Fever in the Disputed Territory

The growing interest of the metropolises in the gold-bearing possibilities of the ancient rocks of the Lake of the Woods region was not without foundation. Although gold had been first discovered in 1871, becoming a factor in the negotiations between the Treaty #3 Commissioners and the Ojibway chiefs, the promise did not begin to reach fruition until the 1880s. But what a promise it was. In his 1893 report on "The Gold Fields of Ontario," Archibald Blue gave brief mention of

two new fields [that] have since come into notice, each of which may possibly prove to be of greater value than any of the ones referred to here. On Rainy Lake gold was discovered upon the American side of the international boundary in the month of August last year, and since then numerous gold-bearing veins have been explored on the Ontario side of the lake and on the Seine and Manitou

¹⁵ NAC, RG 10, vol. 1918, file 2790D, reel C-11110, July 31, 1874. Pardee sent them a 'Plan M' showing mineral lands applied for and approximate locations. The Governor General in Council had final approval.

rivers, the shows of which are so good as to have attracted to the region large numbers of prospectors.¹⁶

While the enthusiasms of the locals must be discounted, nonetheless some truth persists in the comparisons of the region's potential with the gold-producing districts of South Africa and Yukon. The Lake of the Woods region was Ontario's major gold producer, accounting for 55% of the province's gold in the decade after 1880 from an estimated production of 50,000 ounces.¹⁷ While the yield of gold had only amounted to \$2,000 in 1891, it leapt to \$115,000 by 1896, peaking at \$421,951 in 1899.¹⁸ Most of these yields were from the Lake of the Woods region, with Sultana and its two close rivals, the Mikado and Regina mines, producing by far the largest share.¹⁹ Such was the outlook by 1893 that a gold and silver reduction plant was constructed at Rat Portage to serve the twenty working mines established by that year.²⁰

¹⁶ Archibald Blue, "The Gold Fields of Ontario," in Legislative Assembly of Ontario, *Third Report of the Bureau of Mines* (Toronto, 1893), 13. The other find was around Lake Wahnapiatae in the Temagami region of northeastern Ontario.

¹⁷ G[reg] Clark, *Handbook for Prospectors & Developers in the Kenora Area* (Kenora, Ontario: Tri-Municipal Economic Development Commission, 1984), 12.

¹⁸ Ryan, "The Kenora-Keewatin Urban Area," 305, Table G.1.

¹⁹ Ryan, "The Kenora-Keewatin Urban Area," 305, Table G.1; K. Nelson, P. Nelson and L. Vogrig, comps., *Klondike at Home - a history of mining - Lake of the Woods*, 3 vols., ([Kenora?], Experience '76, [1976]), 1:8-9.

²⁰ Nelson et al., "Klondike at Home," 1:8.

The fields that one expert observer from the United States had described as "the most promising gold region in America"²¹ appeared to be paying off. And the payoff seemed to be one that could not have been achieved more easily. In 1900, the *New York Engineering and Mining Journal* offered an optimistic assessment of the region's potential:

1. ... the ore is practically all free-milling, and from actual testing the gold has averaged about \$15 to the ton, while the cost of working and treating has only averaged about \$4 or less per ton.

2. Abundance of water for power and other purposes. The whole region is a network of lakes, rivers, and streams, which afford not only excellent means of communication ... in the summer, but also in the winter ... Exceptional advantages are also afforded the prospector, as almost every part of the region can be reached by canoe. Power sources are almost unlimited. At Keewatin, ... the Keewatin Power Company is installing what will be, when completed, one of the greatest power plants in the world. By the erection of an immense dam at this point they have converted the Lake of the Woods into a reservoir 3,000 square miles in extent.

3. Abundance of timber both for building and fuel purposes. As fuel, it can be laid down at the mines at a cost not exceeding \$1.50 per cord, while for building purposes it is also relatively cheap.²²

This vast potential notwithstanding, the development of working mines in the region was fraught with difficulties, ranging from problems with management and technology, to competition from other regions, to the effects and aftereffects of the Boundary Dispute. Geologist Greg Clark charted the chaotic career of mining properties in the area from 1881 to 1946, relating the activity

²¹ Nelson et al., "Klondike at Home," 1:3.

²² Quoted in Nelson et al., "Klondike at Home," 1:3-4.

loosely to other significant events. The number of active properties ranged from about twelve in 1883 to one or two in 1888, zigzagging up to twenty in 1894 only to drop off to about seven the next year. But the Klondike and Ontario boomed at the same time, with active properties in the province soaring to a peak of about sixty-two in 1899. The boom was shortlived, however, passing as quickly as it rose, matching the 1884 low of only two active properties by 1909, the year of the Timmins gold rush. As with the Klondike and the discovery of silver at Cobalt in 1903, the Timmins gold fields drew miners from the Kenora region. It was not the last to do so. Two years later, gold was discovered at Kirkland Lake (although that year saw a slight increase in active properties around Kenora) and in 1925, there was a minor gold rush in the Red Lake area that created a dip between the somewhat better years for Lake of the Woods of 1924 and 1926. Intense interest in the Lake of the Woods region would not redevelop until the mid-1930s, when a three year tax exemption on gold helped create a new peak of thirty-two active properties in 1936.

Of the active properties, very few lasted any length of time; Clark found that only nineteen were in operation for seven years or more.²³ Despite the promise and potential, wrote the authors of a history of the region's mines,

the fates seemed to be against all mining operations from the start. The story of gold mining on the Lake of the

²³ Clark, *Handbook for Prospectors*, chart.

Woods was one of rather erratic cycles of activity and inactivity, and considering the number of gold discoveries made, the lake's gold mining history was, on the whole, disappointing.²⁴

5.3.4: Gold Fever and Sultana Island

If there was one man who was not disappointed by the gold production of the region, it must have been John F. Caldwell, a Winnipeg businessman who owned the Sultana Mine from 1891 to 1899 and was its managing director until 1906.²⁵ Blue noted that Caldwell had "met with a full share of the pioneer gold miner's difficulties, but he has faced them with courage, intelligence and enterprise." Few Ontario miners have Caldwell's "tenacity of purpose," Blue went on, "and none have shown a better example of what pluck and skill can do; and he deserves to succeed."²⁶

Sultana Mine was on Sultana Island in Bald Indian Bay in the north end of Lake of the Woods (Map 2). Its 520 acres formed part of I.R. 38B. Blue set the scene in his 1893 report:

Sultana island is on the north shore of Lake of the Woods. In a direct line it is four and one-half miles southeast of Rat Portage; but the overland route is used only in winter, and even then it is hardly better than a snow-shoer's trail. By water the distance is eight miles

²⁴ Nelson et al., "Klondike at Home," 1:5.

²⁵ J.C. Davies and P.M. Smith, *The Geological Setting of Gold Occurrences in the Lake of the Woods Area* (Ontario Ministry of Northern Development and Mines, Open File Report 5695, 1988), 321.

²⁶ Davies and Smith, *Gold Occurrences*, 19.

... This is the summer route, and in good weather it may be taken safely and pleasantly in a canoe. ... usually it is a delightful trip.²⁷

Sultana was the first among the Big Three producers, as mentioned above, yielding between 1894-1902, 1904-6, and briefly in 1949, 15,977 ounces of gold from 7,481 tons of ore.²⁸ Gold had been discovered on the island by 1880, and since it was part of I.R. 38B under the provisions of Treaty #3, licences for mining (as opposed to exploration and staking a claim) could not be granted until a surrender had been given by the Ojibway. They agreed to a surrender in 1886, and by 1888, the Department of Indian Affairs had granted patents²⁹ for lot 42X to Henry Bulmer, Jr., J.H. Hennessy, C.A. Moore, A.C. and H.G. McMicken, George Heenan and Dr. S.S. Scovil. They had located the six main veins on the island and dug test pits to examine them.³⁰ A second location, 43X, had been licensed to Bulmer and Hartt. These locations had originally been the property of the Ontario Mining Company, then an unincorporated group of fifteen men. They had turned the locations over to the men who received the federal patents.³¹

²⁷ Blue, "The Gold Fields of Ontario," 13.

²⁸ Davies and Smith, *Gold Occurrences*, 315.

²⁹ The information on patents is from NAC, RG 10, vol. 3696, file 15410, reel C-10122, J.D. McLean to [DM], Jan. 27, 1890. Locations 42X and 43X comprised 178 88/100 of the island's 520 10/100 acres.

³⁰ Davies and Smith, *Gold Occurrences*, 320.

³¹ Nelson et al., "Klondike at Home," 2:202-3.

A negative engineering report discouraged the patentees, but not Caldwell, who acquired lots 42X and 43X from them in 1890-91. He developed three of the veins, with the main shaft having been sunk to a depth of almost 600 feet by 1899. In 1893, Caldwell employed "twelve miners, three above and nine under ground, a smith, five mill men and a superintendent, besides two cooks" who collectively earned about \$30.00/day and lived at the minesite, "as there was no white man's habitation within several miles of Sultana mine."³² By 1896, fifty men were employed, "mining and milling ... very economically and efficiently" twenty-four tons of ore a day with a crusher and eight stamps. A chlorination plant was under construction for treating the tailings, new buildings were being put up to house the workers, and Caldwell had plans to triple the size of the operations. "It was a genuine surprise," concluded the author, "to see how immensely the prospects of this pioneer mine have improved in the last year or two."³³ Although Caldwell met his goal for development, the success of the mine was short-lived. The Bureau of Mines report for 1911 noted that the mine shafts were full of water and, although the equipment was kept "in excellent repair," no work had been done in the past few years.³⁴

³² Blue, "Gold Fields of Ontario," 19.

³³ Dr. A.P. Coleman, "Third Report of the West Ontario Gold Region," in Legislative Assembly of Ontario, *Sixth Report of the Bureau of Mines, 1896* (Toronto, 1897), 94-5. This report contains an extensive description of the geological formations of Sultana; see 121-4.

³⁴ Arthur L. Parsons, "Gold Fields of Lake of the Woods, Manitou and Dryden," in Legislative Assembly of Ontario, *Twentieth Annual Report of the Bureau of Mines, 1911* (Toronto, 1911), 169.

Caldwell's was not the only mine on Sultana. An adjoining property in which he had an interest, the Ophir mine, was owned by the Ontario Mining Company,

but a wrangle amongst the officers and shareholders has hindered operations upon it. At one time it was bonded to an English syndicate, and it is said that a shaft was sunk on one of the veins to a depth of fifty feet, with excellent showings, but the wrangle of the shareholders broke out afresh and the ore was thrown back into the shaft, which is now filled with water.³⁵

This rather compressed view of the fate of Ophir hides both the romantic stories of the so-called "twentieth" men, miners who owned one twentieth of this promising mine, and the law suit that is the focus of this chapter.

Caldwell's ownership had been a point of contention in the region for, as a private owner, he did not have to and in fact did not reveal the production value of the mine. This was seen as the loss of an opportunity to promote the area, and many believed that the region would benefit if Caldwell sold out to an English syndicate, for "the output might be made public and the district advertised in English mining circles through the medium of this property."³⁶

³⁵ Blue, "Gold Fields of Ontario," 14.

³⁶ J.-Louis Causse and L. Mendonca, *Mineral Potential Literature Research Study, Kenora Indian Reserve No. 38B* (Ottawa: DIAND, Indian Minerals [East] Directorate, November 1986), App. A, citing 1900 Ontario Bureau of Mines *Annual Report*. Not everyone agreed with this apparently; see MTCL, Baldwin Room, Matheson Papers, File 1884-1886, I.D. O'Meara to A. Matheson, April 1, 1884. O'Meara was organizing the Lake of the Woods Milling Company to provide machinery for the crushing of ore, which some mines were starting to produce. Links were being established with U.S. firms.

Caldwell apparently yielded to this pressure, and reached a deal in 1899 whereby he sold the property to an English syndicate which incorporated it as Sultana Mine of Canada, Limited in July 1899.³⁷ The company took possession on August 12, 1899, resuming operations on a limited basis on September 1.³⁸

Whether or not the sale of the mine helped the area, it was of little comfort to the new company. Operations were scaled down in 1902, owing to problems of flooding and lack of capital. One of the main veins was 'lost' and, after numerous attempts to relocate it, the company decided it had faulted and ceased operations. The company's Canadian Advisory Director, John F. Caldwell, was more persistent, however, and managed to locate the vein in 1903. The Sultana Mining Company was reorganized, this time being controlled by people from Rat Portage.³⁹ Continuing problems with flooding forced its closure again in 1906; in spite of flurries of activity in the 1930s and 1950s, Sultana has not been actively productive

He named other men involved (including Bulmer) and invited Matheson to join. O'Meara described the capitalization of the company and the mines so far involved. "This is I think the first real bona fidi [sic] effort that has been made for nearly 2 years to place the mines in Lake of the Woods on a solid footing by our own efforts. All other efforts have looked towards selling of floating stock in England or Canada. Heaven helps those who help themselves and I think that should be our motto." A marginal note by Matheson identifies O'Meara as a "canon."

³⁷ Causse and Mendonca, *Mineral Potential Literature Research Study*, App. A; Davies and Smith, *Gold Occurrences*, 320.

³⁸ Causse and Mendonca, *Mineral Potential Literature Research Study*, App. A.

³⁹ Nelson et al., "Klondike at Home," 2:207.

since.⁴⁰ This doleful tale needs to be recapped by one significant fact: its difficulties notwithstanding, the Sultana was the most productive of the northwestern Ontario mines, yielding gold worth an estimated record value for the time of one million dollars.⁴¹

As for the Ophir, the "wrangling" of the company members proved too much, at least for them. The mine was not worked until 1903, but then was almost immediately shut down while the courts decided on the question of its ownership. A new company, Ophir Consolidated Mines, was formed in 1912 to develop the site.⁴²

The history of the Sultana Island mines reveals the main problems experienced by mining entrepreneurs in the area: problems with technology, which was not yet developed to the point where the ores could be processed adequately and the mining problems addressed successfully; inadequate management, for many of the miners in the area were inexperienced; adverse conditions, for the lake that enhanced communications produced enormous difficulties for those who would dig beneath its waters; problems raising the capital required for such expensive ventures; the lure of gold discoveries in other areas; and the difficulties of asserting rights to claims against competitors.

⁴⁰ Davies and Smith, *Gold Occurrences*, 321-2.

⁴¹ Nelson et al., "Klondike at Home," 2:208.

⁴² Nelson et al., "Klondike at Home," 2:154-7.

As if these obstacles were not enough, mining on the Lake of the Woods, especially on Indian Reserves, faced two other complexities that overshadowed the problems listed above. The Ontario-Manitoba Boundary Dispute had left a strong, lingering uncertainty about title that, although problem enough in its own right, exacerbated some of the others. Not much work could be done if a final licence to remove the ore had not been granted. Capital could not be attracted under that circumstance. Furthermore, some Indian Reserves were found to contain gold. The Ojibway were well aware of its value, and had been instrumental in locating a number of the mines. When it came to questions of who owned the gold on Indian Reserves, the answers evaded the efforts of all concerned for many years. Unravelling this complexity will begin with an examination of the competition for the gold resources of Sultana Island. Some patience must be had with the seemingly arcane details of its beginnings if the evolution of *Ontario Mining v. Seybold* is to be fully understood.

5.4: The Development of *Ontario Mining v. Seybold*

The problems within the Ontario Mining Company have been alluded to above. The complexities become more apparent when we add to this the parties on the other side, competing claims of first discovery and the new (1886) requirement of a surrender from the Ojibway.⁴³

⁴³ Among the amendments to the *Indian Act* in 1886 was a provision that "no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to

Not only did the various parties attempt to brush aside one claimant or another, but they took to playing off the Dominion and Ontario governments against each other. The grab for gold attempted by these people reveals something of the greed and eagerness of the times," which was assisted by the laxity of the regulations.⁴⁵ More importantly, it contributes to our understanding of the confusion at the time regarding resource development in the new province. Ontario was just beginning its northwestward expansion, a process that was pushed and pulled by the drive to exploit the resources of the shield. The great burst in development of northwestern Ontario's gold fields did not come until after the settlement of the Boundary Dispute, but the questions of ownership were not solved but rather made worse by the final result of that larger issue. If Ontario's economic progress is truly without planning, the contentious issues under examination will help explain why, adding a chapter to the works of George and Nelles on resource development.

the Crown ..." R.S.C. 1886, 49 Vic., c. 43, sections 38, 39.

⁴⁴ In his comments on the political corruption that resulted as mineral and timber lands became readily available during the construction of the Canadian Pacific Railway, Joseph Schull noted that "the opportunities were there. They were a part of the general atmosphere of a decade of rush and grab." He quoted W.T.R. Preston, no stranger to such activities: "'They were a hungry lot in Ottawa then'." Joseph Schull, *Edward Blake. Volume 1: The Man of the Other Way, 1833-1881* (Toronto: Macmillan of Canada, 1975), 27-8.

⁴⁵ Peter George, "Ontario's Mining Industry, 1870-1940," in *Progress without Planning: The Economic History of Ontario from Confederation to the Second World War*, ed. Ian M. Drummond (Toronto: University of Toronto Press, 1987), 52-76.

5.4.1: Competition for Resources

The competition for the resources of Sultana Island arose on a number of levels. Gold was not the only resource of interest, although it was the most valuable. Such was its value that a number of men launched claims asserting primary discovery that dragged on, usually with little success for the claimant. A thorough study of these conflicting claims would reveal much about the business practices of the time, but enough will be learned of those by the brief notice provided below.

Perhaps the most unfortunate of the claimants to first discovery were J.F. Snow, a surveyor, and C. Codd, an investor from Winnipeg. In 1882-3, Snow and Codd discovered gold-bearing quartz, surveyed a claim on part of Sultana Island, and formed a mining company with H.G. McMeekin of Winnipeg, George Heenan, and David Kerr Brown. The Winnipeg firm of Macdonald, Tupper & Phippen were retained for one eighth of the claim to help them get a Dominion government patent.⁴⁶ Over the next few years, the need to secure a surrender from the Rat Portage Band on I.R. 38B held up the claim, a situation made more complicated by the Boundary Dispute. Sultana Island had been set aside in 1879 as part of 38B by Dominion

⁴⁶ NAC, RG 10, vol. 3659, file 9538, reel C-10115. Hugh John Macdonald and John Stewart Tupper, a team of 'sons of famous men', were prominent lawyers in Winnipeg who utilized their paternal connections to acquire resource limits then turn them over for generous profits. Cottam, "An Historical Background of the St. Catherine's Milling Case," 57-8.

officials, but the Indian Reserve was not confirmed by order in council. The federal government asserted that the reserve was in the Disputed Territory "west of the Province of Ontario, and therefore, under the control of the Dominion."⁴⁷

By 1888, a surrender had been secured, but Snow and Codd were out of touch with developments, Codd himself being in Minnesota. Both men filed affidavits that year asserting that they had been squeezed out by McMeekin and Brown with the collusion of Macdonald, Tupper & Phippen, who sought to increase their share to three eighths of the claim. Codd's affidavit of August 31 explicitly stated that Macdonald, Tupper & Phippen were "in league with other speculators, [and] have conspired to defraud me." According to the affidavits, Macdonald, Tupper & Phippen had failed to inform them of changes to mining regulations. Deputy Superintendent General J.D. McLean's marginalia show the Department of Indian Affairs had little sympathy for Snow's accusations.⁴⁸

There would appear to be some substance to these charges. In 1886, Macdonald, Tupper & Phippen had sought the assistance of Alexander Matheson, the HBC Chief Factor based in Rat Portage, who was heavily involved in the investments and machinations of the mining community. Macdonald, Tupper & Phippen were hoping Matheson would exert his influence in order to help achieve a surrender. Snow and

⁴⁷ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 387.

⁴⁸ NAC, RG 10, vol. 3659, file 9538, reel C-10115.

Codd were not mentioned; rather, Hugh John Macdonald wrote "to ask you to use your powerful influence with Mr Macpherson in favour of our Montreal friends Mr Micken [sic], Caldwell and Heenan, who are endeavouring to lease part of an Indian Reserve for mining purposes."⁴⁹ In the end, Snow and Codd made arrangements with other participants. Indian Agent Robert J. Pither was to hold an investigation in 1888 after Snow registered his complaint, but Snow worked out a deal with McMicken and withdrew his complaint. John S. Ewart, whose Winnipeg law firm represented the Central Canada Chamber of Mines, became involved upon receiving one half of Snow's 'interest'.⁵⁰

Snow and Codd were not alone in their claims to Sultana Island by any means. In 1895, John B. Wilson claimed to be the original discoverer of gold on 38B, but there is little record of what came of his claim.⁵¹ A more prominent claimant was Jacob Hennessey, who successfully asserted being original discoverer of gold on X42 location in 1881. His claim was contested by Joseph Capistran, a Métis. C.A. Moore claimed unsuccessfully to be a co-discoverer with Hennessey, who ultimately sold his interest to Henry Bulmer. Indian

⁴⁹ MTCL, Baldwin Room, Matheson Papers, file 1884-1886, Hugh J. Macdonald to A. Matheson, Aug. 6, 1886. The reference is no doubt to Senator D.L. Macpherson, who between Oct. 17, 1883, and Aug. 4, 1885, had been Minister of the Interior.

⁵⁰ NAC, RG 10, vol. 3659, file 9538, reel C-10115.

⁵¹ NAC, RG 10, vol. 3806, file 51976, reel C-10141.

Inspector Ebenezer McColl investigated the conflicting claims of Hennessey and Capistran, ignoring Moore's claim.⁵²

5.4.2: Jurisdictional Deadlock

By 1889-90, only three patentees, A.C. and H.G. McMicken and George Heenan, had received letters patent. They supplied quit claim deeds to the Ontario Mining Company for Sultana Island, exclusive of Sultana mine, which was owned by Caldwell.⁵³ Over twenty other applicants had failed to gain mining locations on 38B.⁵⁴ Even after difficulties in obtaining a surrender were overcome, the applicants were informed in 1890 that questions between the Ontario and Dominion governments in the Disputed Territory had to be settled before mining could begin.⁵⁵ The process by which some Ontario Mining Company members and not others received letters patent from the Department of Indian Affairs for mining locations on Sultana Island in 1890 were detailed in that company's 1897 memorandum to the Ontario government.⁵⁶ For example, A.C. McMicken, a member of the Ontario Mining Company, complained for years to the Department

⁵² NAC, RG 10, vol. 3895, file 97971, reel C-10156.

⁵³ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 388.

⁵⁴ NAC, RG 10, vol. 3803, file 50358, reel C-10140. This long file details the applications from a number of people, including Alexander Matheson and twenty others.

⁵⁵ NAC, RG 10, vol. 3803, file 50358, reel C-10140.

⁵⁶ NAC, RG 10, vol. 3799, file 48508, reel C-10139, Petition, Ontario Mining Company to J.M. Gibson, Clifford Sifton and Oliver Mowat, June 9, 1897, points 1-8.

about the difficulties he had in acquiring a patent. In 1889, a year after his original application, McMicken had "had a long talk" with Deputy Superintendent General Vankoughnet about the claim. Apparently, an investigation into the matter had begun, and the two men agreed it was necessary to continue it. Vankoughnet went on to make the interesting comment that he did "not see how there could be any complication with the Ontario Government in respect to the Indian title to the Island."⁵⁷ The island had been set apart and surveyed without comment from the province until mining applications began to be received. But Ontario "ha[d] not pressed its claim" to the Island, although it had questioned its status as a reserve, being of the impression that it could not be since it was an island. The federal government had noted that being an island had nothing to do with it, and Vankoughnet had not had any reply in the past year.⁵⁸

Not only was Vankoughnet off the mark in his impressions about Ontario's position, but the investigation must have failed, for McMicken took up the matter again some years later, this time writing to Superintendent General Hayter Reed. He noted that his application dated back almost eight years to August 1888. Some members of the Ontario Mining Company had received patents and those who had not, McMicken believed, had received extensions at

⁵⁷ NAC, RG 10, vol. 1100, Deputy Superintendent General's Letterbooks, L. Vankoughnet to Edgar Dewdney, April 27, 1889.

