

Levelling the Lake

Transboundary Resource Management in the Lake of the Woods Watershed

JAMIE BENIDICKSON

FOREWORD BY GRAEME WYNN



UBC Press • Vancouver • Toronto

Sample Material © UBC Press 2019

The Nature | History | Society series is devoted to the publication of high-quality scholarship in environmental history and allied fields. Its broad compass is signalled by its title: *nature* because it takes the natural world seriously; *history* because it aims to foster work that has temporal depth; and *society* because its essential concern is with the interface between nature and society, broadly conceived. The series is avowedly interdisciplinary and is open to the work of anthropologists, ecologists, historians, geographers, literary scholars, political scientists, sociologists, and others whose interests resonate with its mandate. It offers a timely outlet for lively, innovative, and well-written work on the interaction of people and nature through time in North America.

General Editor: Graeme Wynn, University of British Columbia

A list of titles in the series appears at the end of the book.



NATURE | HISTORY | SOCIETY
GENERAL EDITOR: GRAEME WYNN

Contents

- List of Illustrations / xi
- Foreword: Reflections from the North Country / xiii
Graeme Wynn
- Acknowledgments / xxv
- Introduction / xxvii
- 1 Building Boundaries / 3
- 2 Cultural, Commercial, and Constitutional Fishing / 24
- 3 This Land Is My Land – It Can't Be Your Land / 40
- 4 Water Rights and Water Powers / 60
- 5 Pulp and Paper: From Emergence to Emergency / 79
- 6 Bacterial Waterways / 93
- 7 Levelling the Lake / 113
- 8 Power Struggles / 134

- 9 Economy and Ecology / 151
- 10 We Are All in This Together / 172
- 11 “Slowly to the Rescue as a Community Fails” / 196
- 12 Lumbering towards Sustainability / 215
- 13 Fishing Contests / 240
- 14 “For Water Knows No Borders” / 257
- Conclusion: Finding the Watershed / 281
- Notes / 288
- Suggested Readings / 355
- Index / 360

I

Building Boundaries

As the winter of 1868 approached, twelve to fifteen thousand residents of the isolated settlement at Red River, their crops devastated by locusts, faced “imminent danger of starvation.” The Canadian government – in the belief that the Hudson’s Bay Company (HBC), which then exercised authority across the region, had done nothing to address the “threatened calamity” – allocated \$20,000 to relief supplies and road work linking the imperilled community with the Lake of the Woods.¹ For its part, the company deemed the fledgling Canadian government’s initiative “most unusual and improper.” The HBC strenuously objected to road construction from the settlement to the Lake of the Woods, describing the undertaking as “a trespass upon [its] freehold territory.”² This early skirmish between remote competing authorities foreshadowed numerous land-use disputes soon to unfold within the territory, entangling incoming settlers and Indigenous inhabitants in contests about the rights of occupants, the quality of land ownership, and the relative authority of rival jurisdictions.

A CONTESTED TERRITORY

Canada’s formal response to the HBC’s protestations could not have been unexpected: “Canada ... denies ... the pretensions of the Hudson’s Bay Company to any right of soil beyond that of squatters, in the territory through which the road complained of is being constructed.”³ Georges Etienne Cartier and William McDougall, then in London to represent

Canada in negotiations with the HBC concerning surrender of the fur trading company's North American domain, took advantage of the exceptional circumstances to claim humanitarian high ground. They insisted that the simple objective was "to supply food to a starving community about to be imprisoned for six months in the heart of a great wilderness." Since the settlement lacked roads and other means of communication, the government sought to provide a link "and to supply it in the way most acceptable to a high-spirited people, viz. in exchange for their labour."⁴ Canada's ambassadors ventured further to suggest that the HBC might actually appreciate the transportation initiative as offering "valuable protection to those under their government against similar dangers in the future."⁵ The Canadian negotiators took full advantage of the HBC's public relations misstep to condemn the company's stewardship. Had the company "performed the first duty of a government towards its people" by establishing an "easy means of communication with the outer world," or had it demonstrated some capacity to address the threatened calamity by forwarding provisions and supplies in a timely fashion, then "the Canadian government would have rested happy in the belief that neither humanity nor public policy required or justified their interference."⁶

In January 1869, Canada was pleased to report that relief supplies had arrived from St. Paul, the capital of neighbouring Minnesota, and that a second shipment was on hand in the Dakota Territory for spring delivery.⁷ Yet collaborative good works in difficult circumstances hardly ensured harmonious international relations in the continental interior, for Canadian aspirations to secure HBC territory formed part of a more ambitious strategy to extend and solidify the authority of a youthful national government.

Much was at stake in connecting Canada's newly federated eastern provinces with the North-West Territories and British Columbia. The formation of a chain of settlements and communication linkages was of great public interest given "the danger of the Red River Settlement, from its close connection with Minnesota, consequent on its isolated position with regard to Canada, becoming imbued with American principles and views." The risk of losing Red River to "our rivals" threatened to deprive the country of trade with British Columbia, and ultimately with China.⁸

British and US negotiations over territorial boundaries had previously been contested within the frameworks of the 1783 Treaty of Paris and the 1814 Treaty of Ghent. The former, acknowledging American independence, apportioned this section of North America according to a line originating at Sault Ste. Marie and "thence through Lake Superior Northward of Isles Royal & Phelipeaux to the Long Lake; Thence through the middle of said

Long Lake, and the Water Communication between it & the Lake of the Woods ... Thence through the said Lake to the most Northwestern Point thereof.”⁹ The latter treaty, concluding the War of 1812, made provision for survey commissions and other required procedures to determine the boundary line on land and water and to identify the northwesternmost corner of the Lake of the Woods. At stake was the possibility that east-west traffic – including HBC trade – between Rainy River and the Red River settlement might be forced to enter American waters in order to pass around the vast Aulneau Peninsula, which would mean the potential further complication of tariff duties and American regulation.¹⁰

Transfer of the HBC’s lands to Canada in 1869 may have forestalled American aspirations and, eventually, facilitated exchange with China, but it also introduced more immediate challenges. These included questions associated with the rudimentary track – or “simple road” – linking Fort Garry and the Lake of the Woods: What lands had actually been acquired, and by whom might the newly added territory be governed? Quite apart from American territorial aspirations, real or imagined, the Canadian contenders included the Dominion government as purchaser or in some other capacity, the ambitious Province of Ontario, neighbouring Manitoba (after 1870), and adherents to Louis Riel’s alternative vision for the territory. Long-established Aboriginal communities also exercised governmental authority until such territorial claims as they might assert could be satisfactorily resolved. Thus, the relief road linking the Lake of the Woods to the West was a pathway to uncertainty. Decades later, even the HBC remained ensnared in residual controversy over the extent of its ongoing rights to land and water in the “disputed territory.”

