

THE BOUNDARIES OF CANADA

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I. General Introduction.

Throughout its history Canada has been concerned with both international and internal boundary problems, and the purpose of this article is to present the legal authorities by which they were settled. The international boundaries were finally determined early in this century, and this article does not cover such secondary problems as the utilization of international rivers,¹ particularly the Columbia,² St. Lawrence³ and Niagara⁴ Rivers, the Air Defence Identification Zones,⁵ the use of the contiguous zone for fisheries conservation⁶ and the status in international law of Hud-

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¹ See Robert A. MacKay, *The International Joint Commission between the United States and Canada* (1928), 22 Am. J. of Int. L. 292; Clyde Eagleton, *The Use of the Waters of International Rivers* (1955), 33 Can. Bar Rev. 1018; Robert Day Scott, *The Canadian-American Boundary Waters Treaty: Why Article II?* (1958), 36 Can. Bar Rev. 511; L. M. Bloomfield and G. F. Fitzgerald, *Boundary Waters Problems of Canada and the United States* (1958); William L. Griffin, *The Use of the Waters of International Drainage Basins under Customary International Law* (1959), 53 Am. J. of Int. L. 50; Jacob Austin, *Canadian-United States Practice and Theory Respecting the International Law of International Rivers* (1959), 37 Can. Bar Rev. 393; Ludwik A. Leclaff, *United States River Treaties* (1963), 31 Fordham L. Rev. 697; L.J. Bouchez, *The Fixing of Boundaries in International Boundary Rivers* (1963), 12 Int. & Comp. L.Q. 789.

² See C. B. Bourne, *The Columbia River Diversion: The Law Determining the Rights of Injured Parties* (1958), 2 U.B.C. Legal Notes 610, and *The Columbia River Controversy* (1959), 37 Can. Bar Rev. 444; Wallace S. Murphy, *The Function of International Law in the International Community: The Columbia River Dispute*, [1961] *Military Law Rev.* 181; Maxwell Cohen, *Some Legal and Policy Aspects of the Columbia River Dispute* (1958), 36 Can. Bar Rev. 25, and *The Columbia River Treaty—A Comment* (1962), 8 McGill L.J. 212.

³ See H. J. Lawford, *Treaties and Rights of Transit on the St. Lawrence* (1961), 39 Can. Bar Rev. 577.

⁴ See Louis Henkin, *Treaty-makers and the Law-makers: The Niagara Reservation* (1956), 56 Col. L. Rev. 1151.

⁵ See J. A. Martial, *State Control of Air-space over the Territorial Sea and Contiguous Zone* (1952), 30 Can. Bar Rev. 425.

⁶ For the creation of a twelve-mile zone, see (1963), 108 House of Commons Debates 7, 64, 727, 774, 2388 and Bill C-11 of 1963, which will replace s. 2(b) of the Coastal Fisheries Protection Act, S.C., 1952-53, c. 15; 1960-61, c. 14; on June 4th, 1963, the Prime Minister announced that the proposed twelve mile exclusive fisheries zone would be established as of Mid-May 1964. (1963), 108 House of Commons Debates 621, 2503.

son's Bay. There have been several major changes in the internal boundaries since Confederation, and, since the Northwest Territories are soon to be reorganized,⁷ these boundaries have not yet been given their final form. At present the most pressing internal problem concerns the iron ore deposits at Schefferville, which are divided by the Quebec-Labrador boundary.⁸

The different parts of Canada's international boundaries are defined in almost every possible way. Starting in Passamaquoddy Bay, the line crosses sea-water; it then follows the centre of the St. Croix River, before running along the watershed of the St. Lawrence. After reaching and continuing along the St. Lawrence the boundary follows a conventional line through the Great Lakes and the centre channels of the rivers connecting them with each other and the Lake of the Woods. From there to the Pacific coast the line is purely geographic, and is not marked by any natural feature. At its western end the line again runs over salt water through the Juan de Fuca Straits. The Panhandle section of the Alaska boundary follows approximately the line of the mountains, but the northern part is a meridional line.