⁵⁸ NAC, RG 10, vol. 1100, L. Vankoughnet to Edgar Dewdney, April 27, 1889.

least. McMicken claimed to have met any requirements and wanted to know what to do. Reed replied that the Department could no longer give patents since the issue of Ontario confirmation of reserves was under discussion.⁵⁹ Other claimants over the next decade attempted to secure title to locations on 38B; for example, a Toronto legal firm tried to apply in 1896 for a patent "for all the lands remaining unpatented on Sultana Island."⁶⁰ Superintendent General of Indian Affairs Hayter Reed replied that a patent was not possible since Sultana Island lands were on hold "pending the question of the approval by the Ontario government of the Reserves selected in Treaty No. 3 in accordance with agreement entered into between the two Governments of the Dominion and Ontario."⁶¹

In 1897, following its entanglement with the Keewatin Lumbering Company, the Ontario Mining Company sent both governments a lengthy memorandum detailing their experiences and requesting letters patent from the Ontario Commissioner of Crown Lands. According to the memorandum, the Company had made application to the Ontario Department of Crown Lands on February 1, 1889, "for the purchase of said Mining Locations, in order to perfect the title thereof and remove all doubts on account of the question of jurisdiction." It

⁵⁹ NAC, RG 10, vol. 3800, file 48517, reel C-10140, A.C. McMicken to Hayter Reed, May 15, 1896.

⁶⁰ NAC, RG 10, vol. 3696, file 15410, reel C-10122, Kerr, Macdonald, Davidson & Patterson to [Hayter Reed], July 21, 1896.

⁶¹ NAC, RG 10, vol. 3696, file 15410, reel C-10122, Kerr, Macdonald, Davidson & Patterson to [Hayter Reed], July 21, 1896.

noted that this dispute between the two governments over titles had delayed development, being a factor in the withdrawal of the English group, Canadian Pacific Mining, that had invested in the mine.⁶²

Having incorporated on August 2, 1889, the Ontario Mining Company attempted to get Crown Lands "to assert its claim to the property," but in 1893 the Ontario government "finally determined not to assert any claim to Sultana island." Nonetheless, as appreciation of the potential of the island increased, the Company persisted in its efforts to get Crown Lands to assert a claim to it, requesting of the Ontario government on April 30, 1894, for example, how to apply for title to Sultana Island. The province ignored its requests until 1895, however, when A.S. Hardy and Archibald Blue responded in coordinated replies that the government had

not confirmed any grants made by the Dominion since the Privy Council decision [that the Disputed Territory was Ontario land]. Sultana Island was claimed by the Dominion as Indian territory, and patents were granted by that Government only because of such contention. I need hardly mention that where the lands are Indian lands and belong to an Indian Reserve beyond question, this Province can make no claim and therefore, of course, is not called upon to confirm the grants made by the Indian Department at Ottawa. The dispute, however, was as to whether Sultana Island was properly part of a Reserve. The Dominion chose to assume that it was Indian land, and granted patents after the surrender by the Indians. No suit has ever been instituted by the Province having for

⁶² NAC, RG 10, vol. 3799, file 48508, reel C-10139, Petition, Ontario Mining Company to Oliver Mowat, Clifford Sifton and J.M. Gibson, June 9, 1897.

its object a declaration by the Court that the island was not properly part of a Reserve.⁶³

The petition resulted in Sifton's recommendation of July 15, 1897, that a joint commission be established to settle these disputes over Treaty #3 area titles. While a joint commission does not seem to have been established, the Ontario government altered its position and began asserting a right to grant patents on Sultana Island in spite of Ontario Mining Company claims. Furthermore, the province protested the Dominion's letters patent of 1888 which were now held by the Company.

The matter came up for a ruling from the Commissioner of Crown Lands, delivered on November 22, 1898. The Company was granted only a one-third interest and then only if it gave up its claims under Dominion patents. The Company rejected this ruling, which was withdrawn by the Commissioner.⁶⁴ The company's lawyers objected, noting that

It is important that some arrangement should be arrived at between the two Governments for settling their respective jurisdictions, so that persons who have bona fide purchased from the Dominion Government and paid them

⁶³ NAC, RG 10, vol. 3799, file 48508, reel C-10139, Petition, point 31, citing A.S. Hardy, Ontario Commissioner of Crown Lands, to Hough & Campbell, solicitors for the Ontario Mining Company, May 17, 1895. A similar reply was sent by Archibald Blue on May 16.

⁶⁴ NAC, Blake & Redden Papers, MG 28 III 35, vol. 8, file 8-11, *Ontario Mining Company v. Seybold et al.*, Record of Proceedings, 142-5. Blake & Redden was Edward Blake's English firm that handled the cases he argued before the Privy Council.

their purchase money, should not be disturbed in their holdings."⁶⁵

Furthermore, they had entered a "Caution in the Land Titles Office at Rat Portage to prevent any Ontario Patent being registered covering our clients' lands."⁶⁶

A final ironic footnote to the whole question of title is provided by Caldwell's attempt in 1903 to have the Department of Indian Affairs return monies he had paid for his patent to location X42. He had paid \$135.35 in April 1890 for the patents held by Scovil, Hennessy, Moore and Bulmer to X42. At the time, the Dominion was refusing to accept such monies until the confusion resulting from the Boundary Dispute was settled. So the money was returned but Caldwell refused to accept it. Eleven years later, he tried to get it back but the Department refused to return it and it seems Caldwell never did receive it. Law Clerk Reginald Rimmer detailed the situation in his memorandum recommending that Caldwell not be repaid. Rimmer noted that Caldwell had also applied successfully to the Ontario government for a patent "covering location X42 also patented by this Department. The fact would therefore seem to be

⁶⁵ NAC, Blake & Redden Papers, vol. 8, file 8-11, *Ontario Mining Company v. Seybold et al.*, Record of Proceedings, Laidlaw, Kappeler & Bicknell, agents for Hough & Campbell, solicitors for the Ontario Mining Company, to W.A. Orr, Department of Indian Affairs, Jan. 23, 1899.

⁶⁶ NAC, Blake & Redden Papers, vol. 8, file 8-11, *Ontario Mining Company v. Seybold et al.*, Record of Proceedings, Laidlaw, Kappeler & Bicknell to W.A. Orr, Jan. 23, 1899.

that in order to quiet his own title Caldwell acquired the same rights from the opposing governments."⁶⁷

The rights of these governments to grant mining locations were decided upon in *Ontario Mining v. Seybold*, the lawsuit that finally sprang from the convoluted events described above. The issues raised in that suit, how they were resolved by the courts, and their implications are the subjects of the next chapter.

⁶⁷ NAC, RG 10, vol. 3864, file 84435, reel C-10152, Law Clerk Reginald Rimmer to the DSGIA, Jan. 3, 1903.

CHAPTER VI: MINERALS ON INDIAN RESERVES: *ONTARIO MINING V. SEYBOLD*

The issue of ownership of minerals on Indian lands involved a number of points over which the federal and Ontario governments disagreed: the interpretation of sections 91(24) and 109 of the British North America Act (1867); the nature and extent of Aboriginal title; the meaning of Treaty #3. The interpretation of these sections of the B.N.A. Act was a familiar collision course for the two governments. The matter had been a focal point in *St. Catherine's Milling*, which decided that once the lands in the Disputed Territory were surrendered by the Ojibway, they became part and parcel of the province. The federal government maintained its position that for its responsibility under 91(24) to be meaningful, it had to have control over Indian Reserve lands, including the power to sell them for the benefit of the Indians once they had been surrendered by them. The issue came up again in *Ontario Mining v. Seybold*, with similar results.

In each of these lawsuits, the nature of Aboriginal title was argued by both governments in ways that were consistent with their interests. The federal government sought to show in *Ontario Mining v. Seybold* that Aboriginal title included the minerals in the ground, whereas the Ontario government used the "frontier of monarchy" argument to show that in both French and English law, the minerals had never passed with the land, but were retained by the crown. This argument had serious and retroactive implications for

the agreement between Her Majesty and the Ojibway known as Treaty #3. In the negotiations for that agreement, the question of ownership of the minerals was raised by the Ojibway, who were fully cognizant of the discovery of precious metals and their implications for the value of their lands. Alexander Morris had assured them that they would be considered the owners of any minerals found on lands reserved to them, although not in the total area surrendered. This had proved acceptable to the Ojibway, who went on to sign the treaty, but terms specifying Morris' promise were not included in the legal text. Nonetheless, the Ojibway viewed Morris' promise to be as binding as the document itself, a position the legal advisers of the federal government tended to uphold. Ontario disagreed, of course, and her position was victorious in the courts. Unfortunately, this particular federal/provincial dispute had a direct impact on the Ojibway themselves. How could the federal government exercise its authority under 91(24) if reserve lands reverted to Ontario the instant they were surrendered by the Ojibway? How could the reserve lands be developed for the benefit of the Ojibway under such circumstances? The courts at the time dealt lightly with these questions, leaving the governments involved to struggle for decades over abortive attempts to answer them.

6.1: The Provincial Position

Having spent the first twenty years of its existence in the successful assertion of its claim to the region, the Ontario government sought to guard its rights jealously. John A. Macdonald's statement in 1882 that 'not one stick, not one lump of gold' would pass to Ontario was turned on its head by a government willing to go to fastidious lengths to ensure that it would acquire the resources it believed belonged to it by constitutional right. The main architect of Ontario's argument on the precious metals issue was AEmelius Irving, the lawyer who represented the Ontario government in numerous legal battles of the late nineteenth and early twentieth centuries.

On June 8, 1897, Irving produced a memorandum on "Precious Metals and Other Minerals on Indian Lands and Indian Reserves"¹ for the Minister of Crown Lands, A.S. Hardy, who would use the document as the basis for his own memorandum to the federal government. Irving made four points on the matter of whether the Dominion or the Ontario government owned the metals on Indian Reserves in Ontario. He argued that (1) the province owned all the minerals on its lands, whether these were Indian lands or not, and that on Indian Reserves, the Indians had a right only to the base metals; (2) lands covered by unextinguished Indian title become provincial

¹ OA, Irving Papers, Mu 1479, 41/40/02, [AE. Irving] to [A.S. Hardy], June 8, 1897.

lands upon their surrender and the province receives the entire benefit of such lands; (3) the proceeds arising from the sale of surrendered Indian Reserve lands go to the Dominion on behalf of the Indians except for the precious metals for, "neither the Dominion nor the Indians having any interest therein or claim thereto," the province receives the benefit of these; and (4) on lands reserved to the Indians but not confirmed as such by Ontario, the province retains the title and benefit of the lands, which cannot be granted by the Dominion; if such lands are surrendered and sold prior to confirmation by the province, then they remain as provincial lands and Ontario can deal with them accordingly.²

The main pillars supporting Irving's arguments for Ontario government ownership were section 109 of the B.N.A. Act (1867) and its interpretation in various law cases, most notably *St. Catherine's Milling* and *A.G. of B.C. v. A.G. of the Dominion*. Section 109 asserts that

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, and Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.³

² OA, Irving Papers, Mu 1479, 41/40/02, [AE. Irving] to [A.S. Hardy], June 8, 1897.

³ Ollivier, *British North America Acts*, "The British North America Act, 1867," 92.

Irving cited the case law in support of his contention that the minerals in the ground were not to be seen as part of the ground, but as separate from it.⁴ This is a key distinction, a fundamental point described by Nelles as finding its origins in the law of both Britain and France⁵: the Crown owns the so-called 'Royal metals' separately from the soil itself and, in the absence of any words indicating explicitly that the metals have been passed if the land is surrendered, retains its ownership of them.

Irving made a number of distinctions on this point. On Indian Reserves set up before Confederation, the B.N.A. Act "preserved ... the interest" of the Indians, but only to the "baser metals as incident thereto." The precious metals belonged to the Province through section 109. How the section applied in this retroactive manner Irving did not say. In any case, he made the same argument for Indian Reserves set up after Confederation:

Where Indian Reserves which have been legally set apart for the benefit of the Indians are surrendered to the

⁴ *St. Catherine's Milling* had determined that the lands of the Disputed Territory were in fact Ontario lands and that under section 109, once the Indian title had been extinguished by treaty, the beneficial interest of those lands passed to the province. *A.G. of B.C. v. A.G. Dominion* was determining at about the same time that the "precious metals in, upon, and under such [i.e., provincial] lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the BNA Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied." *NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, A.G. of B.C. v. A.G. of Canada On Appeal From the Supreme Court of Canada, 1888-1889. Excerpt of decision of the Judicial Committee of the Privy Council.*

⁵ Nelles, *Politics of Development*, 1-47 *passim*.

Dominion Government to be sold for the benefit of the Indians the Dominion Government can grant the land and the baser metals such as copper, nickel, coal etc. as incident thereto but not the royal mines of gold and silver which remain vested in the Province or the grantee of the Province.

[Furthermore, t]he proceeds of Indian Reserves so surrendered ... go to the Dominion for the Indians but the proceeds of grants of precious metals with the right to mine them are revenues arising from the prerogative rights of the Crown and belong to the Province beneficially, neither the Dominion nor the Indians having any interest therein or claim thereto[.]⁶

Irving shut off from the Ojibway any claim based on Aboriginal title to the metals. Here he followed the denigration of that title that typified Ontario's arguments before the courts in the cases relating to Treaty #3. Citing *St. Catherine's Milling*, Irving observed that upon the surrender of "lands merely subject to the so-called Indian title," the surrendered lands and their "entire beneficial interest" passed to the Province by section 109. The Ojibway could not benefit from the sale of any precious metals on lands reserved to them under the treaty which they might later surrender; only the baser metals were involved.

Even this limited right was qualified by Irving. According to *St. Catherine's Milling*, the Ontario government had a right to confirm the reserves set apart in Treaty #3 since, as the case decided, the area was discovered to belong to the Province. If the Province had not confirmed the Indian Reserves, Irving argued, then the land and

⁶ OA, Irving Papers, Mu 1479, 41/40/02, [AE. Irving] to [A.S. Hardy], June 8, 1897.

the base metals could not be granted or sold for the benefit of the Indians:

Where reserves are set apart by the Dominion and not approved or sanctioned by Ontario the title to the land and the baser metals as incident thereto remain vested in the Province and the Dominion cannot validly grant such lands whether surrendered by the Indians to the Dominion Government or not.

In the case of Indian Reserves so set apart by the Dominion without authority and surrendered by the Indians to the Dominion the land with the minerals belongs to the Province and can be dealt with by the Province as part of the public land of the Province. The precious metals on all such reserves both before and after the approval or sanction of the Provincial Government is given will remain in the Province.

Even if Ontario approved of a reserve, such approval did

not to any extent derogate from the provincial right to the precious metals as royalties under Sec. 109 of the B.N.A. Act. Neither before nor after such approval will a Dominion Patent carry the precious metals which remain the property of the Province until they are aptly severed from the title of the Crown by Ontario.⁷

None of this was clear at the time of the signing of the treaty. Irving's arguments countered the outside promise of Treaty #3 by which the Ojibway understood that they had a right to the metals on their reserves.

A.S. Hardy used Irving's arguments almost verbatim in his memorandum a month later to Superintendent General of Indian

⁷ OA, Irving Papers, Mu 1479, 41/40/02, [AE. Irving] to [A.S. Hardy], June 8, 1897.

Affairs Clifford Sifton.⁸ Hardy warned Sifton that Ontario was not going as far as its rights might allow:

[Our] claim may not be as broad as our rights, and I therefore reserve the right to add to it in case upon further investigation the facts appear to warrant it.⁹

He suggested "a friendly conference" to discuss these matters and, referring to another case involving Treaty #3 annuities, asked Sifton to consider setting off Ontario's claims against the Indian annuities issue if the Dominion proved successful in its claim for annuities.¹⁰

6.2: The Federal Position

The federal government was not long in responding to Ontario's arguments. By September, Law Clerk Reginald Rimmer had produced a memorandum outlining his objections. Rimmer argued that Ontario had little right to the royal metals on Indian Reserves and should by policy allow them to go to the Indians. He was sympathetic to the 'outside promises' regarding metals, which he believed expressly dealt with the issue of metals found on Indian Reserves. In a recapitulation of his arguments, Rimmer noted that the

⁸ NAC, RG 10, vol. 2547, file 111834-2, reel C-11236, A.S. Hardy to Clifford Sifton, July 28, 1897.

⁹ NAC, RG 10, vol. 2547, file 111834-2, reel C-11236, A.S. Hardy to Clifford Sifton, July 28, 1897.

¹⁰ NAC, RG 10, vol. 2547, file 111834-2, reel C-11236, A.S. Hardy to Clifford Sifton, July 28, 1897.

prerogative right of Ontario in Indian Reserves is not of the great value which it appears to be Ontario's object to maintain. ... [Furthermore, it] does not involve the right to precious metals when the specific Treaty grants expressly or should from the negotiations expressly grant them to the Indians.

[Ontario does have the] right to work old mines of gold and silver ... subject to the terms of the specific Treaty. [However, provincial licensees do not have the right to] disturb the surface of a reserve in search of precious metals ... [and Ontario] cannot grant patents of lands in reserves except on the Dominion's request[.]¹¹

Rimmer's themes were picked up by Deputy Superintendent General of Indian Affairs J.D. McLean in a subsequent memorandum to Sifton. McLean had a different interpretation of *A.G. of B.C. v. A.G. of the Dominion* than Irving had made, arguing that this decision did not apply to Indian Reserves since it dealt with provincial, not Indian, land. Furthermore, McLean asserted, section 109 did not apply to "lands reserved for Indians once Indian title has been extinguished." Rather, section 91(24) applied to the Indian Reserves themselves, section 109 to the unreserved lands surrendered by treaty. He argued that "the minerals were conveyed by the Provinces to the Dominion for the benefit of the Indians" according to the legal principle, as defined in Blackstone, that "by the word 'lands' 'everything terrestrial shall pass'."¹² McLean accepted Morris' promise to the Ojibway that they would receive the

¹¹ NAC, RG 10, vol. 2545, file 111834, pt. 1, Re the Titles of the Dominion and the Province of Ontario respectively in Indian Lands, Indian Reserves and in the royal metals and other minerals therein and timber thereon [1899], 17-18.

¹² NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, p. 14.

benefit of any minerals found on their reserves, citing Mawendopenais' statement made during the negotiations and recorded in Morris' account that he could hear the "sound of the rustling of the gold ... under my feet."¹³ Even though the legal Treaty document itself does not mention Morris' promise, the government was bound by it and by the terms of the Robinson Treaties, which do provide that minerals on reserve lands could be sold for the benefit of the Indians.¹⁴ Ontario was bound by the treaty to confirm the reserves set aside for the Ojibway, McLean argued; furthermore, in making these confirmations, "the quality of the land is not to be considered, whether agricultural or mineral land, as ... the Indians stipulated at the time the treaty was negotiated that the minerals in the reserves should belong to them."¹⁵

McLean developed further his arguments about the Ojibway rights to minerals on their reserves with statements regarding Sultana Island and I.R. 38B. He noted that surrenders made by the Ojibway on October 8, 1886, and June 6, 1889, of parts of I.R. 38B containing minerals were made for their benefit, not that of the Province.¹⁶ Although the Department of Indian Affairs had curtailed the

¹³ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, p. 15.

¹⁴ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, p. 16.

¹⁵ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, p. 17.

¹⁶ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, p. 19.

granting of patents on Indian Reserves after the *St. Catherine's Milling* decision and the 1894 Agreement with the province, he noted that if Ontario tried to grant any titles to such lands, then the Dominion Government would "protest" and take the issue to the Exchequer Court if necessary.¹⁷

As to section 109 as applied following the *St. Catherine's Milling* decision, it "can only be held to apply to lands other than reserves, especially set aside." McLean went on to make an argument that today can be seen in light of the term 'fiduciary': the Treaty #3 Indians have

a larger right to the Reserves specially set aside for them, and which are held absolutely in their interest by the Dominion, than they had to their more extended hunting grounds.

If the Dominion tries to remove them from their reserves, which were established in consultation with them, or if Ontario claims the minerals, then the Indians would have "just grounds for complaint of breach of faith on the part of the Crown."¹⁸

McLean disagreed as well with provincial intrusion on the federal power under 91(24) to deal with the Indians and lands reserved for them. The Dominion needed "absolute control" over the Indian

¹⁷ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, p. 20.

¹⁸ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, pp. 21, 23.

Reserves, he asserted, in order "not only to safeguard the rights of the Indians but to relieve the Provinces of caring for them." For example, the Dominion, having power to legislate for Indians,

can make laws against trespassing on their reserves. It is therefore unreasonable to suppose that the Provinces should retain the precious metals in such reserves, and thus have the right to place miners thereon against the wishes of the Indians.¹⁹

About Irving's assertions regarding the prerogative powers of the province, McLean had much to say. He believed that these powers were being overstated by the province, arguing from his view of the intention of the framers of the Confederation agreement that section 109 was not meant to pass the metals on Indian lands to the provincial Crown. John A. Macdonald, George Brown and other men "who understood the Government's dealings with the Indians" intended that "minerals in Indian Reserves should pass from the Province to the Dominion, to be controlled for the benefit of the Indians" in their discussions at the Quebec Conference of 1864. The obscurities of the civil list, as defined by the Act of Union of 1840, were offered up as evidence. By that Act,

Her Majesty accepted by way of the Civil List, the sum of £75,000 instead of all territorial and other revenues at the disposal of the Crown arising in either of the said Provinces. Thus it will be seen that revenues derivable from the prerogative rights of the Crown passed to the Provinces, and by the British North America Act such

¹⁹ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, pp. 14-5.

revenues would pass to the Dominion as respects gold and silver in Indian Reserves.²⁰

McLean bolstered his arguments by noting a plea for the liberal construction of the meaning of treaties made by Chancellor Boyd in an 1895 decision.²¹ The irony here is that the Chancellor was the first to hear both the *St. Catherine's Milling and Ontario Mining* cases, his decisions there giving short shrift to Aboriginal rights.

McLean's arguments are reflected in the reasons for appeal put before the Judicial Committee of the Privy Council by counsel for the Ontario Mining Company. These reasons, which are actually a succinct restatement of the appellants' case, rely heavily on a positive interpretation of the federal responsibility toward the Ojibway, and are thus worth quoting at length:

- (1) Because the Treaty with the Indians is valid.
- (2) Because the [provincial] Crown ..., having acquiesced in and taken benefit of the said Treaty with the Indians is bound thereby and by the selection of the Reserves pursuant thereto.
- (3) Because upon the setting apart of such Reserves the same became and were thereafter held by the Crown in trust for the benefit of the Indians.
- (4) Because before the appropriation of the said Reserves, the Indians had no claim except upon the bounty and benevolence of the Crown, but after such

²⁰ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, pp. 17-8; the argument that Indian Reserves are Dominion lands, not provincial lands, is developed further on pp. 23ff.

²¹ NAC, RG 10, vol. 2546, file 111834-1A, pt. 2, reel C-11236, J.D. McLean to Clifford Sifton, Sept. 24, 1897, pp. 16-7.

appropriation they became invested with a legally recognized tenure of defined lands in which they had a present right as to the exclusive and absolute usufruct and a potential right of becoming individual owners in fee after enfranchisement.

(5) Because the honor of the Crown requires that good faith should be observed with the Indians.

(6) Because the Treaty obligations of the Crown appropriated the Reserves and the precious metals thereunder for the benefit of the Indians.

(7) Because the surrender to the Crown of part of the Reserve for the purpose of a sale is ... a consent and request, by the Indians as cestuis que trustent, to their trustee, to sell the lands for their benefit, and is not an extinction of the Indian title.

(8) Because a clear distinction exists between lands which upon surrender by the Indians become public lands and therefore Provincial lands and Reserves which become Indian lands.

(9) Because [of federal control of Indian lands through section 91(24)].

(10) Because the Reserves selected under the Treaty never were lands belonging to the Province of Ontario within the meaning of the Section 109 ...

(11) Because the title to the said lands is in the Crown and not either in the Dominion of Canada or the Province of Ontario, and can be disposed of only pursuant to such statutory authority as by law is applicable to them.

(12) Because the legislative jurisdiction over Indian Reserves was and is vested in the Dominion Parliament.

(13) Because the legislation of the Dominion Parliament is *intra vires* and the appellants have acquired title by virtue thereof.

...