CULTIVATING AMICABLE RELATIONS

In the late 1850s, Simon James Dawson became engaged in detailed reconnaissance of the territory between Lake Superior and the settlement at Red River.¹¹ He identified a route across the region designed to take advantage of navigable waterways while anticipating railway construction and simultaneously serving to forestall the northward expansion of American ventures.¹² Dawson, later an elected representative from the region that became Northwestern Ontario, was well acquainted with the resident Saukteaux or Ojibwa.¹³ He met personally with community leaders around the fur trade post at Fort Frances on the Rainy River in 1868 with a view to facilitating construction of his proposed transportation corridor.¹⁴

The Ojibwa, Dawson affirmed, “are very intelligent and are extremely jealous as to their right of soil and authority over the country.” He believed that “extreme prudence will always have to be observed by the officers in charge of men to keep them from coming in contact with the Indians.” Through extensive interaction during fishing season along the Rainy River with their counterparts from Red Lake in the neighbouring state of Minnesota, the Indigenous Canadian population had learned from “expert diplomatists” and was well aware of ongoing treaty-making arrangements on the US side. Accordingly, Dawson cautioned that “anyone who, in negotiating with these Indians, should suppose he had mere children to deal with, would find himself mistaken.”¹⁵

Accepting the Saulteaux as trustworthy, Dawson thought that they would adhere to treaty provisions, so long as these were equally respected by the incoming population. He anticipated that the Aboriginal inhabitants of the Rainy Lake and Lake of the Woods region would be prepared to accept a right-of-way across their lands, but he recognized their apprehension about the impact of settlement, particularly any interference with the fisheries, “their chief means of subsistence.” Dawson, accordingly, considered that it would be “imprudent to introduce settlement in the particular section which they occupy.”¹⁶

In an 1869 report, Dawson observed that the international boundary line ran through the territory, such that some of the Indigenous people lived on the US side and some to the north of the border.¹⁷ “Permanent residents,” however, were more numerous on the British side, while those from the United States appeared in greater numbers during the summer fishing season. He advised: “They are sufficiently organized, numerous and warlike, to be dangerous if disposed to hostility; and standing as they do in the gateway to the territories to the North West, it is of the highest importance to cultivate amicable relations with them.” Dawson urged the government to address the question of a right-of-way as a matter of great significance, for the Indigenous residents “would be keenly alive to any imagined slight in opening a highway ... through a territory of which they believe themselves to be sole lords and masters, and to which, if a lengthened period of occupation can give a claim, they have unquestionably some title.”¹⁸ A hundred and fifty years later, the extent of “some title” remained under discussion.

In anticipation of treaty negotiations, Ojibwa leaders outlined an initial proposal.¹⁹ They sought annual payments, forever, of \$50 for each chief; \$20 for council members; and \$10 for every man, woman, and child. Chiefs also expected to receive livestock, tools such as saws and grindstones,

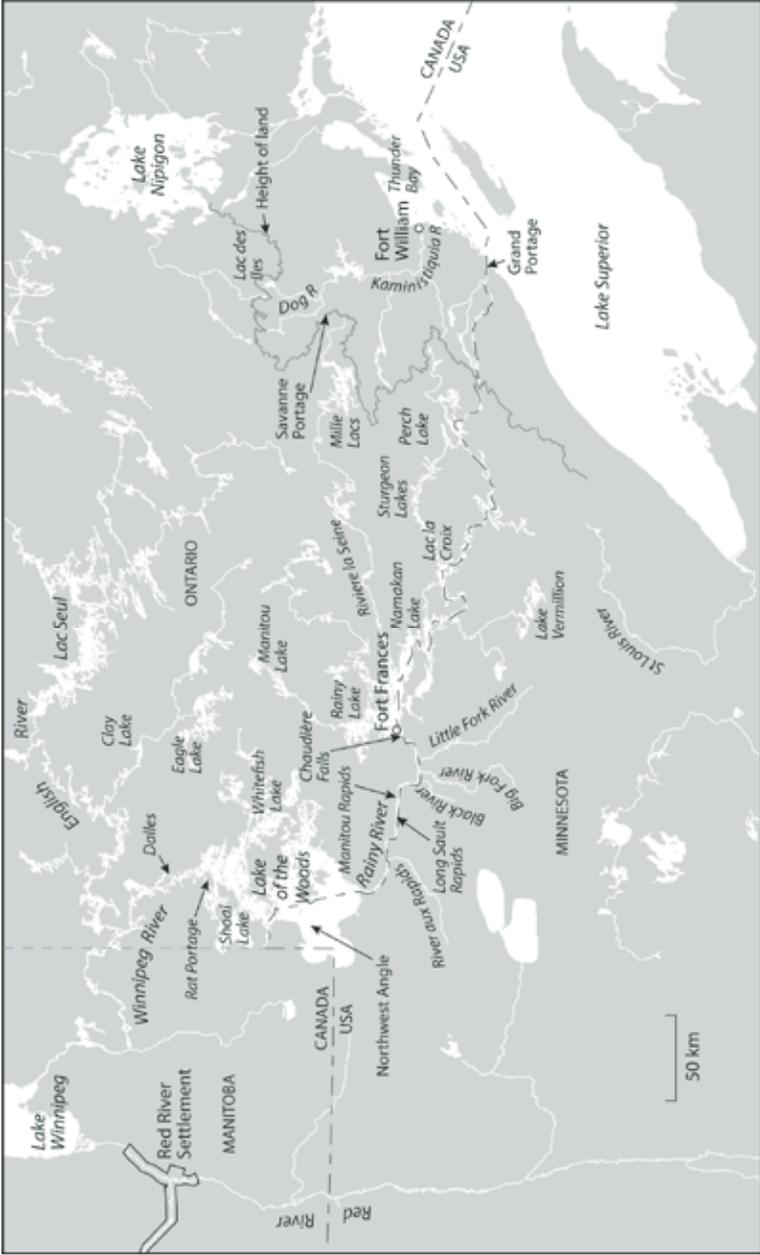
provisions, and household equipment, as well as guns and munitions. In due course, requests were made for free passage on the expected railway – “things that run swiftly, that go by fire – carriages.”²⁰