Canada's international boundaries have been settled by international agreements, based to a large extent on the application of two principles of international law. The first of these is that occupation of territory is one way in which sovereignty can be acquired, and the second is that where the boundary follows a water-course, the thalweg, or centre of the main channel, is the boundary.

To be effective, occupation requires both a right to occupy and an effective occupation to the exclusion of other states. The presence of aboriginal inhabitants is ignored by international law in the acquisition of territory, since they are not organized as a state and so do not occupy effectively the area in which they live.⁹

Until 1783, when the existence of the United States was formally recognized by the Treaty of Versailles, the principle of occupation was irrelevant since all the territory covered by the treaty had previously been under the sovereignty of Great Britain. Once the northern part of the continent had been divided, however, it became important in fixing the boundary between Canada and the

⁷ (1962), 107 House of Commons Debates 7, and *infra*, footnote 183.

⁸ See *The Globe and Mail*, Toronto, Feb. 10th, 1962, and *infra*, footnotes 88, 89 and 90.

⁹ Oppenheim, *International Law* (8th ed., 1955), vol. I, p. 554. See also D. P. O'Connell, *International Law and Boundary Disputes*, Proceedings of the American Society of International Law (1960), p. 77; Norman Hill, *Claims to Territory in International Law and Relations* (1945), Ch.X; Unsigned note, *Occupation as a Title to Territory* (1933), 175 L.T. 300.

United States, particularly on the Pacific coast. The principle has also been invoked in the settlement of Canada's internal boundaries; the extent of the rival operations of the French and the Hudson's Bay Company, and whether they amounted to effective occupation, were important issues in the dispute between the Dominion and Ontario over the latter's northern and western boundaries.

The second principle of international law, that the thalweg marks the boundary along international rivers, is stated by Oppenheim as follows:

... if such a river is not navigable, the imaginary boundary line as a rule runs down the middle of the river, following all the turnings of the borderline of both banks of the river. If navigable, the boundary line as a rule runs through the middle of the so-called thalweg, that is, the middle channel of the river.¹⁰

The editor goes on to say that the boundary may be the bank on one side, so one state owns the whole river, provided there has been prior occupation, immemorial possession, or a treaty. The principle was expressly adopted in relation to the St. Croix by the Treaty of April 11th, 1908, and was held to apply to the Niagara River in *Re Village of Fort Erie and Buffalo and Fort Erie Public Bridge Co.*,¹¹ and to the Rainy River by *Rainy Lake River Boom Corporation v. Rainy River Lumber Co.*¹²

The principle of the thalweg has been adopted for all Canada's internal boundaries,¹³ with the exceptions that the part of the Labrador boundary which follows the Romaine River is formed by the east bank,¹⁴ and part of the Jidnish River section of the boundary between Nova Scotia and New Brunswick follows the northern bank of the river.^{14A}

¹⁰ Oppenheim, *op. cit.*, *ibid.*, vol. 1, p. 532. See also *New Jersey v. Delaware* (1934), 291 U.S. 361, 54 Sup. Ct. 407.

¹¹ (1927), 61 O.L.R. 502, [1927] 1 D.L.R. 723. The court rejected the *ad medium filum aquae* presumption of the common law, which, in the absence of strong proof to the contrary, adopts the centre line between the two banks as the boundary; see *Commissioners for Land Tax v. Central London Railway Company*, [1913] A.C. 364; *Barthel v. Scotton* (1895), 26 S.C.R. 367; *Keewatin Power Co. v. Kenora* (1906), 13 O.L.R. 237, at pp. 256-257 and (1908), 16 O.L.R. 184; *Haggerty v. Latreille* (1913), 29 O.L.R. 300, 14 D.L.R. 532; A. S. Wisdom, *The Medium Filium Rule* (1955), 119 J.P. 218.

¹² (1912), 27 O.L.R. 131, 6 D.L.R. 401.

¹³ This is assuming the following expressions mean "the centre of the channel": "following the several courses" of the river (Nova Scotia-New Brunswick, *infra*, footnote 102), "the centre of the stream" (New Brunswick-Quebec, *infra*, footnote 106), "the middle of the main channel" (Ontario-Quebec, *infra*, footnote 120) and "the middle line of the course of the river" (Ontario-Northwest Territories, *infra*, footnote 142). It is submitted that the thalweg is the correct interpretation, since "the centre of the river", or an equivalent expression, is never used.