(17) Because it would be subversive of the policy respecting Indians to distinguish between the jurisdiction over the lands comprising Indian Reserves and the minerals thereunder.

(18) Because under the Treaty with the Indians, they were entitled to the Reserves selected by the officers of the Dominion Government, and it was not stipulated in said Treaty that such Reserves should be acquiesced in by any Provincial Government.

(19) Because the Province of Ontario acquiesced in the selection of Reserves by the officers of the Dominion Government.

(20) Because the Government of Ontario did not before assuming to deal with said Reserve 38 B express any dissatisfaction therewith or obtain an award of a joint commission determining any question as to the location or extent of such Reserve.

(21) Because the Reserves set apart under the Treaty would otherwise be confiscated and the Indians deprived thereof.

(22) Because this case is not governed by *St. Catharines Milling Co. v. The Queen*, 14 A.C., p. 46.²²

These arguments were systematically overturned in the courts.

6.3: *Ontario Mining v. Seybold*: The Decisions

As in *St. Catherine's Milling*, Chancellor John Boyd of the Ontario Court of Chancery was the first judge to hear *Ontario Mining v. Seybold*.²³ The action was tried on October 26-27 and November 10, 1899, Boyd's decision being rendered on December 2. The plaintiffs, the Ontario Mining Company, were represented by Christopher Robinson, Laidlaw, and J. Bicknell, who wrote the reasons listed above; the defendants, E. Seybold, E.B. Osler, J.W. Moyes, E. Johnston, J.W. Brown, E.H. Ambrose and J.S. Ewart, by various other lawyers. Chancellor Boyd noted that, while the "field of argument was somewhat comprehensive," only "two main questions" needed to be considered:

(1) Whether the title in fee to the land can be validly conveyed by the letters patent issued by the Dominion; and (2) whether the Government of the Dominion has the right to deal with the minerals, especially the gold in Sultana island.²⁴

²² NAC, Blake & Redden Papers, vol. 8, file 8-12, Case of the Appellants.

²³ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386.

²⁴ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 393.

In addressing the first question, Boyd observed that the Dominion acted as though its powers under 91(24) "conferred such plenary form of control as to amount virtually to exclusive ownership."²⁵ But the Judicial Committee of the Privy Council had decided, in *St. Catherine's Milling* and elsewhere, that all "the Dominion had [was] a right to exercise legislative and administrative jurisdiction - while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province of Ontario."²⁶ Thus, I.R. 38B was taken out of provincial land and, even if the Dominion could set up the reserve, the effect of the 1886 surrender by the Ojibway of part of it "was again to free the part in litigation from the special treaty privileges of the land and to leave the sole proprietary and present ownership in the Crown as representing the Province of Ontario."²⁷ Furthermore, the land cannot be owned by both crowns. The Dominion did not refer to any Act that permitted it to grant the letters patent:

Such an Act would be a literal confiscation of provincial property and would transcend the power of the Dominion, because the proprietary right of the Province attaching upon these lands cannot be at the same time lodged in the dominion so as to enable Canada to convey the proprietary ownership of this land to the plaintiffs.²⁸

²⁵ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 396.

²⁶ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 395, citing *St. Catherine's Milling* at 59.

²⁷ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 395-6.

²⁸ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 397.

How these lands surrendered by the Ojibway could then be sold for their benefit Boyd did not say.

As to the second question, "somewhat different considerations apply." Boyd noted that in English and Canadian law,

gold and silver mines, until they have been aptly severed from the title of the crown are not regarded as *partes soli* or as incidents of the land in which they are found. The right of the Crown to waste lands in the colonies and the baser metals therein contained is declared to be distinct from the title which the Crown had to the precious metals which rests upon the royal prerogative.²⁹

Boyd adopted the civil list and section 109 arguments outlined above in concluding his remarks on the Crown's relationship to the precious metals.

In his decision in *St. Catherine's Milling*, Boyd had difficulty accepting any meaningful notion of Aboriginal title to the land. His thinking in *Ontario Mining v. Seybold* was similarly restrictive. The Ojibway might have rights to hunt and fish, but, he asserted, their rights to minerals had never been accepted. Since they had "no interest in the gold and silver they could surrender nothing." The treaty did not specifically mention minerals and

even if it is competent to go behind the treaty, still it remains that the Indians had no interest, and the Dominion had no competence *quoad* these royal mineral rights. It would appear, therefore, to be a proper result

²⁹ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 399.

from this state of affairs that while the Dominion would be interested in seeing that a proper return was obtained for land and baser minerals - they would have nothing to say as to the terms and price for which the Province should dispose of the precious metals.³⁰

Boyd "dismissed with costs" the action brought by the Ontario Mining Company and declared invalid the patents issued by the Dominion.

The Ontario Mining Company turned to the Ontario Divisional Court of Queen's Bench, where the appeal was heard before Chief Justice Armour and Justices Falconbridge and Street on June 7, 1900. Armour was appointed Chief Justice of Ontario before the decision came down and Falconbridge replaced him as Chief Justice of the Queen's Bench. The parties involved agreed that Falconbridge and Street's decision "should be accepted as the judgment of the Court."³¹ Falconbridge concurred with Boyd, as did Street, but the latter offered reasons for doing so.

Street echoed Boyd's contention that the Dominion had no right to act as though the reserved and surrendered reserve lands were anything but parts of Ontario. This was, Street noted, the "obvious defect" in the plaintiff's argument, that it ignored the fact

that we are bound to hold, under the judgment of the Privy Council [in *St. Catherine's Milling*], that, upon the surrender of the Indian title effected by the Treaty

³⁰ *Ontario Mining Co. v. Seybold et al.*, 31 O.R. 386 at 400.

³¹ *Ontario Mining Co. v. Seybold et al.*, 32 O.R. 301 at 301.

of 1873, these lands became the property of the Government of the Province of Ontario, in which they were situate.³²

While Ontario could not ignore the treaty's conditions regarding the setting aside of reserves, nonetheless,

its ownership of the tract of land covered by the Treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the Treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question was not selling 'lands reserved for Indians,' but was selling lands belonging to the Province of Ontario.³³

As to the precious metals, Street agreed with Boyd.

The case generated even less comment in the Supreme Court of Canada from the majority of justices who agreed with Chancellor Boyd's decision. Chief Justice Henry Strong, who had written a 100-page dissent in *St. Catherine's Milling*, now offered merely an oral decision dismissing the appeal "for the reasons given by the learned Chancellor in this case, and more particularly for the reasons given by the Judicial Committee of the Privy Council in *St. Catherine's Milling* case, by which we are bound."³⁴

³² *Ontario Mining Co. v. Seybold et al.*, 32 O.R. 301 at 303.

³³ *Ontario Mining Co. v. Seybold et al.*, 32 O.R. 301 at 304.

³⁴ *Ontario Mining Company v. Seybold et al.*, 32 S.C.R. 1 at 2.

There was a dissenting voice here, however, but this time it belonged to Justice Gwynne, who attempted to reinforce the distinction between public lands and lands reserved for Indians, thereby drawing a clear line between sections 91(24) and 109.³⁵ He upheld the validity of the promise made to the Ojibway at the treaty negotiations regarding minerals, stating that it "stands upon precisely the same foundation" as the promise to pay annuities.³⁶ He asserted that *St. Catherine's Milling* did not apply in this case, and that

the maintaining of the judgment now under consideration in this appeal would be subversive of the scheme of Confederation as designed by the founders and framers of the constitution of the Dominion of Canada and of their clear intention, as expressed in sec. 91, item 24 of the British North America Act, the provision of which would thereby, in my opinion, be rendered wholly illusory and absolutely devoid of all significance.³⁷

Gwynne's impassioned statements were dismissed rather summarily by the Lords of the Judicial Committee, who saw Gwynne as rehashing *St. Catherine's Milling*, on which he had been on the losing side. Their lordships upheld the Canadian courts, and once again Ontario

³⁵ *Ontario Mining Company v. Seybold et al.*, 32 S.C.R. 1 at 7-10.

³⁶ *Ontario Mining Company v. Seybold et al.*, 32 S.C.R. 1 at 12.

³⁷ *Ontario Mining Company v. Seybold et al.*, 32 S.C.R. 1 at 22.

had a sweep of the legal field in a case that was seen as a "corollary" to *St. Catherine's Milling*.³⁸

6.4: *Ontario Mining v. Seybold*: Implications

In his memorandum on Caldwell's request in 1903 for the return of the monies paid for the patent to location 42X, Rimmer observed that the Judicial Committee of the Privy Council's decision in *Ontario Mining v. Seybold*

cannot I think, be said, to have finally settled the question of title between the Dominion and Ontario to reserves in Treaty 3. What the case did determine was that the Dominion had no right to issue the patent to the Ontario Mining Company and that patent was ultra vires but the judgment of the Privy Council did not decide the validity of the Ontario patents.

Rimmer went on to note that the 1902 Blake/Newcombe Agreement (a factor in their lordships' deliberations that will be discussed elsewhere)

stipulated that when the reserves in the territory covered by Treaty 3 should be duly established the precious metals should be considered to form part of the reserves and might be disposed of by the Dominion for the benefit of the Indians. Although the agreement further stipulated that nothing therein contained should be construed to bind Ontario to confirm the titles thereto for [sic] made by the Dominion to portions of the reserve 38B already granted by Ontario, I think that if any agreement is reached by the Dominion and the Province with regard to 38B it may contain some provision which will affect the titles granted by either Government. In short should Ontario confirm 38B or so much thereof as

³⁸ *Ontario Mining v. Seybold*, [1903] A.C. 73 at 82.

includes Sultana Island the title of the Dominion to precious metals would in the absence of special agreement to the contrary be conceded under the agreement of Counsel above referred to."³⁹

In the initial decision in *Ontario Mining v. Seybold*, Chancellor Boyd noted that treaty negotiator Alexander Morris had promised the Ojibway, in response to their concerns, that they had rights to minerals found on their reserves. During the case, this 'outside promise' had figured in the federal arguments. But the promise did not appear in the legal text of the treaty and, Boyd observed, was not reinforced by any order in council stipulating it was in effect. Boyd dealt with the issue by holding that, in the absence of such authority, no government could be held to any promises made by its officers; such promises only became valid once they had been formally recognized and accepted by government. In his terms,

loose and general evidence of conduct which might bind the individual, who is supposed to be on the alert to protect himself, ought not to be invoked as against a great political corporation that cannot be responsible for the acts or decisions of the many functionaries employed in the civil service."⁴⁰

Given this result, "what then is the effect," Boyd asked, "of the understanding and arrangement as between the Indians and the Dominion Government acting in the surrender of 38B?" As noted

³⁹ NAC, RG 10, vol. 3864, file 84435, reel C-10152, Rimmer to the DSGIA, Jan. 3, 1903.

⁴⁰ *Ontario Mining Company v. Seybold et al.*, 31 O.R. 386 at 393. Street echoed this notion in his decision in the Ontario Divisional Court.

above, Boyd denied that the Ojibway had any interest in the metals. But as to the price the band received for the sale of the land, Boyd could see no evidence of discontent on their part, so assumed they were satisfied with the transaction.⁴¹ Furthermore, as it was Ontario and not the Ojibway who held the interest in the precious metals, then it was important that Ontario be part of the process of reserve selection, as accounted for in *St. Catherine's Milling*. The two governments should

engage in a joint or tripartite transaction whereby the rights of the Indians will be secured through the intervention of their protector, the central government, and the interests of Ontario guarded in respect to the ultimate enjoyment of the proceeds of the surrendered land in case the band of Indians cease to exist.⁴²

All parties would share a concern about the price of the land, and the arrangement would mean that, should the Ojibway disappear from the land, then, the federal responsibility being ended, Ontario would gain any monies remaining from its sale.⁴³

His acknowledgement of the need to protect the rights of the Ojibway notwithstanding, Boyd managed to eliminate any interest they might have had in the precious metals and to deny the validity of the outside promises. The 1902 Agreement described by Rimmer did

⁴¹ *Ontario Mining Company v. Seybold et al.*, 31 O.R. 386 at 396.

⁴² *Ontario Mining Company v. Seybold et al.*, 31 O.R. 386 at 397-8.

⁴³ *Ontario Mining Company v. Seybold et al.*, 31 O.R. 386 at 398.

not resolve the issue. It was but one in a line of attempts to solve the problems arising from the Boundary Dispute; as we shall see, that line extends to the present. First, however, the attempts at resolution made between the early years of the Dispute and the apparent attainment of agreement in 1924 will be explored.

CHAPTER VII: ATTEMPTS AT RESOLUTION

From the acquisition of Rupert's Land in 1870 until the present, the governments of Ontario and the Dominion have been attempting to resolve the issues surrounding ownership of the lands and resources of the old North West Territories. The first attempt came in 1874 with the Provisional Boundary Agreement. As its name implied, this was a temporary arrangement that, following the resolution of Ontario's boundaries, was superseded by legislation in 1891 and agreements between the two governments in 1894, 1902 and 1924. The 1924 *Ontario Lands Agreement* was revised last in 1986 and is subject to further negotiation. Interwoven with these agreements are a number of lawsuits that bear upon the issues. These include the focal case of *Ontario Mining vs. Seybold* and its predecessor, the seminal Aboriginal title case in Canadian common law, *St. Catherine's Milling*. Other cases of note are *AG of Ontario vs. Francis*, a Robinson Treaty case that awaited the decision in *St. Catherine's Milling*, since it too addressed the question of ownership of timber on an Indian Reserve; *Caldwell vs. Fraser*, in which two claimants to the gold of Sultana Island contested their claims; and the *Star Chrome* case, located in Quebec but addressing similar issues. This chapter traces these developments and their interrelationship.

7.1: The Provisional Boundary Agreement of 1874

Once the Ontario Manitoba Boundary Dispute got under way, the governments of Ontario and the Dominion realized that some attempt would have to be made to provide for leases and grants of resources in the Disputed Territory without either side conceding any right to the other. In his 1872 report as Minister of Justice, John A. Macdonald expressed concern that, given the "considerable difference" between Ontario and the Dominion regarding the western and northern boundaries of the province, "no criminal jurisdiction can be effectively established or exercised in the disputed territory" until the boundary issue was resolved.¹ Since "the mineral wealth of the North-West country is likely to attract a large immigration into those parts," Macdonald reasoned, the need to establish a system of justice was becoming increasingly urgent. Applications for mining licences in the Lake Shebandowan region, the first in which gold had been discovered, had been received by the Secretary of State, J.C. Aikins, as early as 1871. Aikins had suggested as a result that the boundary question "should, as far as possible, be expedited" before either government acted on such applications.² Macdonald's solution was to suggest the appointment

¹ Legislative Assembly, *Correspondence, Papers and Documents, of Dates from 1856 to 1882 Inclusive, Relating to the Northerly and Westerly Boundaries of the Province of Ontario* (hereafter referred to by the spine title, *Ontario Boundary Papers*) (Toronto: 1882), 231, Report of the Minister of Justice, May 1, 1872.

² *Ontario Boundary Papers*, 239.

by the two governments of a commission to establish "some joint course of action as to the granting of land and of mining licences, reservation of royalties, etc ... subject to the decision of the Judicial Committee of the Privy Council upon the question of the boundary."³

On June 2, 1874, the Minister of the Interior, David Laird, followed up Macdonald's suggestion. He added that the negotiations for a conventional boundary had been delayed until Treaty #3 extinguished the title of the Indians to the Disputed Territory. "That barrier being now removed," Laird recommended that conventional boundaries be established until the boundary dispute could be resolved.⁴ An Order-in-Council to that effect was made the next day and by June 26, Laird and T.B. Pardee, Ontario Commissioner of Crown Lands, had signed a *Memorandum of Agreement For Provisional Boundary in Respect of Patents of Lands* which was approved by the Governor General on July 8.⁵

The four terms of this agreement established western and northern conventional boundaries and provided for confirmation of titles to lands. All patents for lands east and south of the boundaries were to be made by Ontario and to the west and the north by the Dominion

³ *Ontario Boundary Papers*, 232.

⁴ *Ontario Boundary Papers*, 243, Report of the Minister of the Interior, June 2, 1874.

⁵ *Ontario Boundary Papers*, 244-45. NAC, RG 10, vol. 2314, file 62509-4, pt. 1 contains a copy of the agreement.

until Ontario's boundaries were settled. Furthermore, each government "shall confirm and ratify such patents as may have been issued by the other" in lands outside that government's territory once the boundaries were settled.⁶

This agreement provided for grants but not leases of land, as Attorney General of Ontario Oliver Mowat noted in a report of May 7, 1878. Mowat recommended that

an Order-in-Council be passed declaring that all leases and licences, and applications therefor, shall be subject to the stipulations contained in the said memorandum in respect of patents of lands and applications therefor, and that all bonuses, rents and royalties received by either Government for limits which may prove to be situate within the true boundaries of the other shall be transferred in accordance with the provisions of the third and fourth sections of the memorandum as extended by such order.⁷

Such an Order-in-Council was approved by the Lieutenant Governor on May 9, 1878.⁸ Later that year, a Board of Arbitration awarded the Disputed Territory to Ontario, and the Ontario government was keen to act upon that decision. The federal government was reluctant, however, to accept it and ignored notice from Ontario that it was making plans to treat the territory as its own. On December 19,

⁶ Ontario Boundary Papers, 244.

⁷ AO, Irving Papers, Mu 1514, 75/16, *Province of Ontario v. Dominion of Canada. In the Supreme Court of Canada on Appeal from the Exchequer Court of Canada. Record of Proceedings*, 313.

⁸ AO, Irving Papers, Mu 1514, 75/16, *Ontario v. Dominion. Record of Proceedings*, 312.

1878, Ontario informed the Dominion that it considered the Provisional Boundary Agreement of 1874 was "at an end."⁹ When the matter was raised in the House of Commons by David Mills, the government's response was formation of a Select Committee into the boundary dispute.¹⁰ Predictably, this committee decided against acceptance of the Arbitrators' decision. Nonetheless, even as preparations were being made for a further hearing of the boundary dispute, this time before the Judicial Committee of the Privy Council, the Dominion formally abrogated the Provisional Boundary Agreement by Order-in-Council of January 19, 1883.¹¹

The effect of this abrogation is uncertain, however, as indicated by research conducted a few years later by J.P. Macdonell for Attorney General Mowat. On June 30, 1887, Macdonell reported to Mowat his analysis of six timber licences to limits on Lake of the Woods, granted by the Dominion to Henry Bulmer and others in 1883 and 1884. The Dominion claimed, in a letter of November 8, 1886, from the Secretary of State to the Lieutenant Governor, that these licences had been granted in accordance with the 1874 Agreement. Macdonell pointed out to Mowat that this could hardly be so, given

⁹ Morrison, "Oliver Mowat," 131; *Ontario Sessional Papers*, no. 46, vol. 12, part 4, 1880, Provincial Secretary to Secretary of State, Dec. 19, 1879, p. 2.

¹⁰ Morrison, "Oliver Mowat," 131. Morrison considered this committee to be ineffective other than as a means of buying time for the government, 135.

¹¹ See AO, Irving Papers, Mu 1514, 75/16, *Ontario v. Dominion. Record of Proceedings*, 129.

the Dominion's acceptance in 1883 of the abrogation of that Agreement in 1879. Thus, he concluded, the Dominion was granting such licences "by virtue of [its] claim under the Indian title."¹² The Dominion had refused to renew the licences owing to the decision of the Judicial Committee of the Privy Council in 1884 in the boundary dispute. The Dominion had turned to Ontario, requesting "some arrangement ... under which Mr. Bulmer and his associates ... may be permitted to continue to cut and manufacture timber on the berths acquired by them before the said decision was rendered."¹³ Macdonnell suggested that, since the licences had been lapsed for 18 months, Ontario wait until the Indian title issue was settled before acting on this request.¹⁴

Years later, federal lawyer W.D. Hogg required information regarding patents in the Disputed Territory in preparation of his argument in the Treaty #3 Annuities case, decided by the Judicial Committee of the Privy Council in 1910.¹⁵ On January 22, 1906, Hogg enquired of AEmilius Irving about patents granted under the 1874 Provisional Boundary Agreement. Hogg thought nothing had been granted earlier than that. Irving sent out requests to Assistant

¹² AO, Irving Papers, Mu 1480, 42/42/12, June 30, 1887. The Secretary of State's letter can be found in *Dominion Sessional Papers*, 1887, no. 19a, 11.

¹³ *Dominion Sessional Papers*, 1887, no. 19a, Report of the Committee of the Privy Council to the Minister of the Interior, October 28, 1886, pp. 10-11.

¹⁴ AO, Irving Papers, Mu 1480, 42/42/12, June 30, 1887.

¹⁵ *A.G. Ontario v. A.G. Dominion* [1910] A.C. 637.

Commissioner of Crown Lands Aubrey White and to George B. Kirkpatrick, Director of Surveys for Ontario. White replied with a list of seven patents granted by the Dominion between 1875 and 1888, to the Keewatin Lumbering and Dick Banning Companies as well as Fowler and MacAuley. Hogg was mistaken regarding earlier grants, White noted: Ontario had issued mining locations in 1871 at Jackfish Lake in Moss Township, Thunder Bay District, now understood to be "on the Rainy Lake side of the Height of Land." Kirkpatrick's reply corroborated this and added that grants had been made on Star Lake and Partridge Lake in June 1875. Kirkpatrick sent further information in April, stating that "at least" fifty to sixty patents were issued northwest of Lake Shebandowan around 1870-71.¹⁶

7.2: Confirmation of Treaty #3 Reserves by Ontario

In the *St. Catherine's* decision, Lord Watson noted that since the province was to receive the benefit of the treaty and the Dominion bore the costs relating to "Indians and lands reserved for Indians," then fairness alone would dictate that Ontario share some of those costs. In Lord Watson's words:

Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of

¹⁶ Ontario Native Affairs Secretariat (hereafter ONAS), MF #186214, W.D. Hogg to AE. Irving, Jan. 22, 1906; A. White to Irving, Jan. 16, 1906; Geo. Kirkpatrick to Irving, Jan. 29, 1906, and April 24, 1906.

money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government.¹⁷

That this statement led to further years of discussion and legal action between the Dominion and the province, culminating in the Annuities case of 1910, is not the point here. Rather, this clause and the fact that the lands of Treaty #3, including those reserved for the Ojibway, were now considered to be and have been since July 1, 1867, part of the province, mark the beginnings of an encroachment by the provinces upon the federal constitutional responsibility for Indians that is only recently coming into scrutiny in the literature.¹⁸ If Ontario was going to pay anything toward the costs of a federal realm of responsibility and if its lands were being set aside as reserves without its consent, then provincial involvement in the process of reserve selection was essential.

The Ontario government wasted little time pressing the issue. On January 1, 1889, Oliver Mowat wrote to the Minister of the Interior and Superintendent General of Indian Affairs, Edgar Dewdney, who had already heard from Macdonald of Mowat's interest in Treaty #3 reserves. Mowat sought extensive information regarding these

¹⁷ *St. Catherine's Milling and Lumber Company v. R.*, [1888] 14 A.C. 46 at 60.

¹⁸ The best example is J. Anthony Long and Menno Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988).

reserves and any grants of land made by the Dominion before the Boundary Award. He wanted as well precise information on unreserved territory, licences and grants pre-dating the Award, any Dominion patents along the Rainy River and a list of applicants for such patents. He sought this information so that Ontario could consider "how far the Province should recognize any of these transactions."¹⁹

Mowat noted further that the Ojibwa had hunting and fishing rights in the ceded area until lands were required for settlement and resource development:

The meaning [of the Treaty] of course was that such matters should be determined by the authority, whatever it was, from which grants for settlement, &c., should come; and as this has now been decided to be the Province, the Province becomes the rightful authority to make grants, &c., free from the Indian right of hunting and fishing. But whether that would be a legal consequence, without an Order in Council, or Statutory enactment, might be the subject of more or less litigation and friction. I should therefore be glad if your Government would pass an Order in Council to be confirmed by Statute. I enclose draft of such an Order &c as I think would do.²⁰

Such was the beginning of the 1891 legislation, reaffirmed in the 1894 Agreement, that gave Ontario the right to confirm reserves in the Treaty #3 area, as well as to be party to any other treaties to be signed with the Indians of the province.