Notwithstanding one unflattering prediction that the region could anticipate “a destiny of perpetual sterility,” pressure for settlement and resource development intensified.²¹ Mineral prospectors were active and passenger traffic was set to increase with the construction of numerous steam-powered vessels. W.F. Butler, a British military adventurer, describing the Lake of the Woods in the summer of 1870, forecast that “its shores and islands will be found to abound in minerals whenever civilization reaches them.”²² By early 1870, a thousand men or more were engaged in clearing and construction to facilitate Colonel Garnet Wolseley’s expedition to quell Red River resistance to Canadian authority. Reporting his encounter with Wolseley’s troops along the Rainy River in mid-summer, Butler counted seventeen large and well-provisioned vessels.²³

The *Globe*, a Toronto newspaper, promoted Dawson’s route, leading to significant government expenditures on roadways, portages, dams, and canal work to enhance navigability. Koochiching Falls, on the Rainy River, became a hub of construction as engineers excavated solid rock to produce a lock-and-canal complex to facilitate movement between Rainy Lake and the Lake of the Woods. Alongside these early stream flow alterations, an early lumber operation at Fowler’s Mills introduced sawdust and slabs to the waterway.²⁴ Far more transformative impacts on regional waterways lay ahead.

By the end of May 1873, more than two hundred people had travelled the Dawson route by stage and steamer to reach Manitoba.²⁵ Vessels, including locally constructed steamboats, transported two thousand passengers during one season in the mid-1870s.²⁶ Yet travellers unaccustomed to the northern interior faced notoriously difficult conditions, including the rumoured threat that “every mosquito who has been turned out of doors by his parents or who has failed to earn a livelihood in other parts of the world, has emigrated to the Dawson Route.”²⁷

Despite heavy investment, the Dawson route remained vulnerable to competition, whether from alternative passageways through the United States or from the ambitious prospect of an all-Canadian railway. Ottawa’s 1874 decision to pursue such a railway along a more northerly corridor connecting Fort William on Lake Superior with Manitoba via Rat Portage, a fur trade post located where the Lake of the Woods empties into the Winnipeg River, “brought the beginning of the end for Simon Dawson’s magnificent dream.”²⁸



MAP 1.1 Regional Overview. From Grace Lee Nute, *Rainy River Country* (Minnesota Historical Society. St. Paul, 1950).
 Map adapted by Eric Leimberger.

As the 1870s began, Ojibwa fishing, hunting, and trapping continued. Garden plots and extensive wild rice harvesting activities further contributed to sustenance.²⁹ As Dawson had noted, the Ojibwa were determined to maintain their interests in these resources in the face of mounting external pressures. They clashed with settlers, prospectors, railway surveyors, and other work crews entering the district.³⁰ Chief Blackstone, in particular, resolutely resisted the activity of miners who had neither secured consent nor offered compensation to Indigenous residents. He disrupted developments around Shebandowan and carefully monitored the movement of both military and civilian expeditions. When steamboat construction and associated requirements for building supplies and fuel-wood foreshadowed greater flows of settlers and transients, Blackstone became a leading figure in the ranks of protesters.³¹

Benefits from development, though often welcome, did not alter the Ojibwa understanding of resource allocation. Thus, early business operators – steamboat builders, for example – readily purchased forest resources from the Indigenous inhabitants, who were also occasionally employed to provide timber and fuel-wood or to participate directly in building and transportation.³² Individuals appreciated these sources of income, particularly when fish were in short supply.³³ However, the Ojibwa associated such payments with their collective interest in the region's forest resources, and so, during one round of treaty negotiations, Ojibwa representatives responded firmly to a suggestion on the part of a Canadian commissioner that timber resources were available for all to use: "What was said about the trees and rivers was quite true, but it was the Indian's country, not the white man's."³⁴

Robert J.N. Pither had served nearly a quarter of a century with the HBC, including most of the decade from 1853 to 1863 at Fort Frances, when, in March 1871, he accepted an appointment from Joseph Howe, superintendent of Indian Affairs, to represent Canadian interests at Fort Frances. On advice from Simon Dawson, and after recent "unfortunate occurrences" at Fort Garry, Howe assigned Pither a "delicate and confidential mission" for maintaining good relations with the Indigenous people pending eventual negotiation of a treaty. The specific assignment was "to keep up a friendly intercourse with them and disabuse their minds of any idle reports they might hear as to the views and intentions of the Government of Canada in reference to them."³⁵

In the fall of 1873, following earlier and unsuccessful rounds of negotiations and with government steamers already operating on the water system, Canadian representatives pursued the broadened goal of securing