¹⁴ See *infra*, footnote 86.

^{14A} See *infra*, footnote 102.

The thalweg has several practical disadvantages when viewed as a boundary, apart from the use of resources. The prescribed river may have rapids along its length in which no clearly defined channel exists, or there may be a choice of several channels when the river contains islands, as do the St. Croix and Detroit. If the river shifts its channel, the boundary will change also.

The rule applies only to rivers, not to lakes. The Great Lakes are divided along a line equidistant from the shores, without regard to the depth of the water, except where a different line is prescribed, as in the case of Lake Superior.

Apart from these principles, of occupation and the thalweg, two points of interest arise from the fact that Canada's international boundaries are fixed by treaties. The first is the effect on a treaty of the outbreak of war between its signatories;¹⁵ the second is the extent to which legislation is necessary to implement a treaty in Canada.¹⁶

The effect of war on treaties has never arisen as far as Canada's boundaries are concerned, since the Treaty of Ghent in 1814 exactly repeated the boundary provisions of the 1783 Treaty of Versailles.¹⁷ There has, however, been some litigation in both Canada and the United States on the present validity of provisions dealing with freedom of passage contained in the early treaties which fixed Canada's boundaries.¹⁸

The general principle in the Commonwealth on the implementation of treaties is stated as follows:

¹⁵ See McNair, *Law of Treaties* (1961), Ch. 43; Oppenheim, *op. cit.*, footnote 9, (7th ed., 1952), vol. II, pp. 302-306; L. B. Orfield, *The Effect of War on Treaties* (1933), 11 Neb. L.B. 276; James J. Lenoir, *The Effect of War on Bilateral Treaties* (1946), 34 Geo. L.J. 129; Robert Layton, *The Effect of Measures Short of War on Treaties* (1963), 30 U. of Chi. L. Rev. 96.

¹⁶ See *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 326, at p. 347 *et seq.*, [1937] 1 D.L.R. 673, at p. 678 *et seq.*; F. A. Vallat, *Treaties* (1933), 11 Can. Bar Rev. 385; N. A. M. MacKenzie, *Canada and the Treaty-making Power* (1937), 15 Can. Bar Rev. 436; A. P. Daggett, *Treaty Legislation in Canada* (1938), 16 Can. Bar Rev. 159; R. J. Matas, *Treaty-making in Canada* (1947), 34 Can. Bar Rev. 28; G. J. Szablowski, *The Creation and Implementation of Treaties in Canada* (1956), 34 Can. Bar Rev. 28; Jean-Yves Grenon, *De la conclusion des traités et de leur mise en oeuvre au Canada* (1962), 40 Can. Bar Rev. 151.

¹⁷ See below.

¹⁸ See *Francis v. R.*, [1956] S.C.R. 618, (1956), 3 D.L.R. (2d) 641; R. St. J. Macdonald, *Case and Comment* (1956), 34 Can. Bar Rev. 602, and *Correspondence*, *ibid.*, at p. 760. Also *Karnuth v. U.S.* (1929), 279 U.S. 231, 49 Sup. Ct. 274; N. A. M. MacKenzie, *The Jay Treaty of 1794* (1929), 7 Can. Bar Rev. 431 and 577; W. C. Dennis, *The Effect of War on Treaties* (1929), 23 Am. J. of Int. L. 602; James J. Lenoir, *Note and Comment* (1934), 7 Miss. L.J. 309 and 401; W.P.N., *Note and Comment* (1930), 28 Mich. L. Rev. 318; and unsigned comments in (1929), 78 U. Pa. L. Rev. 267 and (1929), 38 Yale L.J. 514 and 1150.

. . . though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction it is deemed safer to obtain such sanction in the case of an important cession of territory.¹⁹ Where taxation is imposed or a grant from the public funds rendered necessary, or where the existing law is affected, or where private rights are interfered with, . . . the previous or subsequent consent of Parliament is in all cases needed to make the treaty binding upon the subject and enforceable by officers of the Crown.²⁰

This principle was applied in *Arrow River and Tributaries Slide and Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*,²¹ where two members of the Supreme Court of Canada held that valid provincial legislation inconsistent with the Ashburton-Webster Treaty meant that the treaty was unenforceable.