¹⁹ NAC, RG 10, vol. 2313, file 62509-2, Jan. 1, 1889; see Jan. 10, 1889, for the reference to Macdonald.

²⁰ NAC, RG 10, vol. 2313, file 62509-2, Jan. 1, 1889.

On May 27, 1890, the Superintendent General of Indian Affairs reported to the Governor General in Council on this situation, "recommending ... that negotiations be opened up between the Dominion Government and the Government of Ontario in respect to the rights of the Indians in Reserves" now found, by decision of the Judicial Committee of the Privy Council, to be in Ontario. A subsequent memorandum of October 18 listed the documents that would be required for such negotiations.²¹

The next month, Justice Minister Sir John Thompson met with Mowat and other Ontario ministers, as well as ministers from the province of Quebec. They reached an informal agreement specifying that "future treaties with Indians for surrendering their rights [were] to require the concurrence of the Province in which the lands be by a Joint Commission."²² Mowat and Thompson agreed that each government should pass an Order-in-Council to that effect. The ministers went on to discuss the reserves of the "Morris Treaty," proposing that these reserves "be deemed to have required and to require the concurrence of the Province and that a Joint Commission shall be appointed to consider those matters." This consent was

²¹ NAC, RG 10, vol. 3830, file 62509-2, Memorandum from the SGIA to the Privy Council, Oct. 18, 1890.

²² NAC, RG 10, vol. 2546, file 111,834-1, Extract from Memo. ..., Nov. 28, 1890. For an analysis of Thompson's role, especially with regard to fisheries issues, see Van West, "Formation and Recission of Headland to Headland Boundaries," 37-39.

necessary if the reserves were to be established "on a proper legal basis."²³

Of course, the reserve selection and surveying process had been going on for seventeen years by this time. In an attempt to allay the possible fears of the Ojibway, Ontario would become a party to selection of new reserves only and a Joint Commission would be set up to address questions relating to those set up before 1890. Ontario's right to information regarding the established reserves would be conditioned by the provision that it would acquiesce "in confirmation of the same without the intervention of the Commission unless some sound reason presents itself for a different course."²⁴ The stipulations regarding the reserves were acceptable to the Department of Indian Affairs.²⁵

Once the appropriate schedules of reserves in Treaty #3 - those surveyed, those remaining to be surveyed and those partly in both Ontario and Manitoba - were produced, legislation reflecting these negotiations could be drafted. On May 4 and July 10, 1891, Ontario

²³ NAC, RG 10, vol. 2546, file 111834-1, Extract from Memo., Nov. 28, 1890.

²⁴ NAC, RG 10, vol. 2546, file 111834-1, Extract from Memo., Nov. 28, 1890.

²⁵ NAC, RG 10, vol. 3830, file 62509-1, L. Vankoughnet to E. Dewdney, Dec. 17, 1890; this acceptance was communicated to Justice on Jan. 2, 1891.

and the Dominion passed their respective acts.²⁶ The province promptly sent out Edward Barnes Borron, a Stipendiary Magistrate with a good deal of experience in northern Ontario,²⁷ to determine the extent and location of the reserves. Although hampered by a lack of documentation, which arrived too late to do him much good, Borron did manage to visit a number of reserves and provide an assessment of them for Ontario.

Borron noted in his report that he had been made aware of the Province's desire to protect its own interests without disturbing those of the Indians unless the latter conflicted with the former. After detailing the motives the Ojibway had in selecting their reserves, and how they understandably ended up with valuable lands,

²⁶ An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, Statutes of Ontario, 54 Vic., c. 3, 1891; and An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, Statutes of Canada, 54-55 Vic., c. 5, 1891. These acts are discussed in sec. 7.3.

²⁷ Borron had already gained mining experience in his native Scotland before emigrating to Canada in 1850. He was manager of the Bruce Mines on Lake Huron by 1852 and between 1869 and 1873 was mining inspector for the Lake Superior region. He was elected M.P. for Algoma in 1874 and began his travels for the Ontario government after becoming Stipendiary Magistrate for the District of Nipissing in 1879. Arthur, "Beyond Superior," 146, citing Zaslow, "Edward Barnes Borron, 1820-1915," in F.H. Armstrong et al., eds., *Aspects of Nineteenth Century Ontario* (Toronto: University of Toronto Press, 1974), 297-304. Borron was one of two Stipendiary Magistrates appointed by Ontario; W.D. Lyon was the other, responsible for Thunder Bay District, which included the Disputed Territory. Their purpose was to help solidify Ontario's claim. Zaslow, "The Ontario Boundary Question," 109-111. Borron testified before the 1888 Royal Commission on Mineral Resources, encouraging the creation of mining schools; Diane Newell, *Technology on the Frontier: Mining in Old Ontario* (Vancouver: University of British Columbia Press, 1986), 48.

Borron conceded that he had "no hesitation in recommending the Government (with a few unimportant exceptions) to assent to the selection that has been made."²⁸ He spoke of the need to "keep good faith with the Indians, who cannot be made to understand, that any differences between the Federal and Provincial Governments should in the least affect them." Borron had reassured them "repeatedly ... that any differences which have arisen, are simply 'matters of account' which can and I believe will be arranged and settled by the two Governments without injury to or interfering in any manner or way with them."²⁹ Borron did not underestimate the seriousness of failing to maintain good relations with the Indians: "The doing of anything which has the least appearance of bad faith, especially in regard of their 'Reservations' would, I am persuaded, excite a great deal of uneasiness and suspicion, and that not only among the Indians included in this treaty, but in all the other treaties." Borron went so far as to assert that no one could complain if the Indians had chosen lands "that were either most necessary to enable them to make a living, or which would be most valuable to us."³⁰

Given all of this, Borron could address "the last, and one of the most important questions," the size of the reserves as provided for

²⁸ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron On the North West Angle Treaty No. 2, As affecting the Rights and Interests, Of the Province of Ontario" [1891], 25.

²⁹ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 25-6.

³⁰ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 26.

by the Treaty in relation to the number of Ojibway living in the region.³¹ The Treaty stipulated that each family of five would receive one square mile of reserve land. Using the schedules of reserves and the current population base, Borron arrived at a figure showing that the lands laid aside were very close to that amount. And there was the problem. Borron noted, reasonably enough, that the number of families should be that present in 1873, not 1890. By his count, however, the 1890 figure was inflated by at least 1040 people who, he argued elsewhere in his report, should be struck off the roles. Taking this into account, the Ojibway had been given 185 square miles too much.³²

Borron's solution was simple enough. Given that it would be difficult to demand the land back from the Ojibway, the Dominion should pay the difference to Ontario. "Seeing that it is the very 'pick' of the whole territory, I have no doubt that the Hon Commissioner of Crown Lands, will see that a good price is obtained for it."³³ Borron concluded his report with the argument that it would be unconstitutional for Ontario to have to pay the full

³¹ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 27.

³² AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 29. Borron calculated as follows: 2830 (the 1890 population) less 1040 equalled 1790, divided by 5 (the average number per family), yielding 358 families, who would receive 358 sq. mi. of land, 185 sq. mi. less than the 543 allocated.

³³ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 29.

amount for a treaty signed by the Dominion that purported to give away to the Indians Ontario land.³⁴

Apart from this remark, Borron declined to comment on the constitutional and legal questions that his analysis raised other than to ponder the nature of treaties with the Indians. When the Treaty #3 annuities issue went before a Board of Arbitrators, however, Borron became more expansive on these questions. In March 1893, he submitted a report on the claims the federal government was preferring against Ontario regarding payments made under the treaty.³⁵ This second report began with questions regarding the obligation of the province

to implement in whole or in part, the promises made in this treaty by the Dominion Government to the Indians inhabiting ... Provincial territory. Is it a legal obligation, rendering it imperative on the part of the Province, to accept whatever terms the Dominion Government may have seen fit to make with these Indians? Or is it a moral obligation, resting upon the Government of the Province, to assume so much of the pecuniary and other considerations granted to these Indians in satisfaction of their claim or title to the soil, as may be reasonable and right under the circumstances?³⁶

³⁴ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 30.

³⁵ AO, Irving Papers, Mu 1469, 31/37/5, "North West Angle of No. 3 Indian Treaty[.] Outstanding Accounts[.] Claims of the Dominion on the Province of Ontario in Respect Thereof. Memorandum by Mr Borron," March 25, 1893.

³⁶ AO, Irving Papers, Mu 1469, 31/37/5, "Memorandum by Mr Borron," 1.

Borron did not answer these questions directly. Rather, he argued that the Dominion's treaty-making powers were limited to lands not yet under Provincial crowns; on Provincial lands, the Dominion had no right at all. The provinces should appoint their own treaty commissioners and negotiate directly with the Indians, the results to be ratified by the Dominion "as the legal guardian of the Indians."³⁷ Since the treaty had been signed and promises made to the Ojibway that should be kept, Borron went on, it was only fair to them that Ontario "aid and assist the Government of Canada" in this regard. But the taxpayers of Ontario should not have to bear the burden of the much higher costs of this treaty than their government would have negotiated.³⁸

Borron observed that the Dominion had known of Ontario's claim to the region before it pressed ahead with the negotiations of Treaty #3.³⁹ However, the Ontario government does not appear to have protested or otherwise attempted to intervene in the making of Treaty #3. Whether it did or not, the lands covered by the Treaty were not definitively part of Ontario until after the *St. Catherine's* decision and the consequent passage by the Dominion of the *Canada (Ontario Boundaries) Act*. One serious difficulty with

³⁷ AO, Irving Papers, Mu 1469, 31/37/5, "Memorandum by Mr Borron," 1-2.

³⁸ AO, Irving Papers, Mu 1469, 31/37/5, "Memorandum by Mr Borron," 3.

³⁹ AO, Irving Papers, Mu 1469, 31/37/5, "Memorandum by Mr Borron," 2.

the *St. Catherine's* decision, therefore, is its retroactive nature. Fifteen years after it was signed and reserves had begun to be laid out, the lands of Treaty #3 were understood to belong to Ontario, and that ownership stretched back to Confederation, predating the Treaty by six years. How could amends be made to Ontario for past actions of the Dominion upon lands it was now seen as having no right to act upon without disturbing the expectations of the Indians upon those lands who were signatories to the treaty as well?

One solution to this dilemma was to raise the question as to the nature of the treaty. For all his apparent sympathy for the Indians, Borron had asserted in his reports that the treaties with them were mere reflections of the moral impulses of the larger society and did not represent hard contractual obligations.⁴⁰ This was a position taken by Mowat and Edward Blake before the Judicial Committee of the Privy Council during their arguments in the *St. Catherine's Milling* case.⁴¹ Ontario believed that treaties with the Indians were meant more to mollify the Indian sentiment that they owned the land, a sentiment that Mowat and Blake believed was

⁴⁰ AO, Irving Papers, Mu 1468, 30/36/6(1), "Report by Mr. Borron," 30, and Mu 1469, 31/37/5, "North West Angle of No. 3 Indian Treaty."

⁴¹ For further analysis of this position, see S. Barry Cottam, "The Twentieth Century Legacy of the *St. Catherine's* Case: Thoughts on Aboriginal Title in the Common Law," in *Co-existence? Studies in Ontario-First Nations Relations* eds. Bruce W. Hodgins, Shawn Heard and John S. Milloy, 118-27 (Peterborough, Ont.: Frost Centre for Canadian Heritage and Development Studies, Trent University, 1992).

overblown. As such, they were indicators of a moral obligation upon the dominant society to deal fairly with the Aboriginal inhabitants of lands it sought for itself. Should the Indians fail to comply with the proffered terms of a treaty and persist in unreasonable demands, then the larger society, for acceptable utilitarian reasons, could simply take the lands.⁴²

Within such a context, Borron argued upstream against history in his second report, attempting to assert (as he had elsewhere) that the Dominion failed to take the province into account when it negotiated Treaty #3. The Dominion may have had some right to negotiate lands sufficient for a public work such as the Dawson route, Borron argued, but the treaty to the whole of the Disputed Territory was negotiated prematurely, i.e., before Ontario's interests were barely recognizable. Furthermore, the Dominion gave away the store: Treaty #3 (and Treaties 1 and 2, for that matter) was much more generous in its terms than the 1850 Robinson treaties, which promised annuities to the Indians only once the ceded lands began to produce the revenues required to pay them.⁴³ It was a cost-effectiveness argument: the Dominion had negotiated in haste at great expense a premature treaty with Indians for lands

⁴² Douglas Sanders notes that the "case law does not support this view." Douglas E. Sanders, "Aboriginal Peoples and the Constitution," *Alberta Law Review* 19 (1981): 417-8, quoted in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. Bradford W. Morse (Ottawa: Carleton University Press, 1985), 304.

⁴³ AO, Irving Papers, Mu 1469, 31/37/5, "Memorandum by Mr Borron."

it should have known were being claimed by Ontario. Why should Ontario have to pay?

7.3: Legislation of 1891 and the 1894 Agreement

Within the context of such arguments and against the background of the arbitration proceedings, the 1891 legislation that flowed out of Thompson and Mowat's November 1890 meeting was affirmed in *An Act For the Settlement of Certain Questions Between the Governments of Canada and Ontario, Respecting Indian Lands* of 1894. The first few months of 1894 were spent in correspondence on the terms of this agreement, and on April 16, Superintendent General of Indian Affairs T. Mayne Daly and John M. Gibson, Secretary and Registrar of Ontario, signed the act. Very similar in terms to the 1891 legislation, this act provided that:

1. Indian rights to hunt and fish "do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario ... and that the concurrence of the Province of Ontario is required in the selection of the said Reserves."
2. Ontario will make "full enquiry" about reserved lands in order to agree to their "location and extent."
3. A joint commission will be established if Ontario disagrees with the reserves.
4. Waters within the reserves, "including the land covered with water lying between the projecting headlands of any lake or sheets of water," will form part of the reserves and no one but Indians can fish there.
5. This agreement is "without prejudice to the jurisdiction of the Parliament of Canada" with regard to the Fisheries Act, if that Act applies to the Indian fisheries.

6. Future treaties with the Indians of Ontario "require the concurrence of the Government of Ontario."⁴⁴

The items dealing with Ontario's involvement with the Reserves of Treaty #3 are of most interest here. Ontario was very concerned that a Treaty which it had played no role in negotiating apparently gave provincial lands to the Aboriginal signatories. As Borron's reports revealed, the province would be diligent in assessing how much land it had lost and whether the amount corresponded with the terms of the Treaty. Such an assessment was necessary before the Province would confirm the reserves, a key concession by the Dominion and one made without any consultation with the Ojibway.

The confirmation requirement was an additional reason that resource development in the Treaty #3 area, especially when Reserves were involved, had to proceed with the utmost caution. In a memorandum to his Minister, Deputy Superintendent General of Indian Affairs Hayter Reed noted that "these lands cannot be dealt with by this Department until the Reserves are ratified by the Ontario Government in accordance with the Agreement" of 1894.⁴⁵ This was a continuation and refinement of policy: in 1890 the Department had sought a Justice opinion regarding licences for resources on Indian

⁴⁴ NAC, RG 10, vol. 2314, file 62509-4, pt. 1, *An Act For the Settlement of Certain Questions Between the Governments of Canada and Ontario, Respecting Indian Lands*, April 16, 1894. The implications of this Agreement for Treaty #3 fisheries are explored fully in Van West, "Headland to Headland Boundaries."

⁴⁵ NAC, RG 10, vol. 3803, file 50358, Hayter Reed to T.H. Gilmour, Oct. 19, 1895.

Reserves and had been advised that it should take no such action until "final arrangements with the Province of Ontario are made."⁴⁶ This policy crippled the plans of the Sabaskong Gold Mining Company, which had managed to obtain from the Ojibway in 1888 a surrender of the parts of Sultana Island not yet covered by mining claims but had been refused a licence by the Department owing to the continuing delay in confirmation of the reserves.⁴⁷

Mining was not the only industry affected. Aubrey White wrote to Indian Affairs in 1896, enquiring about timber cutting by the Keewatin Lumbering Company on island Reserves in Lake of the Woods once the 1894 Agreement was in place. J.D. McLean replied that the Department

has carefully refrained from diminishing the value of the Reserves affected [by the Agreement] by removal of Timber, or otherwise, and pending the settlement or confirmation of these Reserves, it has been assumed that your Department would not alienate any of the Timber which may be found thereon.

The Keewatin Lumbering Company's lease had been issued by the Department of the Interior and "it was subsequently agreed that the

⁴⁶ NAC, RG 10, vol. 3803, file 50358, memorandum, May 12, 1890.

⁴⁷ Forty people, most from Winnipeg and Rat Portage, were involved in this attempt. The story is told in large part in NAC, RG 10, vol. 3803, file 50358. Apparently, the company never did receive a licence, although it kept trying until at least 1898.

Crown Dues on Timber cut upon the Reserves ... should be paid by this Department."⁴⁸

A year later, Clifford Sifton urged the Commissioner of Crown Lands, J.M. Gibson, to move on the issue of confirmation. He had discussed it with Premier Hardy, the two agreeing that Hardy would prepare a "memorandum which might form the basis of action for the two Governments." Sifton thought as well that it was time to consider appointment of a joint commission under the 1894 Agreement, "if Ontario is not prepared at once to confirm the reserves." Sifton's urgency was a result of his "constantly receiving applications for mining locations on reserves." Until the reserves were confirmed by Ontario, the federal government was limited to giving "applicants nothing further than the permission to prospect." Any development had to wait until the matter of the reserves was settled.⁴⁹

Gibson does not seem to have been affected by Sifton's urgency. Two years after Sifton's letter, Gibson was himself suggesting that a joint commission be established to examine the outstanding issues around the reserves. Gibson was responding to rumours that the Ontario Mining Company believed, on the basis of the Bureau of Mines Annual Report for 1893, that the Ontario government had

⁴⁸ ONAS, MF #186214, J.D. McLean to A. White, April 14, 1896.

⁴⁹ ONAS, MF #186214, C. Sifton to J.M. Gibson, June 12, 1897.

agreed with Indian Reserve selection in Treaty #3. The 1894 Agreement, Gibson asserted, showed this not to be the case. Rather, Ontario contended that the Indian Reserves were excessive and the province would make a "full inquiry" of existing Indian Reserves, with a joint commission to be established to sort out difficulties. Gibson wanted all doubt removed on this question: Ontario had not confirmed any Indian Reserves, including Sultana Island, and "definitely claims that, until dealt with by the Government of Ontario under the terms of the said Agreement, the same are Crown Lands belonging to the Province." This memorandum became the basis of an Ontario Order-in-Council of May 31, 1899.⁵⁰

Further questions were raised around the same time on the federal side by J.A.J. McKenna and Reginald Rimmer, who produced in 1899 an extensive analysis of unresolved issues between the Dominion and the province regarding the Indians of Ontario.⁵¹ These issues were organized by McKenna and Rimmer into twenty cases, with recommendations for each should the Board of Arbitration examining these issues fail to reach a solution. Case No. 1 was the *Questions in Dispute Between the Dominion and Ontario Arising Out of, Or*

⁵⁰ ONAS, MF #186214, memo. from J.M. Gibson, May 31, 1899.

⁵¹ NAC, RG 10, vol. 2545, file 111843, pt. 1, McKenna and Rimmer to Clifford Sifton, March 20, 1899, "Case No. 1. Questions in Dispute Between the Dominion and Ontario Arising Out of, Or Incidental to, the North West Angle Treaty (Commonly Known As Treaty 3) and the Cession Thereby of Lands in the Province." The entire report was published separately as *Matters in Dispute between the Dominion and Ontario[:] Joint Report to the Superintendent General of Indian Affairs by Messrs. McKenna and Rimmer* (Ottawa, 1901). Case No. 1 occupies pages 7-23.

*Incidental to, the North West Angle Treaty ... and the Cession Thereby of Lands in the Province.*⁵² The Dominion had filed its statement with the Board on October 18, 1893. Ontario had filed two years later, on November 6, 1895. The Dominion had not replied at the time of the McKenna/Rimmer report and the Board had not heard the case for various reasons, including the ongoing attempts of the two governments to reach "an amicable adjustment of all questions in dispute."⁵³ McKenna and Rimmer had treated the Treaty #3 case as an exception to the other cases, hoping that it could contribute to such a settlement rather than being heard by the Arbitrators.

They outlined the positions of both governments in the Treaty #3 case and then turned to fourteen outstanding issues, of which only the thirteenth and fourteenth concern us here. These are the questions of confirmation of Indian Reserves by Ontario and the ownership of precious metals on Indian Reserves. McKenna and Rimmer reviewed the documents relating to the setting apart of reserves for the Ojibway of Treaty #3. Noting that the Ojibway had chosen their sites prior to final negotiation of the treaty, they argued that even if the Ontario government itself had negotiated the treaty, it would not have been able to do any better than had the

⁵² Although the evidence is voluminous in both the National and provincial archives, little has been written about the activities of this Board, which examined a wide range of issues outstanding between the two governments. The Board was addressing the issues as they stood up to Dec. 31, 1892. McKenna and Rimmer, *Matters in Dispute*, 21.

⁵³ McKenna and Rimmer, *Matters in Dispute*, 7.

Dominion regarding the extent and placement of the reserves.

Therefore,

Ontario should be held strictly to confirmation of reserves, and ... until she confirms the reserves, they should be treated by the Dominion as being the property of the Dominion in trust for the Indians, subject to the restriction on alienation arising from the Agreement of 1894[. Furthermore,] the Dominion should refuse to recognize any titles granted by Ontario.⁵⁴

As for the royal metals, McKenna and Rimmer conceded that the province owned them, "yet it is evident from the negotiations prior to the Treaty ... that Ontario could not have arranged the Treaty without granting the precious metals." Given that premise, they concluded, it was only just and fair to all three parties that the reserves "should include the grant of the royal metals on the reserves."⁵⁵

The judicial meaning of the 1894 Agreement was explored in a lawsuit brought by Sultana Island mining investor Caldwell against a rival, Fraser. Fraser had sought to lease the lands under the waters off Sultana Island and constructed a crib to hold back the waters while a pit was dug. Caldwell took objection and the case went to court. It was heard on November 22, 1897, and the decision by Rose J. in favour of Fraser was delivered on January 31, but was not reported. Caldwell's lawyers were the firm of McCarthy, Laidlaw

⁵⁴ McKenna and Rimmer, *Matters in Dispute*, 21.

⁵⁵ McKenna and Rimmer, *Matters in Dispute*, 21.

and Bicknell, who handled much of the Treaty #3 litigation for the Dominion.

Of interest here is the manner in which the court viewed the Agreement of 1894. This Agreement and its antecedent legislation of 1891 were 'declarations' that the "right exists in the Dominion to extinguish the Indian title by legislation." Rose J. based this assertion on the fact that the Agreement allowed for the limitation of the rights of the Ojibway to hunt and fish on surrendered, non-Reserve lands until these were required for settlement or resource development. Furthermore, the Agreement recognized that while the Dominion had the power to administer and legislate for them, Ontario had a right to confirm the reserves set out by Treaty #3.⁵⁶

Rose J. had some salient observations to make regarding how these declarations came about. He noted that the terms of the Agreement, especially the requirement that Ontario confirm the Reserves, suggest that the entire Treaty #3 area was surrendered, that all the lands then became part of Ontario, and that Indian Reserves would then be selected out of Ontario lands. "If this was not the theory," he noted, "I do not understand why the Dominion conceded the right of the Province to be consulted with respect to the

⁵⁶ NAC, Blake & Redden Papers, vol. 25, file 25-6, Caldwell v. Fraser, "Copy of judgment Rose, J., delivered 31st January, 1898," 9-12.

laying out of such reserves."⁵⁷ He suggested that an alternate argument could have been made: that the lands were surrendered except for unspecified Indian Reserves; that the Ojibway would retain their rights to the unsurrendered lands to be reserved to them; and that the surrendered lands would only be delineated once the reserves had been established, for, in his words, it was "certain the Indians did not intend to surrender absolutely all their lands, but only a portion of them." This argument would be consistent with both the Treaty, which provided that the Ojibway could hunt and fish on surrendered lands until these were required for other uses, and the 1894 Agreement, which took away such rights only on surrendered, not reserved, lands. Although the terms of Treaty #3 are not explicit on this question, he noted, there is room to interpret the Treaty in this way.⁵⁸ Since Rose J. did not make it himself, the suggestion can be made here that the Department of Indian Affairs, in its role as guardian of the interests of the Indians, should have made this alternative argument. If the reserves of Treaty #3 could be seen as unsurrendered land, then perhaps much of the conflict with Ontario could have been avoided.