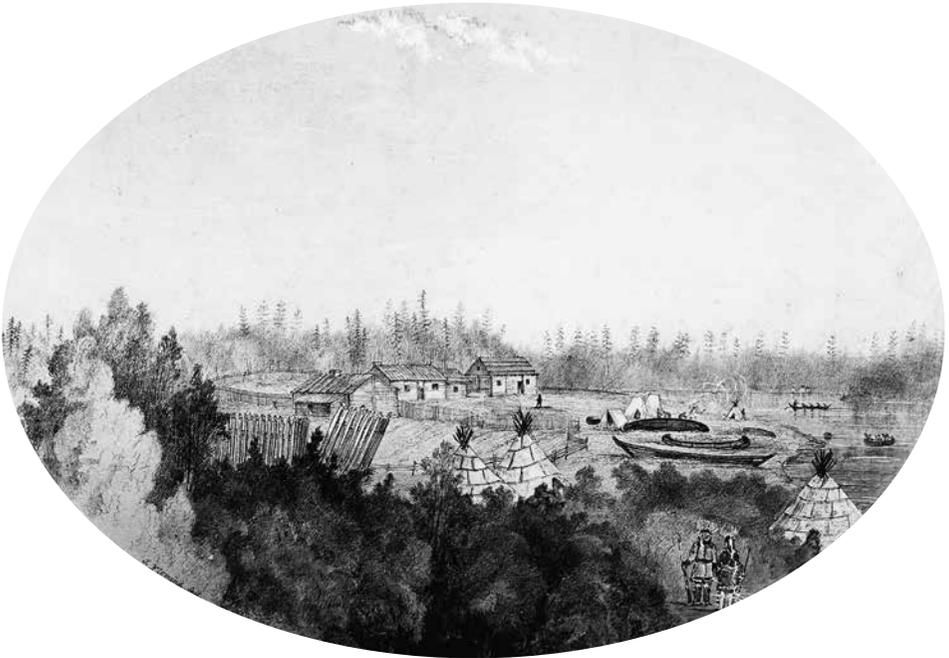


FIGURE 1.1 Hudson Bay Company Post, Rat Portage, 1857. *Courtesy of Toronto Public Library.*

the full extent of Ojibwa territory.³⁶ Alexander Morris, Albert Norbert Provencher, and Simon Dawson met at Northwest Angle on the Lake of the Woods with Ojibwa leaders from Northwest Angle, Rat Portage, Lac Seul, Whitefish Bay, Grassy Narrows, Rainy River, Rainy Lake, Kettle Falls, Eagle Lake, Nepigon, and Shoal Lake.³⁷ Three regional chiefs – Blackstone of Rainy Lake, Mawintopinesse of Rainy River, and Powassan of the Lake of the Woods – figured prominently in negotiations.³⁸

Governor Morris explained land transfer arrangements and his authority to establish Indian reserves. He offered land for farming as well as reserves approximating a square mile for every family. “It may be a long time before the other lands are wanted,” he added, explaining that “in the meantime you will be permitted to fish and hunt over them.”³⁹ In one of his most elaborate statements on cultivation and food, Governor Morris advised the chiefs of his objective to “do everything to help you by giving you the means to grow some food, so that if it is a bad year for fishing and hunting you may have something for your children at home.” More specifically, he offered “two hoes, one spade, one scythe, and one axe for

every family actually settled,” along with communal agricultural equipment, oxen, cattle, and seed. In addition, Morris undertook to provide “ammunition, and twine for making nets, to the extent of \$1,500 per year, for the whole nation, so that you can have the means of procuring food.”⁴⁰ Difficult negotiations culminated in Treaty No. 3 (hereafter referred to as Treaty 3).⁴¹

The interpretations of the agreement of 3 October 1873 – what was in the minds of the commissioners and what Indigenous negotiators understood about the expectations captured in the treaty text – became questions of profound importance for the general configuration of Canadian society’s later relationship with Aboriginal communities. Historian Donald Smith frames the inquiry with these questions: “What was the legal scope of the Indians’ title? In what ways might native title properly be extinguished? And what was the effect of treaties that ceded lands to the Crown?”⁴² Nearly a century and a half after the treaty, ethnohistorians, anthropologists, and political theorists debated the intentions of Governor Morris and his associates, the origins of Canada, the rationale underlying federal constitutional responsibility for “Indians and Lands Reserved for the Indians,” and how Ojibwa representatives might have envisaged the treaty-based relationship they agreed to enter.⁴³

One Ontario judge concluded in 2011 that the Indigenous communities would not have anticipated “increasing and cumulative negative impacts on their way of life.”⁴⁴ According to her assessment of documentary evidence and oral testimony, the Ojibwa expected traditional harvesting practices to continue. She further suggested that the treaty commissioners also understood the importance of traditional Ojibwa harvesting and, for that reason, recognized “the importance of promising continuing Harvesting Rights to induce the Ojibway to enter the Treaty.”⁴⁵ Moreover, in the judge’s view, the route through the Treaty 3 territory was the primary interest of Canada and its commissioners, who were “less concerned with the prospects of the territory itself.” With a view to securing the Dawson route and completing the Canadian Pacific Railway within the Treaty 3 area by 31 December 1876, “they needed to get the Treaty done.”⁴⁶

In the aftermath of negotiations, the creation of reserves was of pressing concern. Even before the formal approval of Treaty 3, Dawson launched the reserve-selection process through consultations. Yet it proved impossible to designate reserves in conjunction with the treaty itself. Hoping to forestall conflict, Morris specifically recommended against issuing patents or licences for mineral or timber lands until the reserves were allocated.⁴⁷ Shortly thereafter, explicit instructions were issued to avoid

including mineral lands in designating reserves.⁴⁸ Unfortunately, however, conflicts arising from mineral prospects associated with reserve lands proved unavoidable.⁴⁹

Dawson and Pither negotiated the selection of Treaty 3 reserves in the summer of 1874. By this time, Ojibwa chiefs had highlighted the urgency of the matter, emphasizing the importance of garden sites and fishing grounds. Dawson quickly identified the valley of the Rainy River as a location where agricultural reserves “could interfere with the progress of settlement.” To mitigate potential conflicts, he sought to confine Rainy River reserves to about six square miles, land that encompassed sites previously occupied as camping grounds, fishing stations, and gardens.⁵⁰ Reverend George M. Grant, who accompanied the railway engineer Sandford Fleming through the district, also highlighted agricultural prospects along the Rainy River, where “every mile seemed well-adapted for cultivation and the dwellings of man.”⁵¹ The most fanciful nineteenth-century estimates even imagined “two million agriculturalists” in the “extremely luxuriant” district.⁵²

INTERGOVERNMENTAL FRICTION

While it appeared that Canada and the HBC had successfully completed land transfer arrangements respecting the North-West Territories, and with Treaty 3 concluded, other matters represented potential sources of contention among neighbouring jurisdictions. Settlement and resource development were advancing northwards in Minnesota – soon to be accelerated by iron ore discoveries in the state’s northeastern corner – while an epic federal-provincial struggle for control of land and resources emerged within the Canadian portion of the region.