⁵⁷ NAC, Blake & Redden Papers, vol. 25, file 25-6, *Caldwell v. Fraser*, 10.

⁵⁸ NAC, Blake & Redden Papers, vol. 25, file 25-6, *Caldwell v. Fraser*, 10. The official document lays out the area ceded, then notes that two types of reserves will be laid aside, farming reserves on lands then under cultivation by the Ojibway, and that "other reserves of land in the said territory hereby ceded ... shall be selected ... after conference with the Indians." Morris, *Treaties of Canada*, 322.

7.4: The 1902 Blake/Newcombe Agreement

The Blake/Newcombe Agreement of 1902 was born out of the persistent questions, noted by McKenna and Rimmer, that plagued the problem of mineral rights on Indian Reserves in Ontario. The tangled lawsuit of *Ontario Mining Co. vs. Seybold* was one outcome. As with the *St. Catherine's Milling* case, Blake was retained to argue Ontario's position as intervenor in *Seybold* before the Judicial Committee of the Privy Council;⁵⁹ E.L. Newcombe, the Deputy Minister of Justice, argued the Dominion's case.

Blake's preparations for *Seybold*, in particular his use of the 1894 Agreement, are worth noting. A week before his trip to England, Blake consulted with Newcombe, "suggest[ing] to him, and subsequently to the Minister, the general lines on which I thought ... the Governments should act in this matter of controversy." Blake "thought we could well raise, and thrash out, the question of the right to minerals" and that the 1894 Agreement "should govern ... all matters really covered by" it, and that "both parties should proceed without undue delay to execute it." Blake and Newcombe agreed to "hold friendly communication with one another, without prejudice, to maintain without unnecessary friction the respective rights of the two powers, and to effectuate the Statutory Agreement." Although these points had to be confirmed

⁵⁹ Each of the defendants agreed to retaining Blake; NAC, RG 13, vol. 2388, file 296/1902, pt. 1.

with Attorney General J.M. Gibson, Blake was pleased with the results and was "quite sure that communication with the people at Ottawa has been beneficial, in this respect at any rate: that there has been established a common disposition to look at matters in a reasonable spirit."⁶⁰

Blake elaborated on these questions on the eve of his trip in an additional memorandum to Gibson that was "in explanation and supplement of my letter of the 24th." He had five main points to make to Gibson, and they reveal the thinking behind the 1894 Agreement and the subsequent agreement of 1902. Blake would have preferred in his arguments before the Privy Council to use what he had "always believed was the true position of the Province"; i.e., that the Treaty was only valid with Ontario's concurrence.⁶¹ Noting that the "Courts below" had arrived at this conclusion, Blake believed that Ontario's arguments in *St. Catherine's Milling* deprived him of the opportunity to press this point in *Seybold*. While he did not wish to explain this comment in detail, he did say that it was a result of Ontario's admission in *St. Catherine's Milling* that the surrender under Treaty #3 gave the Crown the full title. As a result,

we cannot now repudiate the Treaty. The Privy Council, anxious to do two things, (first, to secure Ontario in

⁶⁰ NAC, Blake & Redden Papers, vol. 8, file 8-9, [Ed. Blake] to A.-G. [Gibson], Oct. 24, 1901.

⁶¹ NAC, Blake & Redden Papers, vol. 8, file 8-9, [Ed. Blake] to A.-G. [Gibson], Oct. 30, 1901.

its right to the soil of the vast territory in question; and, secondly, to preserve the right of the Indians to what the Treaty had apparently secured to them,) framed its judgment, as I conceive, with a view to attain these objects, at the sacrifice, to some extent, of a rigorous, logical conclusion. How far they will carry out that view now, or depart from it on the demand of the logic, is, to my mind, the question. But I think the chances are rather against the logic.⁶²

The difficulty outlined by Blake was resolved by the 1894 Agreement, "by which the Province secured so much, and conceded so little, of practical consequence." Blake believed the 1894 Agreement "reduces the questions, apart from minerals ... to a very limited scope, and renders it unfit ... for the Province to enter into the debate on these questions." As a result, he wanted "to be expressly authorized" to use it.⁶³

Blake approached the problem of the minerals by questioning the right of the Indians to them in spite of the promises made at treaty. His reluctance to admit that Ontario was bound by a treaty made without its consent was assuaged by the "arguable question of general public importance[:] ... whether, under the terms of the Treaty, there is an Indian right in respect of the minerals in the special Reserves to be created." Blake had

not examined the question au fond, but my present impression is that, apart from the negotiations and

⁶² NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 30, 1901.

⁶³ NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 30, 1901.

promises which accompanied the Treaty, the Indians would have no right to the precious minerals in the Reserves. I find it difficult to conceive that, applying the ordinary principles of evidence and interpretation of written documents, these promises would be effective.

However, the desire to treat Indians fairly and liberally was strong enough, Blake observed, that the courts would tend to reject attempts to deal with a potential Indian interest in this way, "and therefore we have before us a difficult task in handling the question on these lines."⁶⁴

The problem of Sultana Island was contained by Blake by placing it outside the application of the 1894 Agreement. He did this by noting that the Dominion patents, granted prior to the Agreement, "created a private interest" which the Agreement "could not prejudice."⁶⁵ Blake went on to discuss the general question of title to Indian Reserves once confirmed under the 1894 Agreement. Chancellor Boyd decided "that that title, under the practical effects of the Treaty, vest[s] in the Crown for the Province, which has the right to sell. I presume it is acknowledged, even by him, that the purchase money is to be administered by the Dominion Government for the Indians."⁶⁶ Blake could not go so far himself:

⁶⁴ NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 30, 1901.

⁶⁵ NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 24, 1901.

⁶⁶ NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 30, 1901.

I own myself unable to get away from the view that the provisions of the B.N.A. Act, and the words of the Treaty, and public convenience, all point to a different conclusion, namely, that these special Reserves once effectually selected, are to be administered, even by sale if sale be a contemplated method, by the Dominion Government, and that the title vests in the Crown as there represented; not, indeed, beneficially, but as trustee for the Indians.⁶⁷

As for Sultana Island, Blake had some "suggestions [that] may serve to 'save our face' in respect of the particular case; and to invite the Court not to make general declarations on its basis," including the non-application of the 1894 Agreement and the fact that Indian Reserve 38 was not the original one chosen under the Treaty.⁶⁸

Blake was authorized by Gibson to enter into an agreement with Newcombe intended to resolve the differences of the Dominion and the province over minerals on Indian Reserves. Apparently, Blake's concerns regarding the Treaty and the right of the Ojibway to the minerals on the reserves were overcome, and the two counsellors reached an agreement on July 7, 1902.⁶⁹ Its terms applied to all

⁶⁷ NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 30, 1901.

⁶⁸ NAC, Blake & Redden Papers, vol. 8, file 8-9, Oct. 30, 1901.

⁶⁹ Blake explained to the court that he was "absolutely convinced that the claim to precious metals does not in law pass by this Treaty ... But there was something which my learned friend said in the course of his argument with which I have always sympathized and sympathize to-day. I do believe that if there ever was a case in which a large and liberal view should be taken of transactions by those who are at all concerned or interested in them, it is the case of transactions such as this. It is indisputably proved, whatever the law may be about it, that the

Indian Reserves in Ontario, including those of Treaty #3 and any that might be set up after the Agreement of 1894. Ontario agreed "to confirm the titles heretofore made by the Dominion," which could sell or lease such lands. Furthermore, regarding the Reserves of Treaty #3, "Ontario agree[d] that the precious metals shall be considered to form part of the Reserves and may be disposed of by the Dominion for the benefit of the Indians" in the same manner as the lands of those Reserves. Neither party "conceded ... [any] constitutional or legal rights ... as to the sale or title to Indian Reserves or precious metals or as to the contentions submitted by the cases of either Government herein."⁷⁰

The 1902 Agreement was presented during the appeal to the Privy Council and, Blake stated, it "commended itself to their sense of right."⁷¹ Their Lordships hoped that, once the Agreement had been accepted by Ontario and the Dominion, it would "have the effect of finally settling in a statesmanlike manner all questions between

Indians did as part of the negotiations ask for and that the Commissioners who were representing Her Majesty did give them, assurances contemporaneously with the written Treaty that, if precious minerals were found on the special reserves they should belong to them." AO, Irving Papers, Mu 1479, 41/40/08, Address of Rt. Hon. Edward Blake in Privy Council, Ontario Mining Co. vs. Seybold, July 8, 1902, pp. 10-11.

⁷⁰ AO, Irving Papers, Mu 1479, 41/40/07, Agreement between Counsel on behalf of the Dominion and Ontario intervening parties upon the appeal to the Judicial Committee of the Privy Council in Ontario Mining Company vs. Seybold et al. The agreement stipulated that minerals on other reserves in Ontario would be dealt with on a case by case basis.

⁷¹ NAC, Blake & Redden Papers, vol. 8, file 8-9, Ed. Blake to A.-G. Ontario, Dec. 1, 1902.

the Governments relating to the Reserves."⁷² The 1902 Agreement lay dormant for two decades, however. It did not receive legislative sanction until its incorporation into the *Ontario Lands Agreement* of 1924.

7.5: The 1913 Agreement and Ontario's Confirmation of Indian Reserves

The issue of the confirmation of Treaty #3 Indian Reserves by Ontario continued to haunt discussions for a number of years. As noted earlier, one problem was the extent of the Indian Reserves; another was the extent of Ontario's obligation to reimburse the Dominion for its costs in administering Treaty #3. Solutions were slow in coming. The resolution in 1910 of the Treaty #3 Annuities Case⁷³ helped clear the way for further movement on the confirmation issue.

Pressures to develop the region added impetus as well. As part of its investigation of the federal claims in the Annuities case, the Ontario government undertook further assessment of the value of Indian Reserve lands in Treaty #3. William Margach, the government's agent in the area, was questioned in January 1895 by

⁷² *Ontario Mining Co. v. Seybold et al.*, [1903], A.C. 73.

⁷³ The Dominion won in the Exchequer Court in 1907, but lost on appeals to the Supreme Court and the Privy Council, which dismissed the case on July 29, 1910. *A.G. Ontario v. A.G. Dominion* [1910], A.C. 637.

AEmilius Irving regarding the natural resources on and around these lands. Margach testified that the sale of mining lands around reserves in the Rainy Lake and Seine River areas had increased the value of the reserve lands themselves. As well, gold had been discovered on some of these reserves, which also contained stands of pine timber. Lands along the Rainy River were excellent for farming and Ontario was giving them away as "Free Grant Land," a policy that was encouraging the rapid settlement of the area. Margach indicated that about 1000 settlers had moved onto the lands of "from 100 to 150 Indians" who were "scattered all over," not just on their reserves. He indicated as well that, since they knew Reserve lands were not for sale, prospectors were reluctant to explore on the Reserves.⁷⁴

The tensions between settlers, miners and the Ojibway that Margach described would appear to have increased in the twelve years between his testimony and the 1907 tour of northwestern Ontario by Frank Cochrane, Minister of Lands, Forests and Mines. His visit included Rainy River and Cochrane

found considerable feeling to exist there, owing to the delay and inconveniences to settlement caused by the Indian Reserves which are held by the Dominion Government

⁷⁴ AO, Irving Papers, Mu 1469, 31/37F/18-19, Case re Indian Claims Arising out of North-West Anglo [sic] Treaty No. 3, Jan. 14-15, 1895. Margach had been assisted in collecting his information by the cooperation of Indian Agent Robert Pither.

in trust for the Indians. These reserves block the way to the opening up of the country.⁷⁵

Cochrane's solution was to request an Order-in-Council

giving the consent of the Province to the surrender and sale of these particular Reserves ... to actual settlers, pending the settlement of the whole Reserve question and without prejudice to any rights the Province of Ontario may have in the matter.⁷⁶

This solution was adopted in an Order-in-Council of July 26, 1907, although confusion persisted over confirmation of the Rainy River Indian Reserves for at least a year. The federal government appeared to lose track of this development, for in 1908, when the Association of Canadian Veterans in the United States of America requested access to reserve lands to establish a community, it was referred by the Department of Indian Affairs to the Ontario Government. The latter replied that the reserve in question had been surrendered and that Indian Affairs had been so informed.⁷⁷

The opening up of the Rainy River district took on an increased importance in negotiations between the Dominion and Ontario. On December 9, 1913, W.J. Roche, Superintendent General of Indian Affairs, and W.T. Hearst, Minister of Lands and Forests, met in

⁷⁵ ONAS, MF #186214, F. Cochrane to Administrator of Government in Council, July 24, 1907.

⁷⁶ ONAS, MF #186214, F. Cochrane to Administrator of Government in Council, July 24, 1907.

⁷⁷ ONAS, MF #186214, F. Cochrane to Administrator of Government in Council, July 24, 1907.

Ottawa to discuss "outstanding and unsettled Indian matters between the Dominion and the Province." According to the minutes, the first point discussed was unconfirmed Treaty #3 Indian Reserves. Agreement was reached that Ontario would confirm the Reserves and submit a memo to the Lieutenant-Governor, in which the Dominion would concur, resulting in joint Orders-in-Council. The Dominion would try to have Rainy River Reserves (except Manitou Rapids) amalgamated.

At the instigation of his Minister, Aubrey White sought a week later to "clear up more fully certain matters" regarding this meeting. In particular, he sought to clarify the apparent agreement of the Dominion that the Treaty #3 reserves were too large and Ontario should be compensated for the excess acreage. This compensation should not wait for settlement of the "legal question as to the respective rights" of the Dominion and Ontario regarding "disposition of Indian lands." White went on to stress the importance of the Rainy River district to Ontario:

Please bear in mind that practically the whole consideration for our agreement to confirm these Reserves is the undertaking on your part to obtain a surrender of all the Reserves on or adjacent to the River, except the one at Manitou Rapids, and to open up the same for sale and settlement, and we must be protected against the possibility of failure on your part to obtain a surrender of the Reserves referred to. [In such an event,] our confirmation should become null and void and the lands revert to the Crown in the right of Ontario.⁷⁸

⁷⁸ ONAS, MF #186214, Re Disputes in Indian Matters, A. White to D.C. Scott, Dec. 20, 1913.

The final question left to resolve, then, was the excess acreage and compensation for Ontario. In an "historical memorandum" to his Minister, Hearst, White outlined the developments to date, characterizing the discussions as "occasional wakeful periods of negotiation" breaking up long "dormant" spells of inactivity. White could inform Hearst that the excess acreage issue was finally resolved following a meeting in Toronto between White and D.C. Scott: "the figures with respect to the areas of the reserves were carefully analyzed and an arrangement was arrived at and crystallized into a memorandum." The Dominion was to pay Ontario one dollar per acre for 20,672 acres. The Minister of Lands, Forests and Mines approved of this agreement. It was also agreed that Ontario would approve the Indian Reserves. "If the Minister approves of the Memorandum then an Order-in-Council should be passed authorizing the transfer of the reserves to the Dominion Government." Hearst's marginalium of December 15 indicated approval.⁷⁹ The Ontario legislature passed an act in 1915 stipulating that the "said reserves ... are hereby transferred to the Government of Canada, whose title thereto is confirmed."⁸⁰

A final note of irony can be struck before leaving this topic: white settlers were not the only people affected by the issue of

⁷⁹ ONAS, MF #185245, A. White to [W.H. Hearst], Dec. 14, 1914.

⁸⁰ *An Act to confirm the title of the Government of Canada to certain lands and Indian lands*, 5 Geo. 5, c. 12, *Statutes of Ontario*, 1915.

confirmation of reserves. Four Rainy River chiefs had requested in 1909 that they be allowed to cut timber on Treaty #3 Indian Reserves. Correspondence passed back and forth between governments until 1912 before the Deputy Minister of Indian Affairs suggested that, although the Indian Reserves had not been confirmed by Ontario, perhaps cutting could be allowed if there was a danger that the timber would go to waste.⁸¹

7.6: The 1924 Ontario Lands Agreement

The 1915 agreement related to specific Treaty #3 reserves; it did not apply to Indian Reserves generally. The 1902 Blake/Newcombe agreement had "expressly left undecided the question of the precious metals" on Indian Reserves outside Treaty #3 and two decades later, the two governments sought to resolve this problem through further agreement. In a *Memo re Proposed Agreement as to Indian Reserves in Ontario* of October 5, 1924, it was stated that the "main purpose" of the 1924 Agreement was "to confirm by concurrent statutes of Canada and Ontario" the 1902 Agreement, which "has been acted upon ever since it was entered into, but no statutory provision dealing with the title to the lands has ever been made."⁸² The reserves of Treaty #3 were excluded from the 1924 Agreement because Treaty #3 "expressly provides that the Indians

⁸¹ ONAS, MF #186214, 1909-1912.

⁸² NAC, RG 10, vol. 2547, file 111834-3, pt. 1, Agreement Between the Governments of Canada and Ontario Regarding Indian Reserve Lands..., 1921-1924.

shall have the benefit of all minerals, including the precious metals."⁸³

As the courts confirmed that the provinces received the beneficial interests of surrendered Indian reserve lands, however, further problems arose. Although in general the Indians were not consulted or kept informed regarding these issues, they understood that the benefits of surrendering were not going to accrue to them. Both *Ontario Mining* and the *Star Chrome* case in Quebec in 1921 added fuel to this fire.⁸⁴ As Richard Bartlett has observed, the "effect" of these cases was

to inhibit the establishment of reserves by the federal government and to preclude the surrender of such lands for the benefit of the Indians.⁸⁵

Another result, given that the provincial and federal governments could not reach common ground, was that minerals on reserves were staying in the ground: "No disposition of them ... has been

⁸³ NAC, RG 10, vol. 2547, file 111834-3, pt. 1, memo of Oct. 5.

⁸⁴ *A.G. of Quebec and Star Chrome Mining v. A.G. of Canada*, [1921] A.C. 401. This Privy Council decision dealt with surrendered Indian lands in Quebec. The lands in question had been reserved under an 1851 Statute to Indians in Quebec who surrendered them in 1882. The Dominion argued that it held the title in trust for the Indians and that upon surrender the province did not gain title under sec. 109. In his decision, Duff J. disagreed and, following *St. Catherine's Milling*, decided that the lands vested in the Province of Quebec since the Indian right was merely usufructuary and personal.

⁸⁵ Richard Bartlett, "Reserve Lands," in Morse, *Aboriginal Peoples and the Law*, 487. The 1924 Agreement was an attempt to rectify this problem.

possible since the Indians will not surrender unless they are to derive benefit from so doing."⁸⁶

Newcombe himself had elaborated on this point to D.C. Scott in 1921, following the *Star Chrome* decision. Scott had made enquiries to the Justice Deputy Minister as to the case's implications. Newcombe replied that the case meant that "it would be unjust to the Indians ... to accept surrenders from them" since once surrendered, the lands revert to the province, "without apparently affording the Indians any right of compensation." The Dominion has exclusive administration of minerals and timber on Indian Reserves and leases can be "negotiated so long as the Indian title is not surrendered but I would hesitate to advise that the Indians may for any purpose safely surrender." Timber does not require a surrender under the Indian Act (sec. 73), but minerals do (under sec. 48, 51). "I would suggest that the Act be amended so as to provide for working the minerals without any surrender."⁸⁷

On July 19, 1924, assent was given to *An Act For the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Reserve Lands*.⁸⁸ This Act authorized the carrying out of the March 24, 1924, Agreement, signed for the federal

⁸⁶ NAC, RG 10, vol. 2547, file 111834-3, pt. 1, memo of Oct. 5.

⁸⁷ NAC, RG 10, vol. 2547, file 111834-3, pt. 1, E.L. Newcombe to D.C. Scott, May 7, 1921.

⁸⁸ *Statutes of Canada*, 1924, c. 48.

government by Charles Stewart, Superintendent General of Indian Affairs, and for Ontario by James Lyons, Minister of Lands and Forests, and Charles McCrea, Minister of Mines. Its terms provided that:

1. The federal government would administer Indian Reserves in Ontario;
2. Surrendered lands may be sold, leased, etc., with benefits to the Band;
3. If a Band becomes extinct, Ontario gets the lands and benefits;
4. The stipulations above include sale of any minerals, even precious metals;
5. Indian Agent's permission is required before any prospecting can be done on an Indian Reserve;
6. 50% of proceeds of sales of mining claims go to Ontario and 50% to the Dominion for the Band;
7. Treaty #3 Indian Reserves are exempt from sec. 6;
8. Water power over 500 horse power requires consent of Ontario before sale by the Dominion;
9. Any sale, lease, etc., made by the Dominion of Indian Reserve lands "is hereby confirmed," whether or not it included the precious metals.⁸⁹

The practical effect of this Act, at least in the short term, seems to have been minor. Almost a decade after its passage, T.W. Gibson, Deputy Minister of Mines, asked the Superintendent General of Indian Affairs "whether any lands have fallen to Ontario under the agreement" of 1924. On March 15, 1933, the Departmental Secretary replied that "no surrender, sale or lease has been made" since the agreement that would fall under it.⁹⁰

⁸⁹ This is a paraphrase; a copy of the Act can be found in Morse, *Aboriginal Peoples and the Law*, 487-491.

⁹⁰ NAC, RG 10, vol. 2390, file 79941-1A, pt. 2, T.W. Gibson to SGIA, March 13, 1933; DIA Sec. to Gibson, March 15, 1933. The next year, H.J. Bury, Supervisor Indian Timber Lands, indicated to his superior Caldwell that \$180.00 was received in 1933-34 for

As usual, pressures to develop resources forced unresolved questions back to the surface. On May 19, 1937, the Deputy Minister of Indian Affairs requested from the Deputy Minister of Justice "a statement in non-technical language of just what our powers and obligations are" regarding minerals on Indian Reserves, before and after surrender. He needed it because the "question of control, management and disposal of under-rights in Indian Reserves, both before and after surrender, is becoming acute."⁹¹

mining leases on 38B. He noted the relevant terms of the 1924 Agreement then asked for a ruling whether Ontario would get any of the benefits. Ibid., Bury to Caldwell, April 11, 1934.

⁹¹ NAC, RG 10, vol. 2390, file 79941-1A, pt. 2.

CHAPTER VIII: OJIBWAY INVOLVEMENT

The Ojibway have never been a formal party to the discussions and subsequent lawsuits discussed in the previous chapters. Their opinion has never been considered seriously by the courts except in *A.G. of Ontario vs. Francis*¹, in which the judge granted the Whitefish River Band of the 1850 Robinson Huron treaty equal status in the court to that of the Ontario government.² In *Ontario Mining v. Seybold*, Chancellor Boyd was asked to admit as evidence a speech made in 1890 by the Rat Portage chief, who protested to Indian Agent Pither the taking of 38B for timber and mining, contrary to the terms of Treaty #3. The exchange in the courtroom is worth repeating. Bicknell, counsel for the Ontario Mining Company, was putting in evidence for his clients when he discovered "one other

¹ This 1889 decision went unreported until 1980, although copies of the judgment were published in two Toronto newspapers, the *Empire* and the *Globe*, on January 21, 1889. It was rediscovered in the Irving Papers (box 42, file 42, item 9) at the AO and published in the *Canadian Native Law Reporter* 4 (1980): 5-26, with "A note on the text and related documents" (pp. 1-2). A typescript of the copy published in the *Empire* was located in the Canadian Indian Rights Collection at NAC by this researcher, but the most accessible and complete version is that in *C.N.L.R.* As well as appearing in the decision, part of the evidence Chief Mongowin presented to Ferguson J., as interpreted by Rev. Allen Salt, has been published in Serafina Penny Petrone, *Aboriginal Pre-Twentieth Century Canadian Literary Materials: A Collection* (Thunder Bay: Faculty of Education, Lakehead University, April 1983), 438-9.

² In his decision, Ferguson J. noted that objection had been made to the evidence offered by the band chief and went on to say that he was "of the opinion this evidence was properly received, and that the objection to it could not be sustained. I think that for this or a like purpose this band of Indians should be considered as standing in the same position as any other high contracting power or government." *C.N.L.R.* 4 (1980): 13.

document I omitted," Chief Lindsay's speech. "That is going pretty far," objected J.M. Clark, a lawyer on the other side. "It may be," replied Bicknell, yet the document "shows what the Indians understood." Boyd accepted it laconically: "It may be interesting, if nothing else."³

The viewpoints of the Ojibway have been ignored for various reasons: attitudinal (people had difficulty believing in the nineteenth century that so few 'primitive' Indians needed so much land); historical (a study could be made of these cases as examples of the 'uses and abuses' of history); legal (the construction of an evidentiary bridge that would allow the contemplation of Aboriginal property concepts in the context of the common law was virtually impossible in the nineteenth century); and constitutional (the Ojibway were not partners in the B.N.A. Act and the terms of that act were seen as applying to them, not subject to their views).

None of this means that the Ojibway were mere passive victims, however. They did not accept their apparent fate; rather, they protested throughout this period, from the time of the negotiations of Treaty #3, which would have been completed sooner and with a different result if the Ojibway had been less persistent in pursuing their interests, to the present, which has witnessed their protracted efforts to resolve these issues through the specific

³ NAC, RG 125, vol. 183, file 1991-2, *Ontario Mining v. Seybold*, Record of Proceedings, Supreme Court of Canada, 1890, p. 39.

claims process. The Ojibway have had to demonstrate such a capacity for persistence precisely because the issues have been so reluctant to yield to resolution. This chapter explores this lengthy process of assertion of Ojibway rights, focusing upon resources on reserves. To put this process into context, however, it begins with an examination of the attitudes against which the Ojibway had to struggle in order to be heard.

8.1: Eurocanadian Attitudes Toward the Ojibway⁴

Study of the attitudes and perceptions recorded by the various groups of people who came into contact with the Ojibway of northwestern Ontario in the latter half of the nineteenth century provides important insights into the changes the Ojibway experienced. These perceptions can be found in the reports, speeches and articles of the surveyors, geologists, engineers, journalists, writers and army officers who travelled to and through the Boundary Waters region.

In Upper Canada in the 1850s, increasing awareness of the agricultural potential of the prairie west and growing suspicion of the monopoly of the Hudson's Bay Company led to the British Parliamentary investigation in 1857 of the Company's control over

⁴ Parts of this section are drawn from S. Barry Cottam, "The Nineteenth Century Nexus: English-Canadian Perceptions of the Ojibwa of Treaty 3," paper presented to the CHA Annual Meeting, Victoria, May 1990.

Rupert's Land. The British government organized an expedition under the aristocratic sportsman, Captain John Palliser, to evaluate the development possibilities of the west. It spent three years exploring the west from Lake Superior to the Rocky Mountains. Palliser's extensive reports to Parliament, together with those of his fellow explorers, Sir James Hector and W.S.W. Vaux, offer some insights into European perceptions of the Ojibway.

A concurrent Canadian expedition, led by George Gladman, a retired Hudson's Bay Company chief factor, and Henry Youle Hind, a geologist and naturalist, travelled a route similar to Palliser's. Its major reports were Hind's narratives published in 1860 and the reports of Simon J. Dawson, the expedition's chief surveyor. Dawson was retained by the Department of Public Works in 1867 to survey and build the route that bore his name. He was one of the trio of commissioners who negotiated Treaty #3 and later became the first M.P. for northwestern Ontario. His extensive experience makes him an important source of perceptions of the Ojibway.⁵ The building of the Dawson Route and travel along it inspired volumes such as Captain Butler's account of the ordeal experienced by Wolseley's troops, dispatched to Red River to quell Riel's rising in 1870.⁶

⁵ See Arthur, Dawson, 3-18.

⁶ Capt. W.F. Butler, *The Great Lone Land: A Narrative of Travel and Adventure in the North-West of America* (London, 1872). Butler was Wolseley's intelligence officer for the expedition.

The inadequacies of the Dawson Route for military purposes contributed to the decision to construct a railway through the area. Surveyors and engineers of railway lines and transport roads often left accounts of their experiences. Other writers included newspaper reporters who accompanied famous personages or were hired to tour the west to write popular accounts for their readers. Missionaries left accounts of their attempts to convert the Ojibway. As western urban centres sprang up, scientific societies were formed and scientists evaluated the area's resources and attempted to unravel the mystery of the ancient mounds of Rainy River. Members of the British Association of Science toured the region to explore the possibilities of the Canadian west for the Empire. Area boosters extolled the virtues of New Ontario, trying to play down the impact of the Boundary Dispute on local development.

What did this array of individuals and groups think of the Ojibway they met and observed in the woods and on the waters of northwestern Ontario? A number of concerns emerge from these works: cultural contexts for understanding the Ojibway; the question of population - whether the Ojibway were increasing in number or dying off; the stereotype of the 'lazy Indian'; and the question that was uppermost, the claim to and use of the land. The accounts left behind were frequently contradictory and revealed an ambivalent mix of attitudes.

Nineteenth century notions of the land and the place of Aboriginal peoples on it are of most relevance here. Many accounts are pervaded by an air of inevitability regarding the loss by the Ojibway of their lands. Whatever their interest in Indians, whether scientific, cultural, religious or otherwise, both sympathetic and hostile observers believed that the whites would ultimately take the land. For example, George Munro Grant regretted deeply the implications for the Ojibway of Treaty #3. By signing it, they were producing "their own death warrants," he believed. "Who, but they, have a right to the country ...?"⁷

Grant was not alone in his concern for the loss by Aboriginal people of their right to the land. Recognition that Indians were, or had been, 'lords of the soil' is a theme that emerges frequently, especially in the contexts of favourable comparisons of British to American policies and the question of adequacy of compensation to the Indians for their lands. In their description of the various tribes contacted by the Palliser expedition, Hector and Vaux asked whether

we [are] warranted in looking on these vast territories merely as outlets for our surplus population, without considering the claims of the Indians to our aid and protection as British subjects? And are we to regard these natives as we should so many wild beasts, the natural evils of a new country which are in time to be removed in the process of settlement[? ... It would be a] crying injustice to the Indian possessor of the soil [if

⁷ George Munro Grant, *Ocean to Ocean: Sandford Fleming's Expedition through Canada in 1872* (Toronto & London, 1873), 33.

he did not] at least have the benefit of the same laws
[as the settler.]⁸

Canadian Geographical Survey geologist George Mercer Dawson argued that the inadequate compensation Indians received for their lands called into question the generally accepted idea that the British government recognized the Aboriginal title.⁹

The rights of the 'lords of the soil' to the soil were influenced heavily by concepts of property ownership. For classic Lockean liberals, one's right to property was acquired through the labour one expended. Indian labour did not alter the face of the land and thus did not meet the primary requirement as established by John Locke in the seventeenth century.¹⁰ To nineteenth century observers, the land seemed untouched by human hands and was often described that way.¹¹

⁸ Sir James Hector and W.S.W. Vaux, "Indian Tribes and Vocabularies" in John Palliser, *Exploring of British North America: The Journals, Detailed Reports, and Observations Relative to the Exploration of British North America ... During the Years 1857, 1858, 1859, and 1860* (London: Queen's Printer, 1863), 204-5.

⁹ George M. Dawson, "Sketches of the Past and Present Condition of the Indians of Canada," *Canadian Naturalist* 4, no. 3 (1878): 6-8.

¹⁰ See Locke, *Two Treatises of Government*, chapter 5, "Of Property," sections 26, 30-43.

¹¹ See, for example, *The New West* (Winnipeg, 1888), a promotional book 'boosting' the west from the "Great Lakes ... to the Golden Shores of the Pacific": "In this vast domain - an empire in itself," intoned the anonymous author in the preface, "there are countless thousands of leagues of territory on which the foot of man had never trod, lying tenantless and silent, only awaiting the advent of the Anglo-Saxon race to be transformed into a prosperous and thriving country."

While this is a clear aspect of the liberal philosophy of the right to land, British attitudes to the land were full of contradiction. The land was seen on one hand in terms of the picturesque or romantic ideals of the British landscape.¹² Travellers pressed the landscape into terms they knew and saw everywhere potential gardens. Bigsby's work is an example of this tradition. In his eyes, Rainy River was at once nostalgically reminiscent of Britain's ancient past and ready "for a pleasure excursion; all is serenity and beauty."¹³ Reshaping the land to fit European needs and expectations was undertaken without question. Indeed, the idea of the picturesque implied the reshaping of the land. Beyond the level of the ideal, the land was subject to literal transfiguration. Bigsby's attitude towards the prairies as a "pleasant land" that "presents a variety of enjoyments," including "inspiration to the poet," reveals the incompatibility of the Indian with the picturesque ideal.¹⁴ For those who saw the west in

¹² These notions of the picturesque are drawn from I.S. MacLaren, "Literary Landscapes in the Writings of the Fur Traders," in *Le Castor Fait Tout: Selected Papers of the Fifth North American Fur Trade Conference, 1985*, ed. Bruce G. Trigger, Toby Morantz and Louise Dechêne (Lake St. Louis Historical Society, 1987), 566-86.

¹³ J.J. Bigsby, *The Shoe and Canoe or Pictures of Travel in the Canadas, illustrative of their scenery and of colonial life: With facts and opinions on emigration, state policy and other points of public interest*, 2 vols. (London, 1850; New York: Paladin Press, 1969), 2:270-1. Having made this trip in 1823, Bigsby had over 25 years between experience and written account in which to develop this sentiment.

¹⁴ Bigsby, *Shoe and Canoe*, 1:Preface.

this way, the Indian was part of the landscape¹⁵ and hence could not be described any more accurately than the limited conventions of landscape description allowed.

As Eurocanadians realized increasingly that the wilderness created its own opportunity, Native peoples, logically enough, were seen increasingly as remiss for not seizing it.¹⁶ With one breath, the beauty of the landscape could be described - or stated as indescribable - while with another the value of timber, mineral, fish and other resources could be asserted. The land use patterns of the Ojibway neither tamed the wilderness into a garden nor took full, rapacious advantage of the abundance of resources. Thus the land was seen as unused in any significant way and therefore wasted on the few Ojibway who claimed such a large territory - another requirement of the utilitarian/Lockean approach to acquisition of property.

George Grant observed that "not much use have they ever made of the land."¹⁷ When Captain Butler was called upon by the chief at Hungry Hall to make a speech, he was momentarily at a loss for words. Observing the untouched land and the apparent poverty of the chief,

¹⁵ The disappointment of Britishers as the realization spread that the 'wild Indian' of the West was no more has been described by R.G. Moyles and Doug Owrap, *Imperial Dreams and Colonial Realities: British Views of Canada, 1880-1914* (Toronto: University of Toronto Press, 1988), 169.

¹⁶ Owrap, *Promise of Eden*, 72ff.

¹⁷ Grant, *Ocean to Ocean*, 33.

the best Butler could do was lecture him on using the bounty around him.¹⁸ On hearing the speech of a Fort Francis chief who decried the lack of animals to hunt and the resultant poverty of his people, Palliser "answered that they were to blame for not endeavouring to cultivate their lands and find other resources for maintaining themselves besides hunting."¹⁹

These sanguine observations and generalizations belie the passionate attachment of the Ojibway to the land and its wealth of resources. Furthermore, the Ojibway were not prone to allowing whites simply to take those resources without any compensation.

8.2: Chief Blackstone Defends His Rights

The most dramatic expression of this concern came in 1872 as one of the chiefs who would eventually sign Treaty #3 attempted, with some success, to control the activities of miners and others who had moved with neither permission nor compensation onto his lands. The Boundary Waters Ojibway chiefs had concluded sixteen days of negotiations with the Treaty Commissioners, Simpson, Dawson and Pither with no treaty having been signed. In their report to Joseph Howe, the Treaty Commissioners noted among their reasons for their failure that the "Chief of the section where the discoveries have taken place was emphatic in expressing his determination to keep

¹⁸ Butler, *Great Lone Land*, 162-3.

¹⁹ Spry, *Palliser Papers*, 78, footnote 1.

mines from his country until he had been paid for his land."²⁰ Just which chief this was is unclear from this report, but most likely the reference is to Blackstone, who had been involved in the prospects of a treaty from the beginning, was well known to Dawson, and was actively attempting to curtail mining activity until a treaty was signed.²¹

Blackstone was a controversial figure, not only for his activist stance on minerals but in terms of his relationships with Dawson and Wemyss Simpson, two of the Treaty #3 commissioners. As well, he played an important role during the negotiations. According to Dawson, Blackstone was seen by other chiefs as a minor figure, an American Indian, whose limited status was based on his abilities as an orator. Nonetheless, he was chosen as a "deputy" by the treaty commissioners, a decision that raised Blackstone's status considerably during the negotiations. It may be that, being seen as

²⁰ NAC, RG 10, vol. 1868, file 577, Treaty Commissioners Simpson, Dawson and Pither to Joseph Howe, July 17, 1872. Emphasis in the original. The commissioners noted that the Ojibway "seem[ed] fully alive to their own interests and evince[d] no small amount of intelligence in maintaining their views."

²¹ In his December 1873 report on the adhesion to Treaty #3 of the "remaining bands" that had not attended the Fort Frances negotiations, Dawson named Ke-ba-quin as the chief in whose area gold had been discovered. According to his report, the three chiefs "comprehended perfectly the nature of the obligations into which they were about to enter, that the surrender of their Territorial rights would be irrevocable, and that they were to stand forever in new relations to the white man." Dawson made no comment on the issue of compensation for minerals. Ke-ba-quin can hardly have been the chief referred to in the 1872 report. PAM, Morris Papers, MG 12, B2 K, #86, S.J. Dawson to Minister of Interior, Dec. 26, 1873; see Canada, *Indian Treaties and Surrenders*, 1:307, for a copy of the adhesion.

a troublemaker who was quick to complain and even take direct action on his complaints, the commissioners wished to mollify him by granting him some of the status he apparently sought. In his brief preliminary note informing the Department of Indian Affairs that a treaty had been successfully negotiated, Morris indicated that Blackstone had "behaved admirably," a comment that reflects concern over just how the chief might conduct himself.²²

Whatever Blackstone's standing among the chiefs, he was certainly willing to take action against those he saw as trespassers upon unsurrendered Indian lands. Blackstone disrupted the efforts of steamboat builders at Lake of the Woods in 1871. F.B. Marshall, the Government officer who accompanied the builders, implicated Blackstone in the burning of their equipment and supplies.²³ Marshall reported in April 1872 that the Indians at the "North West Angle of Dawson's Route ... were found to be very much opposed to the cutting of wood in that locality." Marshall was again accompanying boat builders on contract with the government to build six steamers, but "the Indians stopped the work, not allowing them

²² See AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 203-5. There is no point here in going into the letter, alleged to have been written by Blackstone and taken to Ottawa by Antoine Tremblay, in which Dawson was accused of seeking a treaty only because he had an interest in mineral lands and in which he was personally slandered as well. Dawson's rebuttal and the positive tone of his reports belie the veracity of the letter.

²³ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, F.B. Marshall to Department of Indian Affairs, September 29, 1872, p. 202.

to cut timber of any kind." Arrangements were made to pay with barrels of pork and flour for cordwood cut by the Indians, and this particular situation was mollified.²⁴

By July 1872, Blackstone was calling for the cessation of mining activity, under threat of force from the Rainy Lake Ojibway if necessary.²⁵ Most notably, Blackstone's aggressive stand created brief havoc for William Frue at the gold mine he was opening at Shebandowan. At Silver Islet, Frue was more than a superintendent of the work; he was a shareholder in the company, had set up the mine in the first place, and in his first year of operation at least was on a bonus system that rewarded him well if the price of the mine were repaid in that year.²⁶ Whether he had a similar relationship with the Shebandowan mine is not known, but Frue appears to have been a non-nonsense man who would not brook opposition to his interests.

²⁴ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, F.B. Marshall's Remarks on Indian Affairs in Lake of the Woods Section, April, 1872, p. 191. Marshall considered Blackstone to be a "most notorious scoundrel" who "requires to be watched". Ibid., F.B. Marshall to Department of Indian Affairs, September 29, 1872, p. 202. Marshall castigated Indian Agent Pither in only slightly more generous terms in an apparent attempt to inherit Pither's job.

²⁵ Letter of July 7, 1872, published in the Fort Frances newspaper and quoted by Holzkamm, "Ojibway Knowledge of Minerals," 92. See NAC, RG 10, vol. 1869, file 582.

²⁶ Arthur, *Thunder Bay District*, 143, footnote 4.

These concerns may explain in part the variations in Frue's reports of Blackstone's activities. To Patrick C. Phelan of Boston, who was handling stock for Frue, he minimized the problem, almost glossing over it in his eagerness to report how well the mine was doing. Informing Phelan of the work stoppage caused by Blackstone, Frue asserted that "this trouble can of course be easily over come."²⁷ He was more expansive with Edward Trowbridge of Detroit, whom he wrote that same day:

I am sorry to state that work on the goldmine for the present is suspended owing to 'Blackstone', the Indian Chief, having paid the mine a visit on the 29th of March. He ordered the men then employed to discontinue their work, stating that the Government had no right to dispose of land belonging to him. There were only three men at work at the time and they did not feel disposed to dispute possession-ship and the[y] abandoned the same.

This occurred the second day after I had left the 'diggings'. Had it occurred a month earlier, I would have sent the men back in sufficient force to have defended themselves against any attack that Blackstone might have been disposed to risk, but owing to the break up which, judging from appearance is now upon us, I have concluded and let the mine lie idle until after the opening of navigation. I have, however, got sufficient rock from there to show visitors that it has value. I have no doubt but the Government will be able to perfect a treaty with the Indians early in the summer. It is my intention to write to some of the Canadian Government officials and advise them of Blackstone's movements.²⁸

Frue promptly wrote to two officials in the Ontario government. His account to Hon. F.W. Cumberland of Toronto, enclosing a copy of a

²⁷ NAC, Algoma Silver Mining Company Papers, C-1336, W.B. Frue to Patrick C. Phelan, April 4, 1872.

²⁸ NAC, Algoma Silver Mining Company Papers, W.B. Frue to Edward Trowbridge, April 4, 1872.

letter (not recorded on the file) to Scott, Commissioner of Crown Lands, was rather more strident than a mere report on Blackstone's "movements":

From the contents of the enclosed [letter] you cannot fail to see the great damage that I have sustained by the unexpected and sudden stoppage of my works and if you can consistently do anything to prevent a recurrence of the same you will place me under many obligations.²⁹

Frue also sent a copy of the letter for Scott to Adam Crooks, Attorney-General for Ontario, indicating to Crooks that the letter to Scott "will give you some idea of the uncertainty of mining or even the title to such property." Frue sought redress through Crooks: "If you could do anything to reinstate me in my rights you will place me under many obligations."³⁰

One irony of this situation is the fact that Indians had been employed by Frue to cut a road for the Shebandowan mine, but they had been let go as of March 1, 1872, upon completion of the work only a few weeks before Blackstone's visit.³¹ His experiences with Blackstone did not put Frue off the necessity for Indian labour; in June he suggested the hiring of a few Fort William Indians to pack

²⁹ NAC, Algoma Silver Mining Company Papers, W.B. Frue to F.W. Cumberland, April 4, 1872.

³⁰ NAC, Algoma Silver Mining Company Papers, W.B. Frue to Adam Crooks, A.-G. Ontario, April 4, 1872.

³¹ NAC, Algoma Silver Mining Company Papers, Frue to Capt. Duncan Laurie, Shebandowan Gold Mine, March 12, 1872.

ore samples out from the Black Bay location, since no road had been cut, and employed an Indian guide.³²

8.3: Natural Resources and Treaty #3 Reserves

As Blackstone's example indicates, the desire to develop newly discovered resources in the Boundary Waters region and the need to honour the requirements of Treaty #3 that reserve lands be set aside for the Ojibway produced unavoidable conflict. A number of factors heightened the tension that would have existed anyway between these two goals. The Ontario-Manitoba Boundary Dispute increased the chances of opportunism already provided by the inability of governments to articulate clear policies regarding resources on Indian lands. Development of resources and development of policy were virtually simultaneous. For example, in December 1872, the federal government moved from a system of private sale of timber limits on Indian Reserves to public auction which, a test had revealed, would bring in much higher prices.³³ Two years later, Crown Timber Agent A.J. Russell, a man of twenty years experience, argued that government responsibility as trustee of the Indians necessitated getting the best possible price for timber on Indian

³² NAC, Algoma Silver Mining Company Papers, Frue to Simon Mandlebaum, Boston, June 10, 1872; Frue to Hugh Wilson, P.L. Survey, Fort William or in Camp, June 10, 1872.

³³ NAC, RG 10, vol. 1881, file 1116, Order in Council Changing the System of Selling Timber Permits By Private Sale, Joseph Howe, Sec. of State for the Provinces, to the Privy Council, Dec. 26, 1872, recommending the new system. An Order in Council to this effect was approved on Dec. 28.

lands. Russell had been an agent for twenty years and worked against the abusive practice of acquiring lots under the pretence of settlement then using them for the timber. His ideas had influenced regulations adopted by the Ontario government in May 1869. He recommended that timber licences for Indian lands be subject to provincial regulations.³⁴

By 1883, the situation regarding theft of timber on Indian Reserves had worsened and the Superintendent General recommended selling off the timber as soon as possible. John Hourigan was hired May 14 as a Forest Ranger based in Rat Portage to prevent thefts and count sold timber. He was to go through the area and assess the timber on Treaty #3 Reserves. "This information should be obtained quietly and reported confidentially" to the Superintendent General.³⁵

Perhaps the strangest manifestation of the rather *ad hoc* approach to Indian lands involved the construction in 1884 of a saw mill on a wild land reserve by J. Kavanaugh, a partner of McAuley, who was handling the actual work. Kavanaugh had requested permission to lease or purchase 30 acres for building a mill that would employ 75

³⁴ NAC, RG 10, vol. 1935, file 3600, Crown Timber Agent A.J. Russell Sending a Report Re Indian Timber Regulations For Ontario & Quebec, June 27, 1874. Russell had been asked by the Deputy Minister of Indian Affairs, E.A. Meredith, to reply to enquiries from a lumberman regarding timber on Indian Reserves.

³⁵ NAC, RG 10, vol. 3635, file 6664. Hourigan became a casualty of the settlement of the Boundary Dispute, when he was suddenly and unceremoniously let go by a federal government that had no more work for him to do.

men and cut 10 million feet of timber. He received approval from Indian Affairs on the understanding that he would require permission from the Indians as well, who were away hunting at the time. Superintendent General of Indian Affairs John A. Macdonald thought the Indians would approve, but it was Kavanaugh's risk. On this understanding, he received a twenty-one year lease for 30 to 160 acres.³⁶ The Indians were outraged to learn of the lease, which they saw as against "the bargain made with Our Great Mother." A petition signed by Mawundopanase, a Treaty #3 signatory, and three other chiefs, as well as four councillors, four constables and four messengers, was sent to the governor general, The Marquis of Landsdowne, and apparently Kavanaugh was ordered to shut down.³⁷

Bad practices were not soon forgotten by the Ojibway and restitution for unfair treatment in the past could be a factor in later negotiations. This was the case during the final round of negotiations of Treaty #3, when the first concern expressed by the Ojibway was a reminder of Dawson's failure to pay as he had promised for wood cut for the steamers and along his Red River road.³⁸ Similarly, when John Gardner sought to purchase the pine

³⁶ NAC, RG 10, vol. 3693, file 14281, R. Sinclair, Acting DSGIA, to Macdonald, August 21, 1884, with Macdonald's note of August 23 in the margin; McColl to Macdonald, October 2, 1884.

³⁷ NAC, RG 10, vol. 3693, file 14281, undated petition.