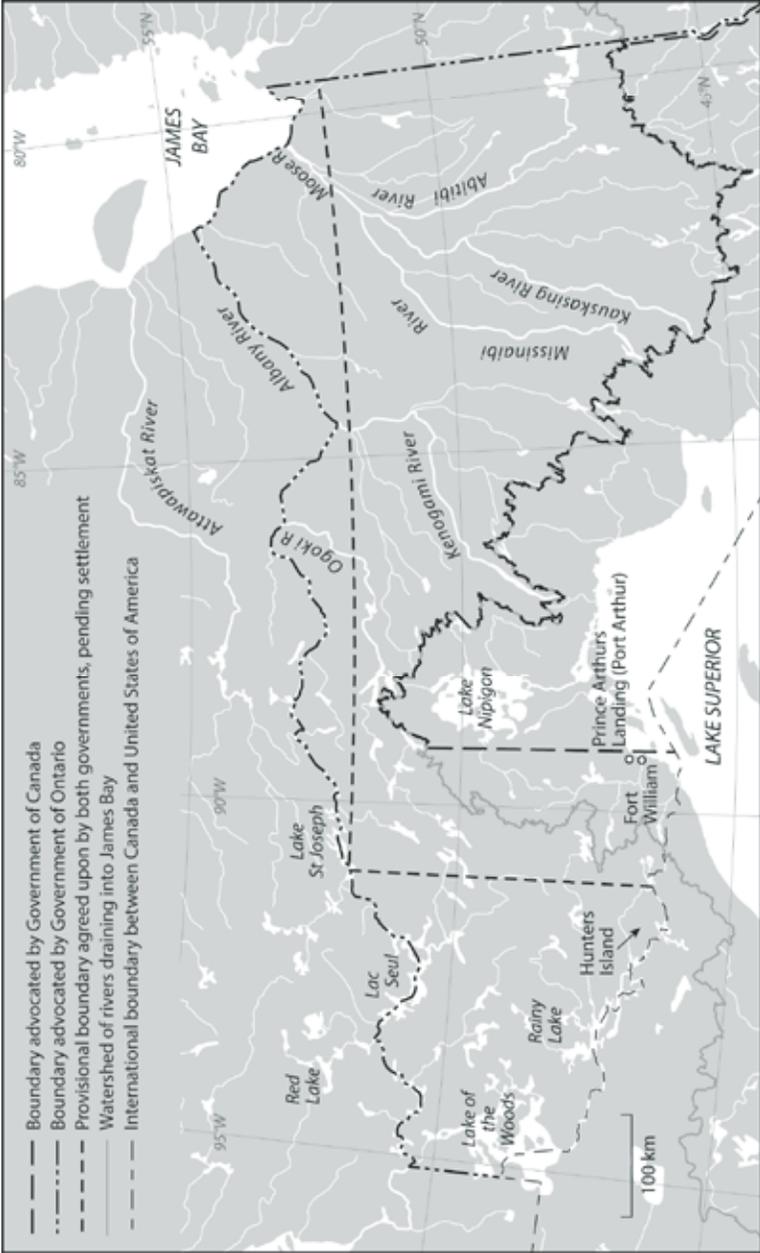
Even before the treaty had been agreed, Ontario and the federal government were contesting provincial boundaries and natural resources.⁵³ In an 1871 memorandum prepared for Conservative prime minister John A. Macdonald, Dominion Surveyor General J.S. Dennis reviewed the origins of the provincial boundary dispute. The controversy centred upon the interpretation of language in the 1774 Quebec Act, in which the westerly boundary of Quebec, after reaching the northwest angle of what was then the Province of Pennsylvania, was set out. From that point, Quebec’s boundary continued “along the western boundary of the said Province (Pennsylvania) until it strikes the River Ohio, and along the bank

of the said river westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchant Adventurers of England trading to Hudson's Bay."⁵⁴

Dennis explained two views as to the meaning of this description. Those committed to locating the Ontario boundary as far west as possible argued that "the term 'to the banks of the Mississippi, and northward to the southern boundary of the territory, etc., etc.,' means that in going northward, the banks of the Mississippi are to be followed to its source, and that they were in fact so intended in the Act." In contrast, an interpretation more favourable to the Dominion government suggested that the phrase "to the banks of the Mississippi" should be understood as meaning "to the banks of the said river at the point where it is joined by the Ohio, and the words which follow, 'and northward to the southern boundary etc.,' was intended to be construed as upon a due north line."⁵⁵ A greater or lesser Ontario lay in the balance, as did a greater or lesser Canadian federal domain. And much else besides.

Oliver Mowat, premier of Ontario as of 1872, set out to establish his province's boundary as running north from the source of the Mississippi, a point slightly west of the Lake of the Woods.⁵⁶ With a more receptive Liberal government then in office federally, efforts to resolve an inherently contentious matter proceeded in as orderly a manner as could be expected. David Mills, a Liberal MP and a constitutionalist, was appointed special commissioner for Ontario in relation to the boundary issue in March 1872, reporting back in 1873 and again in 1877. Mills' reports facilitated an interim boundary determination in 1874 and an award by an arbitration panel four years later.⁵⁷

In 1874, David Laird, federal minister of the Interior, and Timothy Blair Pardee, representing Ontario's Crown Lands department, agreed that following the final settlement, each of their respective governments would confirm and ratify land patents "issued by the other for lands then ascertained not to be within the territory of the government which granted them" and would account financially for proceeds or revenues derived from lands determined after resolution of the boundary dispute to belong to the other.⁵⁸ This worthy effort to provide clarity and stability was most welcome, yet it was inconclusive on at least two grounds. First, the mutual recognition of land patents failed to address vast acreages over which claims would arise under leases, licences, and other forms of entitlement. Further uncertainty derived from the fact that parts of the relevant terrain were simply unknown.