³⁸ Morris, *Treaties of Canada*, 56-7. Dawson's reply had Lockean overtones as he invoked the rights of the common. The Indians wanted payment for any wood taken; Dawson responded that "wood on which Indians had bestowed labor was always paid for; but wood on which we had spent our own labor was ours."

timber on I.R. 35J in August 1888, offering \$3.00/per million feet, Chief Naitumeequan enquired whether Macauley & Co. had ever paid for the seventy-seven trees they cut in 1881-2. The band had learned from this experience and did not want to sell the timber on "mere promise" of payment without knowing how much they would get for it or when. A few months of correspondence ensued between the Department and Indian Agent McPherson before they resolved that Macaulay had cut 489,000 feet in trespass on I.R. 32 prior to January 14, 1881, when he was told by the Department to stop, and 411,000 afterward. He paid \$1800 in trespass dues on April 21 and Dick, Banning & Co. paid an additional \$822 for the 411,000. McPherson had reported on January 31 that year that seventy-seven trees had been cut on I.R. 35C for timber shanties, but no dues had ever been paid. McPherson was instructed in May 1889 to approach the band to determine whether they wished to sell the burnt timber on the reserve, Macauley's price being "altogether too low" for the green timber.³⁹

³⁹ NAC, RG 10, vol. 3805, file 51467, for Gardner's application. See also NAC, RG 10, vol. 3801, file 49179, for a road cut through I.R. 35G by the Rat Portage Lumber Co. In June 18, 1888, McPherson informed Inspector of Agencies E. McColl that Chief Naituniequan[?] had laid a complaint against Dick, Banning & Co. for cutting a road without permission through I.R. 35G. The Department informed McColl that the company was in violation of section 26 of the Indian Act, McPherson was to seize the trees and the company was to stop using the road. This road was last mentioned in 1907, when George H. Kelly, Lake of the Woods Milling Co., wrote to R.S. McKenzie about using the old road on 35G for taking out stove bolts. The Department informed McKenzie that Kelly could use the road as long as "no damage is done and that they pay to you whatever sum they consider the privilege worth."

One problem within the Department of Indian Affairs revealed by this application was its inadequate record keeping. The Department alleged it had "no record in this Branch of any timber having been cut by Macaulay"; furthermore, the accountant could not provide a breakdown for the 900,000 feet of "Timber cut in Error" by Macauley on Indian Reserves 32A and 35C. Another problem was the lack of adequate knowledge within the Department of the timber resources available on Indian Reserves. Lumbermen in the area were sometimes the first to become aware of the potential on a reserve. In 1888, Walter Oliver of Rat Portage sent Inspector McColl a "lyst" of Indian Reserves with burnt timber on them that "should be cut this winter or it will be useless." He offered \$2.50/1000 ft board measure, substantially more than Macaulay's figure. McPherson replied to McColl that the timber on these reserves should be assessed, even though he had not met with the "principle Indians that own those Reserves." He wondered whether the Department could arrange to have the Indians cut it themselves for sale by the Department "for their benefit ... rather than giving it to parties that will only take the choicest of the timber and leave the rest to spoil or rot."⁴⁰

McPherson's reply suggests other difficulties faced by Indian Affairs in its administration of resources on Indian Reserve lands. Who should cut the timber, the Indians or outside lumbermen? The

⁴⁰ NAC, RG 10, vol. 3805, file 51467, McPherson to McColl, Sept. 28, 1888. Oliver had sent his letter on Sept. 7.

Department did not seem to have a policy that addressed this question. If it did, then the Agent in the area - McPherson - was unaware of it, another apparent problem. McPherson hinted at a further difficulty, that lumbermen would take out only the best timber and the reserves would be left with inferior stands. This raises the associated questions of regulation of cutting and of forestry practices.

The opening up of a new region coupled with the jurisdictional issues that affected it for twenty years plus small bureaucracies and inefficient communications added up to difficulties for the Department. Large companies could play the Dominion and Ontario governments off against each other, applying pressures and acting with some impunity in the absence of government control. One example of this pressure from a company is the manner in which the Rat Portage Lumber Company sought permission to build a dam on Wasaw Creek on Stangecoming Indian Reserve in 1897-1898.⁴¹

The construction of lumber and colonization roads created problems at all levels, on the reserves, for the builders and within the bureaucracies. In 1904, after the Ontario Commissioner of Roads, Neil McDougall, authorized construction of a mail road across Wabigoon I.R. 27, Chief John Brown and Councillor William Chief protested, asserting that they had "not given nor been asked to give permission for the cutting of this road." They sought advice

⁴¹ NAC, RG 10, vol. 1981, file 6124-12.

on safeguarding their rights, noting that the "white men in this district seem to have no regard for our property and their frequent infringements on our Reserve is a constant source of annoyance for us."⁴² Apparently, the Ontario Department of Public Works had provided funds for a mail road and McDougall had refused to stop cutting when the Indians asked him to. Indian Affairs had consented to a road in 1900 after L.J.A. Levesque, Inspector of Indian Agencies at Rat Portage, had informed the Department that the Indians would permit a road if they could work on it. After receiving the protest, the Department decided to find out whether any Indians had been hired. It turned out that a road had been built in 1900 (in spite of the Department's warning to Levesque that it could not be constructed until Ontario confirmed the Reserve, which had not yet been done) and now Public Works wanted to make a new one and this had upset the Indians. Agent McKenzie noted that the Indians had been offered jobs on the new road but had refused. Henry Smith, Superintendent of Colonial Roads, explained on March 29, 1904, that only a winter trail had been built through the reserve, not a road at all. Indian Affairs thought the Band would accept this explanation.⁴³

This account illustrates a number of realities: the Ojibway lacked the control over their reserve lands that they believed they should have; they had difficulty translating their required permission

⁴² NAC, RG 10, vol. 3556, file 25, pt. 24, Jan. 27, 1904.

⁴³ NAC, RG 10, vol. 3556, file 25, pt. 24, April 8, 1904.

into jobs for themselves; agents on the ground did not follow their governments' policies (how did McDougall decide to proceed? with the consent of Levesque and/or McKenzie?); the exigencies within the region could take precedence over the attempts at control from the metropolises.

Two more examples will suffice to illustrate these difficulties. In 1903, R.A. Mather of Keewatin Lumber Co. and J.W. Short, a Canadian Pacific Railway contractor, requested roads for hauling logs be cut through Indian Reserves 31D and 31A/35A respectively. Mather was given permission as long as a record was kept of logs cut, for which payment would be made to the Indians. The Department could not consult in time with the Indians to get permission soon enough to benefit him, so presumably the road was not built.⁴⁴ Short decided to cut a road outside the reserve in 1904, but some timber was cut inside the reserve by mistake and the Indians complained. The Department decided the amount involved was insignificant and that the Indians had complained before learning all the facts.⁴⁵

A few years later, Red Sky informed Indian Commissioner Laird that he and nine of his men had cut a road from Indian Bay to Ingulf Station as "a short cut for us in to Kenora." He wanted the Department to pay them for the work (2.00/day for the men and 4.00/day for himself). The Department refused to pay, Indian Agent

⁴⁴ NAC, RG 10, vol. 3556, file 25, pt. 25.

⁴⁵ NAC, RG 10, vol. 3556, file 25, pt. 25.

McKenzie having informed the Commissioner that the road was for the "exclusive benefit of the Indians" and he could not understand why the Department would consider paying. Laird expressed this opinion to Red Sky, noting that the road was outside the reserve and "I do not think the Indian Dept would consent to pay for work mostly through Ontario Government lands."⁴⁶

As with timber on Indian Reserves, the relationship between mineral lands and Indian Reserves was still being worked out. Deputy Superintendent General Spragge noted in a memorandum of September 5, 1872, that, upon learning of the discovery of precious metals in the region, the Ojibway had

taken serious umbrage at lands being sold and patented by the Government of the Province of Ontario, while as yet the Indian Title thereto remains unextinguished.

Another subject of complaint is that their timber has been taken for the construction of Government vessels, and other purposes - and they have not yet been paid for it.⁴⁷

Spragge determined that these patents were given out west of the height of land, i.e., in "unsurrendered Indian territory." The Ontario government was bound by the Indian Act of 1860, which protected the right of Indians to unsurrendered lands and so, if the Indians seek any of these patented lands as reserves, then the

⁴⁶ NAC, RG 10, vol. 3556, file 25, pt. 25, Red Sky to Laird, Dec. 22, 1908; Laird to Red Sky, Dec. 31, 1908.

⁴⁷ AO, Irving Papers, Mu 1514, 75/16, [1910], Ontario v. Dominion, Record of Proceedings, 197.

patents would have no value.⁴⁸ Spragge then made the strange suggestion that the Treaty commissioners "be empowered to exempt from surrender a block of land to contain 10,000 acres, which shall include the mineral locations sold by the Government of the Province of Ontario." A more reasonable suggestion was that the Indians should be paid for the wood taken, an amount that would prove "inconsiderable," especially in light of the good will it would foster.⁴⁹

Dawson had asserted prior to the signing of Treaty #3 that the territory was unorganized and so no one could acquire the minerals.⁵⁰ Morris echoed this in his report of the successful negotiation of the treaty, calling for the immediate establishment of reserves, since "no mining, lumber licences, or sales should be made till this is done."⁵¹ The Ojibway themselves were concerned that reserves be laid out quickly, since they were experiencing already pressures from whites who sought "wood for sawing."⁵² They too linked economic development by whites to establishment of

⁴⁸ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 197.

⁴⁹ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 198-9.

⁵⁰ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 207.

⁵¹ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 226.

⁵² AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 255.

reserves: Chiefs Katakepenis and Wawosing wrote to the Lieutenant-Governor in May 1874, informing him that:

All the Indians who were parties to the Treaty wish to have an understanding about the land Reserves, that being the most important part of the Treaty. After we have selected our claims, then the white man can go about and search for minerals, etc. ... We have been told by the Indian Agent at Fort Frances that the Commission would go from camp to camp and measure the allotments to them. We would prefer to select our own lands.⁵³

A year later, some Lake of the Woods Ojibway had an "anxious desire" to have their reserves established, for "parties have been cutting timber on the Reserves" and they were concerned that this activity would increase, "and perhaps result in heavy loss for them."⁵⁴

Trespass on their Reserves continued to be a serious problem for the Ojibway. In 1879, a number of bands requested a resurvey of their reserves because, as Pither explained to Vankoughnet, they "see Whites going through the country exploring for limits; and they are apprehensive that the sites which they have chosen may be taken up." Surveying had been started but not finished, and a month passed before the Department replied that Surveyor General Lindsay Russell had been asked to survey "so soon as may be considered best in the public interest." This particular situation dragged on for

⁵³ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 260.

⁵⁴ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, 276.

a few years and, although the Department tried to expedite the process, as of June 1882 nothing had happened.⁵⁵

The Ojibway had genuine reason to fear for the resources of their reserves because, as noted in chapter three with additional examples here, the failure of governments to resolve the Boundary Dispute increased the threat to these resources. The terms of the Treaty were often overlooked in the conflict between economic interests eager to develop resources on reserves and the Ojibway's desire to gain benefits from their lands. Chief Thomas Lindsay's speech of 1890 is a strong statement of the dilemma in which the Ojibway could find themselves. As chief of the Rat Portage Band, whose reserve lands included Sultana Island, he had a good deal of experience with these conflicts. On August 4, 1890, Chief Lindsay walked into Indian Agent Pither's office and informed him of the problems he and his band faced:

The chief of 38B Reserve came in today, and made a speech in reference to that part of their Reserve which they surrendered to the Department and now known as the Sultana, and said that he heard that the Keewatin Lumber Co. laid claim to the Peninsula which we surrendered to the Department in which we found gold. We reserved this land long before the Treaty and we had gardens on it long before the Treaty of 1873, and it is only an Island when the water is high in the Lake. Since the Dam was built across the mouth of the River it is higher and has killed all our Wild Rice and nearly all our Hay fields are now covered with water. Our Rice is a great loss to us, and again at the Treaty we were promised that on any Islands

⁵⁵ NAC, RG 10, vol. 3697, file 15706, Pither to L. Vankoughnet, Aug. 15, 1879. Russell had been involved in the early attempts to negotiate Treaty #3, but was replaced by Wemyss Simpson upon becoming Surveyor General.

on which we had Gardens we were allowed to keep them and above the quantity we were to have for our Reserves[.] We were promised at the Treaty that if we discovered any Valuable Minerals on the Reserves the land would be sold with our consent and the money placed to our credit. Now we discovered Gold on the Reserve or Peninsula and we surrendered part of it to the Department and we now hear that the Keewatin Lumber Company lay claim to it. On the strength of the promise made to us at Treaty we surrendered the land and we now hear that we are to loose [sic] it. We have always endeavoured to follow the promises we made to the Queen at the Treaty and we hope and trust the Queen will fulfill her promises made to us at the Treaty.⁵⁶

Simon J. Dawson recommended to the Minister of the Interior that wild land (as opposed to farming) reserves should include areas "where timber is to be had, or valuable minerals likely to be found," so "as to afford an early prospect of their returning a fair revenue" for the Indians.⁵⁷ The Minister made his recommendations to the Privy Council in June 1874. These included the appointment of Dawson and Pither to select the reserves "at the earliest possible moment." Both men had extensive knowledge of the Ojibway and the country and had gained "in a peculiar degree the confidence of the Indian tribes for whom the Reserves are to be selected." Dawson had already done some preliminary work on the location of reserves; while the Minister could accept one wild land reserve on Rainy River, he recommended that

⁵⁶ NAC, RG 10, vol. 3696, file 15410, R. Pither to E. McColl, Aug. 4, 1890; on Aug. 15, 1890, as requested by the Band, McColl sent a copy of the speech to L. Vankoughnet.

⁵⁷ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, S.J. Dawson to Minister of the Interior, March 2, 1874, p. 252.

the other Reserves of this class yet to be selected should be removed as much as possible from the probable line of settlement, and that they should not be taken from the more valuable portion of the territory.⁵⁸

Thus did the Minister of the Interior overturn Dawson's suggestion regarding wild land reserves. The Privy Council followed the Minister's lead and Dawson was instructed in 1875 to ensure that Indian Reserves in Treaty #3 did not include "any land known to the Commissioner to be mineral lands" or any lands for which patents had been sought from either the Ontario or Dominion governments.⁵⁹ The Dominion requested from Ontario information as to just where these patents were so that this information could be forwarded to Dawson.⁶⁰ The Ontario government was happy to oblige.⁶¹ Dawson reported in October 1875 that most of the Indian Reserves had been laid out in accordance with that stipulation.⁶² This decision was made, it is worth noting, in the period during which the Dominion

⁵⁸ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, Departmental Memorandum to Council as to Selection of Reserves, June 24, 1874, p. 259.

⁵⁹ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, Order-in-Council, July 8, 1874, p. 261.

⁶⁰ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, Department of Interior to Secretary of State, July 13, 1874, p. 262.

⁶¹ AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, T.B. Pardee to Minister of Interior, July 31, 1874, p. 265.

⁶² AO, Irving Papers, Mu 1514, 75/16, [1910], *Ontario v. Dominion, Record of Proceedings*, S.J. Dawson to Minister of Interior, Jan. 28, 1875, p. 268.

and Ontario governments were discussing how they would handle licensing of resources in the Disputed Territory during the Boundary Dispute. The tone was set for governmental approaches to lands reserved for the Ojibway.

CONCLUSION

The Ojibway were confronted with such rapid change in the half century following the signing of Treaty #3 that their abilities to adapt were severely strained. Certainly, adaptations had been made in the past. For example, the fur trade provided new technologies and new wealth, although at the risk of dependency upon European goods and alcohol. As the fur trade period passed and Eurocanadian interest in the region increased in the later nineteenth century, the Ojibway turned to the new economic opportunities and challenges that followed. The negotiation of a treaty provided the opportunity to set the terms of the new relationship, especially as these related to land and its use. Important goals of the Ojibway were to maintain an identity of their own and some reasonable control over their own affairs and the lands and resources left to them through the Treaty. These are positions they made clear during the Treaty negotiations and continue to maintain.¹

Matters were made immeasurably more difficult, however, by the impact on the region of the economic, political and legal issues discussed in this dissertation. In the absence of these issues, the Ojibway would still have faced increased pressures on the land base from an alien culture with completely different ideas of resource

¹ A recent pamphlet traces briefly the assertions of self-government by the Ojibway from before 1873 to the present; TARR, Grand Council Treaty #3, "Indigenous Government of Treaty #3 Indians," April 1992.

use. But the situation of the Ojibway was made extremely complex by the Boundary Dispute, which brought in its train confusion and competition over jurisdiction and title, and the consequent lawsuits involving Aboriginal title and rights. In an attempt to unravel this complexity, the arguments in this dissertation unite the developments in Aboriginal law with the historical factors that shaped them and show how these factors, whether by design or not, contributed to the diminishing of specific rights that the Ojibway had every reason to believe they possessed.

Other factors contributed to such a diminishment, of course. The rights of a few Ojibway could be and were seen as expendable in the face of the nation-building impulses that possessed the new confederation.² Furthermore, these Ojibway lived in and were seen more or less as part of a vast hinterland, almost blending into its landscape. The dominant society would claim that hinterland as its own; the question was simply which branch of the dominant society would benefit from it. Furthermore, it need not compensate the Ojibway for the land as though it were buying the land outright, for, it believed, they did not own that land and never had put it to any significant use other than fishing and hunting.

² Although such a notion can be and has been regarded as racism in action, its philosophical roots are nurtured by utilitarianism, social Darwinism and deeply held notions of property and human rights.

But these attitudes underlie the events under consideration. They are part of the philosophical underpinnings of trends that were taking place everywhere European and Aboriginal peoples came in contact. This study attempts to analyse how such thinking could work itself out in a specific time and place, for even as the attitudes changed and improved, the twentieth century still finds itself locked at times into the patterns and results of the nineteenth.³ Since those results worked so well in favour of the dominant society, change in attitude toward Aboriginal peoples has been sometimes easier to make than change that leads to the full realization of their rights.

9.1: Resource Development on Treaty #3 Reserves

Richard Bartlett has observed that:

the extent to which Indians own or are entitled to the benefit of minerals located in reserve lands is subject to the extent to which the provinces retain an interest

³ The common law has moved in the 1980s toward a notion of Aboriginal title as a *sui generis* right that could embrace ownership of the land. Bartlett makes this argument, but notes, as does Barton, that the content of Aboriginal title is not a fixed entity applicable uniformly in all circumstances. Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990), 79; Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law), 1993, 81-84. However, some justices still adhere to the rigidities of nineteenth century thought. See, for example, the criticisms of Justice Steele's decision in the Ontario Court of Appeal on February 27, 1989, in *A.-G. Ontario v. Bear Island Foundation*, Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket," in *Temagami: A Debate on Wilderness*, ed. Matt Bray and Ashley Thomson (Toronto & Oxford: Dundurn Press, 1990), 185-221.

therein and the degree of recognition accorded Indian mineral rights by the Indian Act. ... The agreements reached between Canada and Ontario ... [and various other provinces] ... with respect to reserve lands and minerals thereon were arrived at after consideration of the concept of the usufruct, the Crown prerogative with respect to precious metals, and the promises made by treaty.⁴

Bartlett has captured in this summary the three major elements behind the struggles between Ontario and the Dominion over the lands that comprise the Treaty #3 region. His comments are applicable beyond the question of minerals on reserve lands, for they characterize the essentials of the debate between governments that produced such seminal cases as *St. Catherine's Milling* and its "corollary," to use Lord Davey's term,⁵ *Ontario Mining vs. Seybold*.

The concept of the usufruct derives from Roman civil law, in which it was the most important of the personal servitudes. It was the "right to use and take the fruits and profits of another's property, movable or immovable, without fundamentally altering its character."⁶ As such, it was personal, residing in the person who held it, not the thing owned by the other; it was inalienable; it restricted the rights of the owner of the property; it made no demands upon the usufructuary; and it was a right that 'ran with'

⁴ Morse, *Aboriginal Peoples and the Law*, 536-7.

⁵ [1903] A.C. 73 at 213.

⁶ Barry Nicholas, *An Introduction to Roman Law*, Clarendon Law Series (Oxford University Press, 1962), 144.

the property and "could be asserted against the world at large."⁷ The "usufruct effects ... a division in time but hardly in content of a single ownership. ... it constitutes the nearest approach that Roman law ever made to the creation of successive and yet simultaneous ownerships."⁸

This is the concept that was brought into the common law of Canada in the *St. Catherine's Milling* decision, first mentioned by Justice Strong in his lengthy dissent in the Supreme Court decision,⁹ then enshrined forever in Lord Watson's words: the Aboriginal title, which their Lordships did not feel compelled to define more precisely, was "a personal and usufructuary right, dependent upon the good will of the Sovereign."¹⁰ Its terms in Roman law have been related at some length because they fit so well with the nineteenth century views of Aboriginal title. The usufruct is a brilliant solution to the problem of reconciling European notions of acquisition of title by the Crown with the unavoidable presence of Aboriginal inhabitants on the lands the Crown came to possess. It allows for an admission of an Aboriginal title or right to the land while preserving both the Crown title and the sense of honour that called for a recognition of the Aboriginal right without the

⁷ Nicholas, *Roman Law*, 144.

⁸ Nicholas, *Roman Law*, 145.

⁹ 13 S.C.R. 577 at 604.

¹⁰ [1888] 14 A.C. 46 at 54.

inconvenience of a denial of the Crown right.¹¹ The Crown right had a 'lien' or 'burden' or 'cloud' upon it (to use the nineteenth century metaphors) that was eliminated in the process of making treaty with the Indians; once their title was extinguished, the Crown right became complete, a "plenum dominium."¹²

As to the resources of the land, "'trees were not fructus, except in a timber estate in which the ordinary profit was in cutting timber, and here the cutting must be done in a husbandlike way. Analogous rules apply to the getting of minerals.'"¹³ But the Indians were not seen as husbanding the land; they merely "roamed and hunted over it." Thus, their rights to the resources of the land could be limited. As this dissertation has tried to show, the result is a "narrow view of rights for the Indians and a broad view of rights for the provinces."¹⁴

The Crown prerogative regarding minerals is another ancient concept that worked against the Indian interest. Nelles traces its journey to the new world from both Britain and France. According to the laws of these nations, only the soil passed in the making of

¹¹ For further discussion, see Cottam, "Twentieth Century Legacy of the *St. Catherine's Case*," in Hodgins, Heard and Milloy, eds., *Co-existence?*, 118-127.

¹² [1888] 14 A.C. 46 at 55.

¹³ W.W. Buckland, *Manual of Roman Private Law*, 2nd ed. (Cambridge: University Press, 1939), 162; cited in Bartlett, *Indian Reserves and Aboriginal Lands*, 76.

¹⁴ Barton, *Canadian Law of Mining*, 91.

treaties or sales of land; the minerals of value, the 'precious' or 'Royal' metals gold and silver, remained the separate property of the Crown. Similarly, the Crown owned the timber; those receiving land from the Crown could cut only enough to meet their needs.¹⁵ Commenting upon the reform in Upper Canada in the nineteenth century of the laws pertaining to resources, Nelles observed that

somewhat unexpectedly the provincial government emerged from an era of political and economic liberalism with a great deal of its authority intact. It still possessed, for example, property rights whose origins could be traced back to the ancient prerogatives of the Crown.¹⁶

This dissertation has traced this result from a different perspective than that employed by Nelles. One result of the federal/provincial struggles that dominated political debate during this era of liberalism was the division of the Crown into its federal and provincial counterparts for the purpose of deciding just how, in a confederal state, the Royal metals would be held. The provinces won on this question and by section 109 of the BNA Act, all lands and the resources within them pass to the province once the Aboriginal title has been extinguished.

The promises made by treaty can be just as contentious, for a large gulf exists between the Aboriginal and Eurocanadian views of the treaty terms. Recently, Delia Opepokew asserted that the

¹⁵ Nelles, *Politics of Development*, 1-31 passim.

¹⁶ Nelles, *Politics of Development*, 1.

written treaties do not correspond with the spirit and intent of the treaties as understood by Indian people. There is a disparity, a significant difference between the meaning of treaty as understood from a plain reading of the text of any of the treaties and what Indian persons say it means.¹⁷

This difference, against which commentators had warned in the 1870s as the numbered treaties were covering the prairies, has remained into the present. Opekokew went on to note:

The disparity between our understanding of the treaties and the actual contents of the written documents disappears if the verbal promises, assurances, and guarantees given by the Treaty Commissioners during negotiations are regarded as an integral part of the Treaty agreements.¹⁸

Only in the past two decades have the courts begun to recognize this discrepancy and follow the principle of construing the terms of the treaties in a 'broad and liberal' manner that gives the benefit of the doubt to the Indians.¹⁹

¹⁷ Delia Opepokew, *The First Nations: Indian Government in the Community of Man* (Saskatoon: Federation of Saskatchewan Indians, 1980), 16-18, quoted in Morse, *Aboriginal Peoples and the Law*, 398.

¹⁸ Opepokew, *The First Nations*, 16-18, quoted in Morse, *Aboriginal Peoples and the Law*, 398.

¹⁹ See Barton, *Canadian Law of Mining*, 87. An early proponent of the principle was none other than Chancellor Boyd!

9.2: The Treaty #3 Ojibway and the Specific Claims Process

Both parties in the treaty relationship have become dissatisfied as a result of this inability to agree upon the meaning of the treaties. As the Aboriginal voice has refused to remain silent and a general consensus has appeared that Aboriginal peoples have been treated unfairly in Canada, the federal government has endeavoured to provide some remedy. In 1973, more than a century after the acquisition of Rupert's Land, the claims of Aboriginal peoples against the Crown were recognized by the government. A two-part process was created that has evolved into comprehensive land claims, addressing lands covered by unextinguished Aboriginal title, and specific claims, addressing perceived and actual violations of treaty rights.

While they appear in their own right to be steps toward resolution of the chronic problems faced by Aboriginal peoples, these processes have created as many limits to finding solutions as they have paths and positive results have been extremely slow in coming. Between 1981-1991, for example, twenty-one specific claims were presented to the various First Nations represented by the Grand Council Treaty #3. Of these, only one has been settled at time of writing.²⁰ These are claims involving lands on a particular

²⁰ Internal TARR document. Presentation to the Bands is a stage in the process; once Bands have approved the claim as presented by TARR, it can then go to the relevant government department.

reserve, as opposed to the more complicated general issue claims that are even more resistant to resolution. General issue claims include the 'outside promise' of minerals on Reserves and the legal status of Reserves prior to their confirmation by Ontario in 1915.²¹ The Ojibway of Treaty #3 have not benefited from the vast profits realized by the owners of the Sultana Mine.²² As well, any claims they have arising from actions taken prior to 1915 are thrown in jeopardy by the questions governments have raised regarding the nature of their rights to the lands reserved for them since, it will be recalled, these reserves were set aside from Ontario without the consent of Ontario. Even though Ontario eventually confirmed them, the nature of the Aboriginal right prior to confirmation, if such existed, continues to be questioned, especially by Ontario.

One could be forgiven for thinking that the 1924 Ontario Lands Agreement had resolved at last the issue of precious metals on the Reserves of Treaty #3. The Indians of Ontario were not consulted regarding the terms of this agreement, however, and they have been reluctant to surrender reserve lands containing minerals.

²¹ A third issue is the headlands-to-headlands issue involving the water boundaries of the reserves, which is not a topic addressed in this dissertation. See Van West, *Formation and Recession of Headland to Headland Boundaries*.

²² As well as taking out a million dollars worth of gold, Caldwell sold the mine in 1898 for 2.25 million dollars to British investors, who failed by 1902 and sold the mine back to Caldwell and other Rat Portage investors. Greg Clark, *Sultana Memoirs* (Winnipeg: D.T. Publishing, 1994), 46.

Generally, such agreements have been "concluded more for administrative expedience than for legal clarification." The result is that these agreements have not provided solutions: the "combination of complexity, contested legal entitlement, and inadequate returns [for Indian bands] has had a dampening effect on mineral exploration on reserves."²³

In 1983, the Office of Indian Resource Policy of the Ministry of Natural Resources decided to question the right of the Treaty #3 Ojibway to metals located on their Reserves. The federal government declined the opportunity to stand up for this right. While nothing came of the court case that resulted, in 1988 Ontario reversed its stand and accepted the treaty right. An administrative resolution to that effect was made by the Ontario Department of Mines and Northern Development in 1991, but the federal government has not yet followed suit.²⁴

The persistent difficulties of the issue of Ontario's confirmation of Treaty #3 Reserves can be traced through the five-part claim of the Rat Portage Band of Indian Reserve 38B. In 1977, the Band decided to revoke any surrenders it had made of Sultana Island, claiming they had been improperly obtained; the governor general accepted this revocation by an order-in-council. The Band then submitted its claim to both the federal and provincial governments

²³ Barton, *Canadian Law of Mining*, 99.

²⁴ Internal TARR document.

on March 21, 1980.²⁵ The Band claims a number of islands in Lake of the Woods, including portions of Sultana Island. Although the Ministry of Natural Resources rejected the claim in 1984,²⁶ OIRP conducted its own research, which was presented in the form of a Research Report²⁷ to the Band and the federal government in 1986. Ontario agreed to further discussion on these claims, but first sought resolution of the issue of the nature of the Ojibway interest in their Reserves between 1873 and Ontario's confirmation of those Reserves in 1915. The result was mediated discussions in 1986-87 between the Grand Council, Ontario and the federal government, designed to help the parties understand each other's positions.

Although the legal positions of the three parties remained in disagreement, the mediation process was considered to be successful in that these positions were clearly presented to each side; legal problems, in particular the reliance upon cases that would be decided differently by the courts if they were to be heard today, were identified; and areas of consensus were reached, especially regarding the validity of the Treaty. No further mediation was

²⁵ Cited by D.J. Bourgeois, "Rat Portage Indian Land Claim With Respect to Land Identified As 'Islands' Adjacent to Rat Portage Indian Reserve #38B, Parts 1 to 5 Inclusive" (Toronto: MNR, OIRP, [July 1986]), 24.

²⁶ "Native Land Claims and Surrendered Indian Reserve Land Issues Currently (September 13, 1988) being Considered by Ontario," 40.

²⁷ Bourgeois, "Rat Portage Land Claim." Part 1 of the claim dealt with Sultana Island.

required and in his report, the mediator expressed his "hope that the mediation may open new doors toward a resolution of the Treaty 3 land claims at an early date."²⁸

This hope has not yet been realized. The powerful attraction to the solutions of the nineteenth century continues. While further research will reveal additional factors pertaining to the post-1924 period, clearly the turmoil of the Ontario-Manitoba Boundary Dispute and the lawsuits that arose from it continues today in the staff meetings of the federal and provincial governments and the workshops of the Grand Council Treaty #3. The notion that these problems could prove interminable has borne up well for over 120 years.

²⁸ Indian Commission of Ontario, "The Pre-1915 Issue: Report on Mediation Conducted at the Indian Commission of Ontario," 18.

MAPS

- MAP 1a: Treaty #3
(NAC, NMC-82696)
- MAP 1b: Ontario-Manitoba Boundary
(Prepared by James White, for *Canada and its Provinces*,
vol. 8, edited by A. Shortt and A.G. Doughty (Toronto:
1914-1917)).
- MAP 2a: Map of the Northern Part of the Lake of the Woods and
Shoal Lake, Rainy River District [1878] (excerpt).
(NAC, NMC-12123)
- MAP 2b: Plan of Survey of Indian Reserve No. 38B Lake of the
Woods District of Kenora [Sultana Island, 1913].
(NAC, NMC-12326)

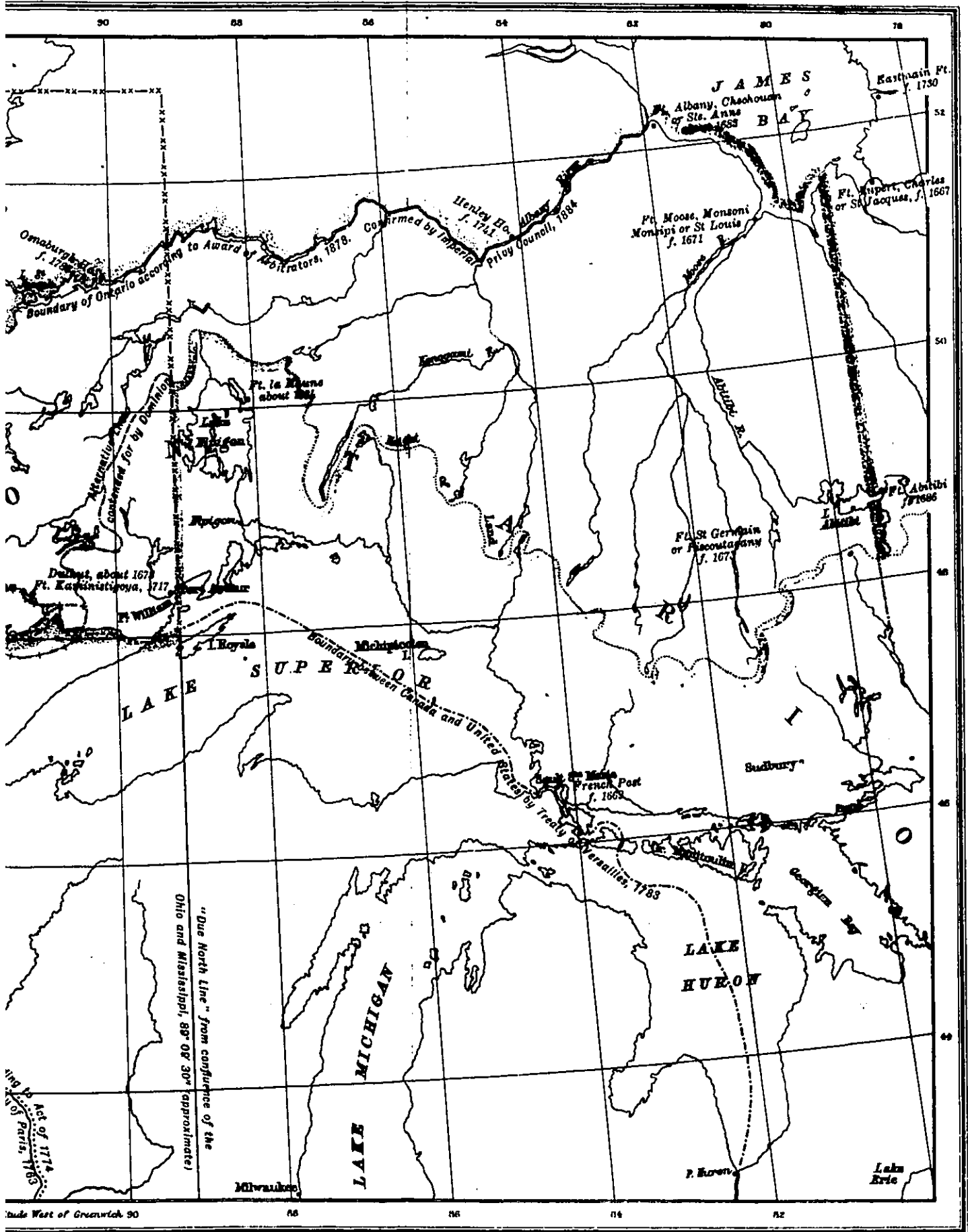
MAP of PART of the
DOMINION OF CANADA
SHOWING TREATY NO. 3

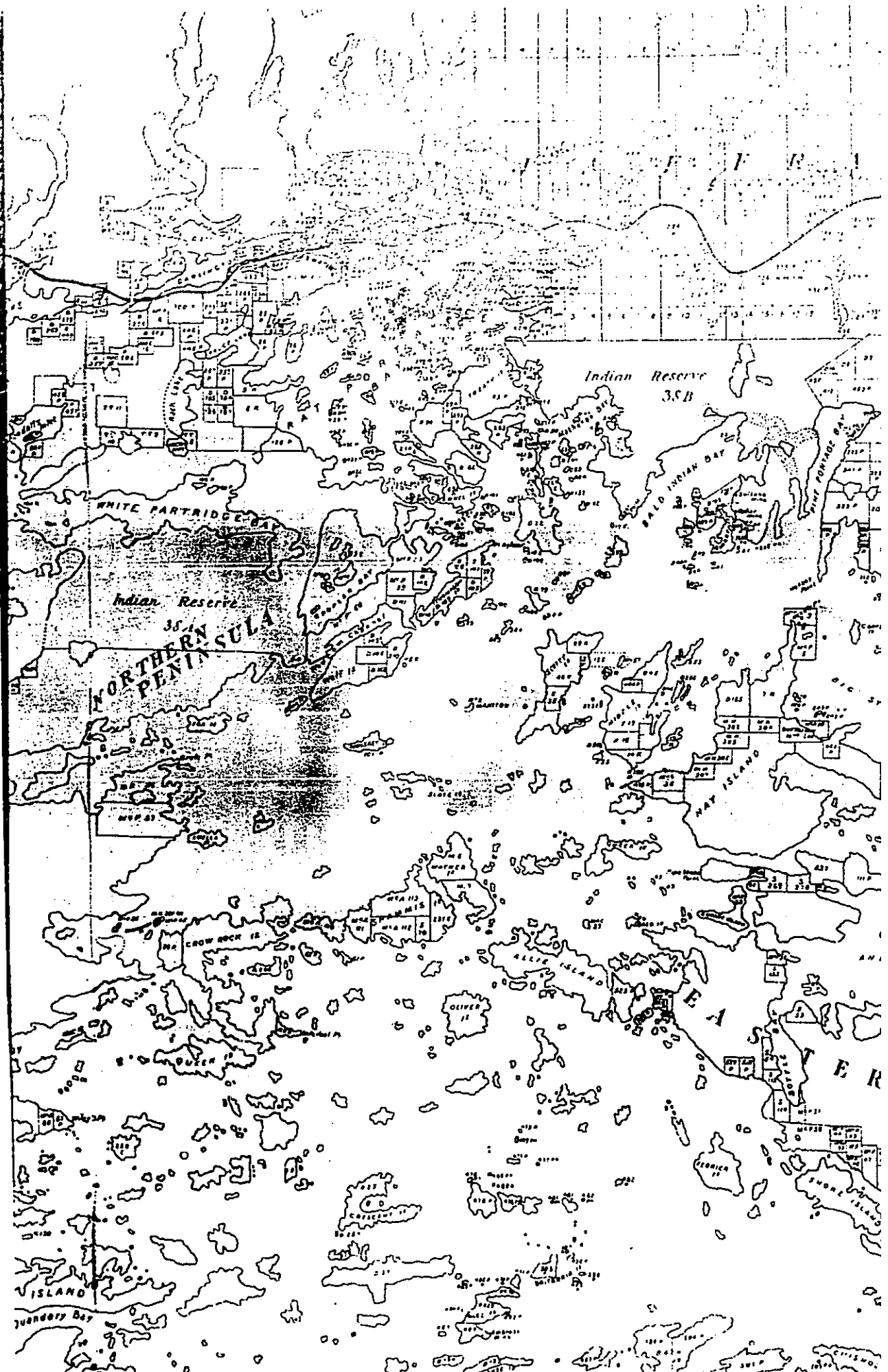
Scale 35 Miles to 1 inch

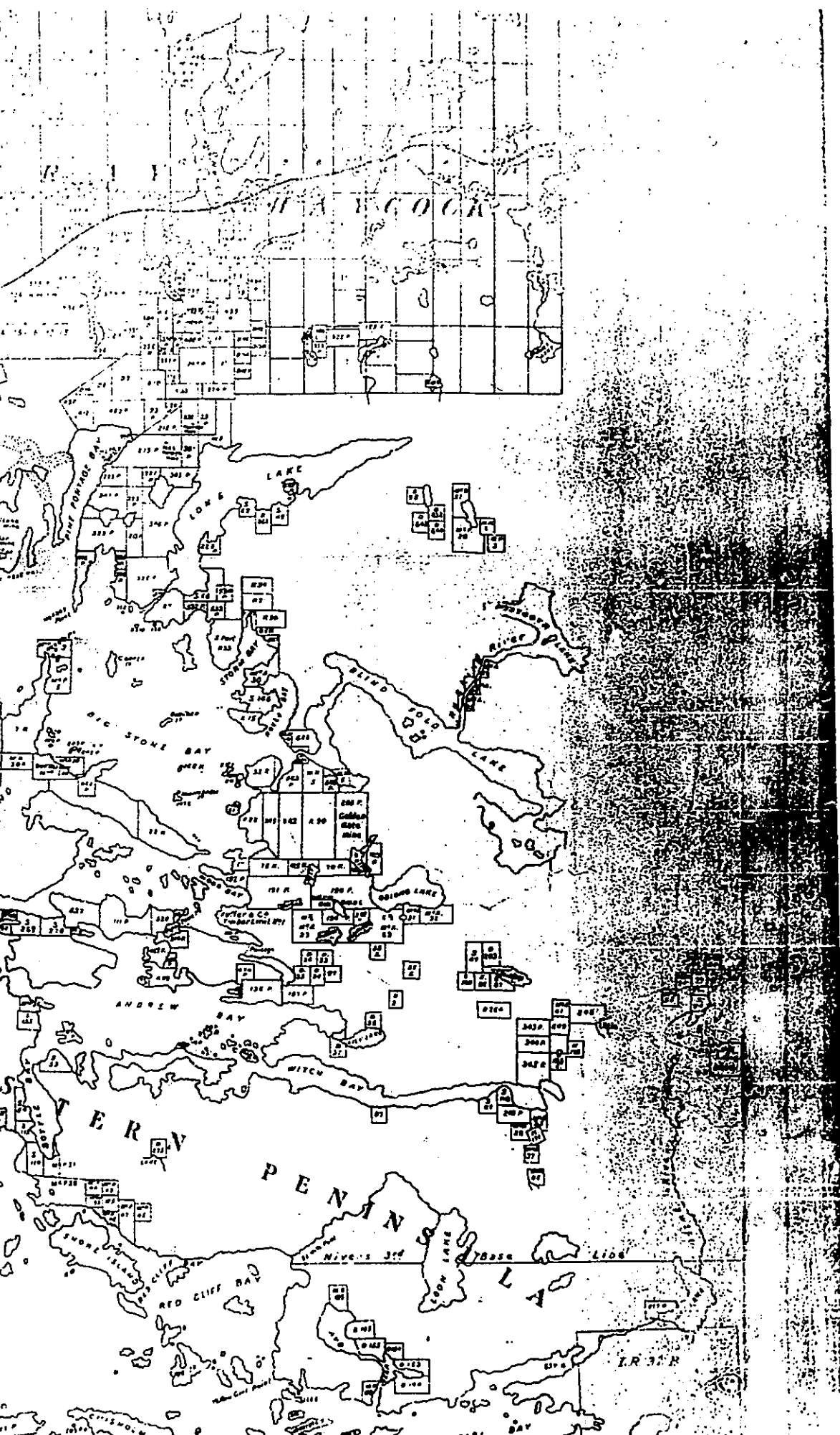


Area of Treaty 3 in Ontario	30,500 sq. miles
Manitoba	5,200 -
Huron	13,600 -
Total	49,300 -

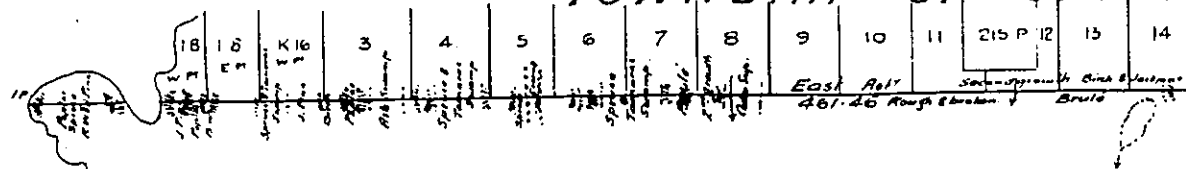
Note - These areas were ascertained by scale
from map of the Dominion of Canada published by
the Dept. of the Interior, 1902. *J. A. Brown*
Chief Surveyor Dept. Ia







TOWNSHIP OF JAFFA



I.R. N° 38. B.

MATHESON
BAY

BALD INDIAN
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LAKE

OF

T

PLAN.

OF SURVEY OF
INDIAN RESERVE
N° 38. B.

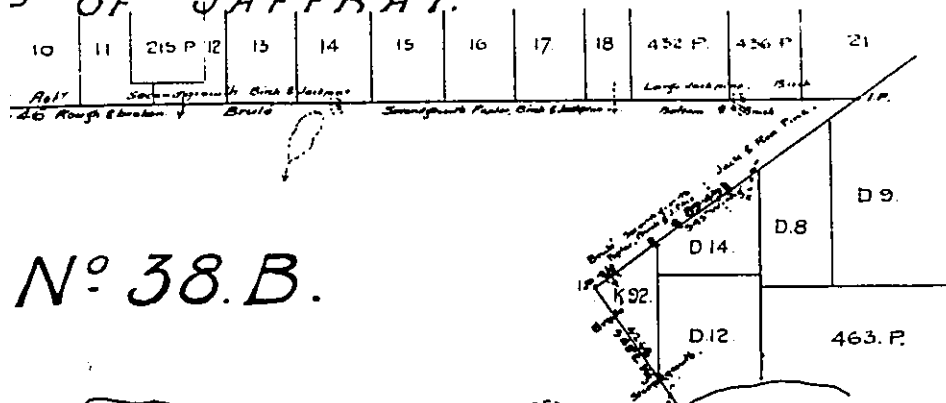
LAKE OF THE WOODS.

District of Kenora.
Scale 40ch^s = 1in

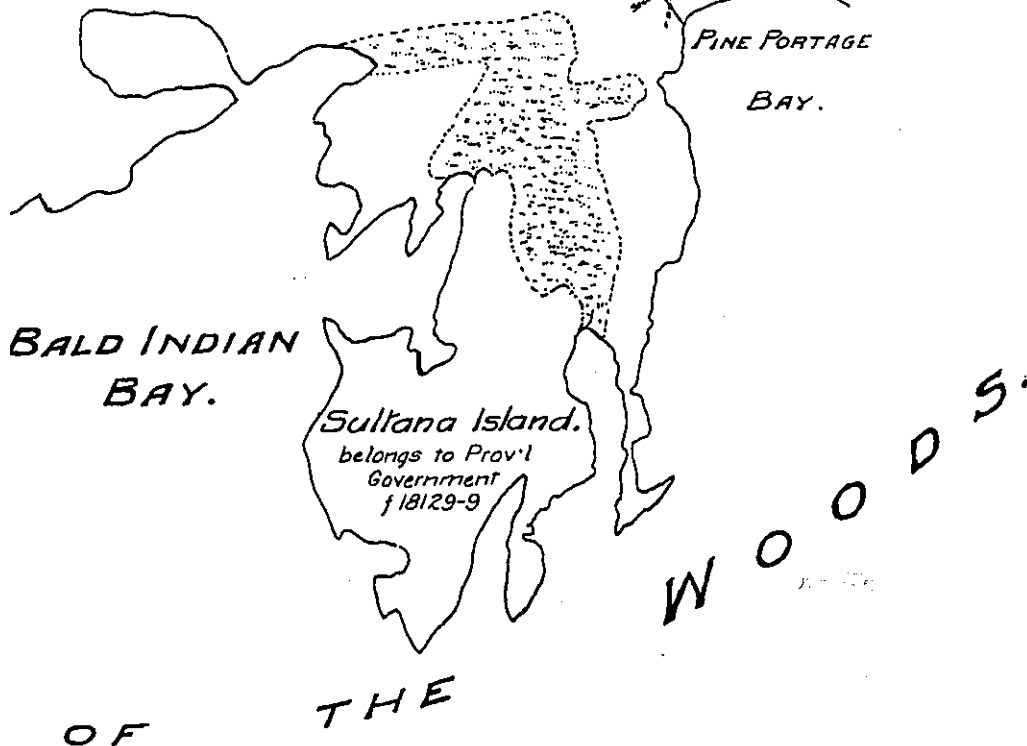
INDIAN AFFAIRS SURVEY RECORDS
No 1302

Boundary lines re-run
instructions dated J

OF JAFFRAY.



Nº 38.B.



D. J. Gibson.

Ontario Land Surveyor.

Fort Frances, Ont.

May 17th 1913.

Boundary lines re-run under
instructions dated July 22nd 1912

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