MAP 1.2 Boundary Dispute. From Norman L. Nicholson, *The Boundaries of the Canadian Confederation*, (Macmillan of Canada for the Institute of Canadian Studies, Carleton University, 1979). Map adapted by Eric Leinberger.

As geologist Robert Bell explained, the height of land – that magisterial divide separating waters presumed to flow northwards from those draining to the Great Lakes–St. Lawrence, should that be identified as a boundary – was more readily conceived on a map than located on the ground. The level landscape and the interlocking headwaters of numerous small streams presented great challenges: “The water soaks through the moss and swamps and one cannot tell on which side of the watershed he may be.”⁵⁹ The precise location of watershed boundaries remained elusive well over a century later, when a new generation of surveyors and officials set out to delineate ecological rather than political space. But Bell’s quest for political lines that corresponded with the flow of waters underscored an enduring theme in the region’s development.

Provisional boundaries were agreed by orders-in-council in 1874, with Ontario accepting the award in advance.⁶⁰ But when Ottawa rejected the arrangements, the Ontario legislation was never proclaimed.⁶¹ The dispute soon found its way to arbitration.

The 1878 board of arbitrators consisted of a provincial nominee, Ontario chief justice R.A. Harrison; Sir Francis Hincks, who was named by the Dominion; and Sir Edward Thornton, Britain’s representative in Washington, who acted as the neutral third member. Prime Minister Alexander Mackenzie accepted the arbitrators’ findings, which largely favoured Ontario’s position, but following a Conservative election victory, John A. Macdonald returned to the office of prime minister and refused to ratify the award. The federal-provincial boundary conflict escalated thereafter, with the interests of neighbouring Manitoba becoming more prominently engaged.

With a growing need for lumber supplies and a covetous eye on port facilities at Lake Superior, the Manitoba legislature approved an eastward extension of its boundaries in December 1880.⁶² The next spring, the federal government extended Manitoba’s boundaries to the north and east so as to meet the “westerly boundary of Ontario.”⁶³

The Toronto press relentlessly emphasized the commercial basis for Ontario’s acrimonious opposition to Dominion interference in the northwest, metaphorically invoking a creative understanding of upstream-downstream relations: “Where is the future growth of Toronto to come from if one half of the country tributary to the city is to be chopped away?” With support from Ottawa, Manitoba’s ambitions threatened Toronto’s ambition to become the political capital of the disputed territory and to dominate the trade of the country.⁶⁴

Officials representing their respective provincial interests pursued conflicting agendas, soon triggering intense skirmishing. In response to a petition from merchants at the new lakeshore community of Rat Portage and elsewhere along the railway line when construction of the transcontinental CPR got underway, Ontario established Division Courts for the District of Thunder Bay in May 1880. In the absence of civil courts, local business operators found it impossible “to enforce payment of our outstanding debts” against subcontractors, traders, and labourers who simply moved on following completion of the works along portions of the railway.⁶⁵ The matter of squatters also called for attention: that category included a wide range of occupants of unsurveyed lands along the Rainy River, around the townsite of the new community of Keewatin, and on Shoal Lake, an important body of water linked through a short channel to the Lake of the Woods and shared – sometimes controversially – between Manitoba and Ontario.

George Burden, an Ontario-appointed commissioner, reported as squatters a number of butchers, carpenters, general labourers, and lumbermen, as well as a railway conductor and an engineer, while assuring Premier Oliver Mowat that no irregular inducements had ever been offered to secure their political allegiance to the government candidate in local elections.⁶⁶ Conflict and political uncertainty intensified following simultaneous elections for the overlapping constituencies of Varennes in Manitoba and Algoma in Ontario. As the Manitoba merchant and journalist Alexander Begg wryly observed, “the people of the district had the unique privilege of voting in both Provinces, for members to represent them in two Provincial Legislatures.”⁶⁷ Begg was simultaneously entertained and appalled by the interjurisdictional shenanigans: “One day a Manitoba constable would be arrested for drunkenness by an Ontario constable, the next, Manitoba would reciprocate by arresting an Ontario official.” Amidst these distractions, Begg imagined that “gamblers and whiskey pedlars enjoyed almost complete immunity,” for not even the most industrious constable could monitor the miscreants “while he was himself a fugitive from justice, engaged in dodging a warrant for his own arrest.”⁶⁸

JUDICIAL RESOLUTION

Following one inflammatory episode involving the arrest by eager Ontario officials of Manitoba’s police chief, Attorney General Mowat and his Manitoba counterpart, James Millar, arranged to coordinate policing and various



FIGURE 1.2 Manitoba Jail, 1883. *Courtesy of the Lake of the Woods Museum.*

civil matters and to submit a joint case on the boundary dispute to the august Judicial Committee of the Privy Council (JCPC).⁶⁹ This would be the first of a remarkable number of opportunities offered to the JCPC to familiarize itself with the contested geography of this granitic corner of empire.

Toronto's *Globe* reported the JCPC's boundary decision as a provincial triumph: "From Glengarry to the Lake of the Woods and from Hudson Bay to the Pelee Islands – these are the magnificent distances between the utmost bounds of the province we may now call our own! It is a splendid victory!" Even if the geographical reference points do not fit harmoniously to the tune of *This Land Is Your Land*, the message was unmistakable: "Ontario wins! The once Disputed Territory is ours!" In addition to most welcome spoils, Ontario enjoyed – and embellished – the experience of the successful struggle that had pitted "all the force against all the right!" The reputation of Prime Minister Macdonald, "a lifelong enemy" of the province, had been "shattered by this crushing verdict, this unanswerable exposure to the baselessness of the pretensions upon which he has founded his six years of rancorous hostility to Ontario."⁷⁰

Yet even before the "crushing verdict" against a boundary demand grounded on an interpretation of historical maps and documentation, Prime Minister Macdonald had reformulated the foundation of federal claims: "By seven treaties the Indians of the Northwest conveyed the lands to Canada; and every acre belongs now to the people of Canada, and not

to the people of Ontario,” the argument began. As a consequence, “there is not one stick of timber, one acre of land, or one lump of lead, iron or gold that does not belong to the Dominion, or to the people who purchased from the Dominion government.”⁷¹

The intergovernmental contest unfolded on several planes, combining bold and intricate legal manoeuvres with determined political engagement. Political struggles at the local electoral level were deeply coloured by the boundary controversy as rival parties allied with local newspapers to rally supporters in vigorous electoral combat.⁷²

But land management proved to be the most contentious issue, one Canadian centennial history reporting that “chaos reigned in the woods over federal and provincial licensing.”⁷³ Charges that Macdonald “gave away literally dozens of timber limits to his political friends provoked acrimonious parliamentary exchanges: for example, one MP, in a House of Commons debate in 1886, declared: “All the grants of the public domain which have been made by this Administration have been made to supporters of themselves, either in or out of Parliament.”⁷⁴ Beyond partisan considerations, however, was the underlying determination of Ontario to secure control of valuable natural resources in the face of persistent federal unwillingness to implement the boundary award.

In November 1883, St. Catharines Milling and Lumbering Company, whose backers and advocates included identifiable Conservative supporters, obtained a federal timber licence for land south of Wabigoon Lake, about twenty miles southeast of what is now Dryden, along the Canadian Pacific Railway (CPR) line.⁷⁵ To supply rail-line construction ties, St. Catharines Milling and Lumber Company cut timber pursuant to a federal government licence on land that Ontario believed to be its own. The St. Catharines Milling licence formed the basis of a “test case,” an initiative that would firmly demonstrate Ontario’s commitment to provincial timber resources and the revenue stream they represented. Ontario seized timber cut by St. Catharines, sold it, and successfully obtained an injunction against the federally licensed company in early 1885.⁷⁶

The federal view, following Macdonald’s revised line of argument, was that the Dominion owned the disputed lands and resources through acquisition under Treaty 3. Ontario, having rested its own claims for years on the documentary record that had stood it in good stead through the arbitration process and the 1884 JCPC decision, was initially ill-prepared to confront the new formulation of federal claims.⁷⁷ As historian Barry Cottam explains, the legal challenge facing Ontario was to advance an alternative analysis of the significance of the treaty: “Indian title had to be

established as something less than full ownership for Ontario's counter-claim to stand."⁷⁸

In the House of Commons, Liberal MP David Mills contributed forcefully to Ontario's cause. His partisanship towards the province was clear: "Anything like hesitation in the total exclusion of Manitoba from any exercise of authority is injurious," he declared.⁷⁹ Mills drew upon his deep knowledge of Indian affairs from his previous experience as minister of the Interior in Alexander Mackenzie's cabinet to actively challenge Macdonald in Parliament over Dominion resource licences. In March 1885, Mills set out a long statement on the nature of Indian title that contributed to Ontario's evolving legal position.⁸⁰ Cottam sums up the Ontario government's assertions "that the Indians had no concept of property recognizable in law, and that, whether they did or not, the title to the lands of North America lay in the Crown of England by virtue of the processes of discovery, conquest and settlement." Accordingly, "if the Indians had any rights at all, they came through the generosity of the Crown."⁸¹ Thus formulated, the debate over the validity of the St. Catharines company's Dominion licence to cut timber set the stage for a legal contest of fundamental importance.⁸²

As judicial proceedings opened in Toronto on 18 May 1885, the Riel Rebellion was underway.⁸³ Only one witness, Alexander Morris, the commissioner who had negotiated Treaty 3, appeared in Chancellor John Alexander Boyd's court. The proceedings were otherwise confined to legal presentations. D'Alton McCarthy, representing St. Catharines and thus arguing for the validity of the Dominion timber licence, insisted that the St. Catharines licence had been issued on the basis of ownership transferred from the Ojibwa to the federal Crown pursuant to the treaty. Oliver Mowat, in his capacity of attorney general, and William Cassels represented Ontario.

Oliver Mowat directly attacked the foundations of Macdonald's revised assertion of Dominion authority: "We say that there is no Indian title at law or in equity. The claim of the Indians is simply moral and no more."⁸⁴ Ontario's position was more fully set out as the case advanced. In the Court of Appeal, Ontario asserted that the Ojibwa right to land was "at most only a right of personal occupation during the pleasure of the Crown, by the band of Indians occupying the same as hunting grounds or otherwise, and was not transferable." Based on the view that the Ojibwa enjoyed only a "right of personal occupation," Ontario insisted that "the so-called surrender of Treaty 3 (regarding it as having extinguished the so-called Indian claim), did not and could not transfer the lands or any interest therein to the Dominion."⁸⁵

Following Chancellor Boyd's judgment in June 1885 and the Court of Appeal decision almost a year later, the St. Catharines case proceeded to the Supreme Court of Canada, where Justice Samuel Henry Strong – in a dissenting opinion – introduced the notion of usufructuary rights. Although lacking precise legal definition, this concept, as Strong expressed it, “nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.”⁸⁶

While “absolute use and enjoyment” represented a high level of respect and protection for Indigenous interests in land use, the entitlement to use traditional lands would not be sufficient to uphold the Dominion's claim to own the disputed territory. Nor, in the longer term, would it satisfy Aboriginal claims to ownership that had been expressed in the context of treaty negotiations: “We have a rich country, it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them.”⁸⁷

In proceedings before the JCPC, advocates for Ontario, now including Lord Haldane, and for the Dominion, which participated directly in support of its timber licence holder, restated their respective positions.⁸⁸ The 1888 JCPC ruling rejected the Dominion government view, while endorsing the concept of usufructory rights. Although distancing itself from the extreme position of Chancellor Boyd, the JCPC grounded Indian possession of traditional lands on the *Royal Proclamation of 1763*. At this point, however, the concept of usufruct underpinned the analysis: “Indian possession was not a fee-simple title but merely a right to occupy the land.”⁸⁹ With this burden on the Crown's underlying title being extinguished or removed by treaty, the lands passed, by virtue of section 109 of the British North America Act (1867), to the province.

Against this new backdrop, implementation of the earlier boundary award resumed. Provincial boundaries were confirmed in 1889 on the basis of a JCPC recommendation for imperial legislation, which was requested from Canada by means of a joint address to the imperial Parliament.⁹⁰

The legislative confirmation of new boundaries in 1889 failed utterly to forestall continuing and future controversies over land and resources arising from the intergovernmental conflict.⁹¹ Ontario, following the protracted dispute with federal officials, had little inclination to compromise a hard-fought legal victory. Among those affected by the province's firm

defence of its interests were the Ojibwa, whose reserve boundaries remained in abeyance.

TREATY IMPLEMENTATION

In 1875, to confirm the selection of reserves (which had still to be settled), Surveyor General J.S. Dennis conferred with Indigenous communities.⁹² At about the same time, Robert Pither was appointed as Dominion Lands agent to give him the authority to deal with trespassers cutting timber on reserves.⁹³ There were, however, extraordinary delays in confirmation of the reserves, attributable largely to the federal-provincial boundary conflict. Regrettably, uncertainty, confusion, and controversy over the location and status of reserve lands persisted until 1915, forty-two years after the conclusion of the Treaty 3 negotiations.⁹⁴

Formerly occupants of their own lands, the Ojibwa, following resolution of the provincial boundary dispute, found themselves to be residents of Ontario. They were living on unconfirmed reserves designated through consultations with federal officials on lands that were understood to be part of the province, lands that had perhaps even belonged to Ontario from the date of Confederation, six years before the treaty. The conundrum arising from the *St. Catharines* decision and the boundary legislation was difficult indeed: as Barry Cottam puts it: “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?”⁹⁵

Taking the position that the province now enjoyed “absolute ownership of all the Treaty 3 lands” while insisting that it had not consented to the use of those lands for the creation of reserves, Ontario questioned the validity of federally allocated reserves.⁹⁶ Prolonged efforts to resolve this and other federal-provincial differences lingering in the aftermath of the boundary settlement included negotiation, legislation, and further court proceedings that extended over several decades. But these efforts involved comparatively limited direct participation on the part of the Aboriginal communities affected, some of whom – especially along the Rainy River – eventually obtained reserves falling short of original expectations.

Governments made some headway in the immediate aftermath of the JCPC decision as Oliver Mowat pressed to secure his understanding of the *St. Catharines Milling* result. Mowat sought to clarify the foundations of

resource development and settlement, including the residual status of hunting and fishing rights. As his point of departure, the Ontario premier declared that “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, etc, should come.” Given Ontario’s success in the courts, he suggested that “the Province becomes the rightful authority to make grants, etc., free from the Indian right of hunting and fishing.” In an attempt to avoid further uncertainty or even friction and litigation, Mowat requested a federal order-in-council, to be confirmed by legislation. He took the liberty to “enclose draft of such an Order etc as I think would do.”⁹⁷

Concurrent federal and provincial legislation emerged in 1891, followed by a ratification agreement three years later.⁹⁸ The combined effect of these measures has been described as an amendment to the treaty, but the 1894 agreement was at least expected to facilitate Ontario’s acceptance of the location and extent of the Treaty 3 reserves as previously selected.⁹⁹ The agreement also provided for a process to resolve any questions if the province was not satisfied with the proposed reserves.¹⁰⁰ The basis of such dissatisfaction was already beginning to emerge.

Provincial inspection of reserves allocated by federal officials revealed that their extent significantly exceeded the formula of one square mile per family, as set out in 1873.¹⁰¹ Although E.B. Borron, who reported on the location of the proposed reserves, was anxious to avoid any appearance of bad faith, he was equally of the view that Ontario should be compensated by the federal government, which had generously allocated valuable provincial lands to reserves.¹⁰² This factor, among others, further delayed the confirmation of reserve lands.¹⁰³

Beyond challenges arising from the boundary award, regional affairs were further complicated by the changing status of adjacent lands. Lying to the north of the disputed territory, the vast District of Keewatin remained under federal authority as part of the old North-West Territories until a portion was annexed to Ontario by statute in 1912. A century later, in a twenty-first-century controversy involving Aboriginal rights and environmental issues, an Ontario court signalled the continuing significance of boundary matters and the status of the 1891 legislation in the Keewatin Territory. Justice Marie Sanderson noted that “the lands in issue in this litigation are *not* in the Disputed Territory but in Keewatin, which at the time was unaffected by the 1891 Legislation. If the 1912 annexation did not affect it, the 1873 Treaty Harvesting Rights continue in respect of Keewatin to this day.”¹⁰⁴ But the resolution of this riddle lies ahead, one

of many examples of the complex intermingling of past and present in this region's history.¹⁰⁵

Persistent controversy continued, not only about boundaries but about resources affected by those boundaries – whether trees on the ground, precious minerals beneath it, valuable fisheries within regional waters, or regulation of the waters themselves. Fisheries issues were particularly challenging because of the wide range of interests, jurisdictions, and values involved in the exploitation and management of the resource.

© UBC Press 2019

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher.

Library and Archives Canada Cataloguing in Publication

Benidickson, Jamie, author

Levelling the lake : transboundary resource management in the Lake of the Woods Watershed / Jamie Benidickson ; foreword by Graeme Wynn.

(Nature, history, society)

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-0-7748-3548-0 (hardcover). – ISBN 978-0-7748-3550-3 (PDF)

ISBN 978-0-7748-3551-0 (EPUB). – ISBN 978-0-7748-3552-7 (Kindle)

1. Natural resources – Lake of the Woods – Management. 2. Natural resources – Rainy Lake (Minn. and Ont.) – Management. 3. Lake of the Woods – Economic conditions. 4. Rainy Lake (Minn. and Ont.) – Economic conditions. 5. Lake of the Woods – Environmental conditions. 6. Rainy Lake (Minn. and Ont.) – Environmental conditions. I. Title. II. Series: Nature, history, society

FC3095.L34B46 2019

333.709713'11

C2018-905834-X

C2018-905835-8

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in Garamond by Artegraphica Design Co. Ltd.

Copy editor: Joyce Hildebrand

Proofreader: Kristy Lynn Hankewitz

Indexer: Noeline Bridge

Cartographer: Eric Leinberger

Cover designer: Gabi Proctor

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpress.ca