Until the Statute of Westminster was passed in 1931 Canada was only able to sign treaties as a member of the British Empire, but after this Act there was no limitation on the treaty-making power. In *ex p. O'Dell and Griffen*²² it was contended that the extradition provisions in the Ashburton-Webster Treaty of 1842 were no longer in existence, since it had been signed by the Imperial Crown on behalf of a colony which could not sign for itself, and that because Canada could now sign its own treaties, the old ones signed by Britain were superseded. Schroeder J. rejected this argument, however, and held that the result of the Statute of Westminster was that Canada could sign a new treaty to replace an existing one, but until this was done the old treaty remained in force.

Before concluding this introduction it is worth pointing out that in determining boundary questions maps will always be used, since they show geographical features by reference to which boundaries can be fixed and are often the clearest record of boundaries claimed. However, when dealing with an uninhabited country, knowledge of which is limited, maps are inevitably misleading since they are only the maker's opinion of what is known. The uncertainty caused by reference to inaccurate maps required the appointment of a commission to determine which was the River St. Croix referred to in the Treaty of Versailles of 1783, and gave rise to the anomaly that the precise position of Northwest Angle Inlet in the Lake of the Woods is not in fact the northwest corner.

¹⁹ In *Damodhar Gordhan v. Deoram Kanji* (1876), 1 App. Cas. 332, at pp. 373-374, the Privy Council doubted the correctness of an Indian case holding that the Crown could not make any cession of territory, however small, without Parliamentary consent.

²⁰ Halsbury's Laws of England (3rd ed., 1954), vol. 7, p. 288.

²¹ [1932] S.C.R. 495, [1932] 2 D.L.R. 250. See S. E. S., Case and Comment (1932), 10 Can. Bar Rev. 400.

²² [1953] O.R. 190, [1953] 3 D.L.R. 207.

The leading English cases in private law on the admissibility in evidence of maps are *Mercer v. Denne*²³ and *A.-G. v. Horner* (No. 2).²⁴ In the first case it was said that maps are merely illustrations, and the actual evidence must come from outside. In the second, it was held that maps are inadmissible if they are not shown to have been made by persons of competent knowledge. The leading Canadian case is *R. v. Price Brothers and Co. Ltd.*,²⁵ where the Supreme Court held that maps were of little weight in evidence since the number of mistakes, particularly in old maps, is so large. The court said they could be admissions against the party producing them. The Privy Council, a year later in *re Labrador Boundary*, refused to treat maps issued by the Canadian Government as binding admissions, but gave them considerable weight as showing the general construction put on the relevant Orders in Council.²⁶ The same approach was adopted by the United States members of the Alaskan Boundary Tribunal in considering British maps which favoured their claim.²⁷

II. The International Boundaries.²⁸

A. Demarcation.

Canada's southern boundary with the United States is now governed by the Treaty of Washington, signed on April 11th, 1908. The treaty defined the whole boundary, from the waters of Passamaquoddy Bay to the Pacific Ocean, though it did so mainly by referring to earlier treaties. It provided for the appointment of one Commissioner by each party to demarcate the boundary on the ground and to delineate it on accurate modern maps; it also gave them power to select what reference points they found necessary. An exception to this scheme was the part of the boundary which runs from its intersection with the St. Lawrence River to the mouth of the Pigeon River (that is, the part of the boundary which runs

²³ [1905] 2 Ch. 538.

²⁴ [1913] 2 Ch. 140.

²⁵ [1926] S.C.R. 28, [1925] 3 D.L.R. 595, rev'd on other grounds, [1926] 3 D.L.R. 642 (P.C.).

²⁶ [1927] 2 D.L.R. 401, at p. 425, (1927), 5 Can. Bar Rev. 335, at p. 359, 137 L.T.R. 187, at p. 199, 43 T.L.R. 289, at p. 299.

²⁷ See C. C. Hyde, *Maps as Evidence in International Boundary Disputes* (1933), 27 Am. J. of Int. L. 311.

²⁸ Sources used but not cited elsewhere are Chalmers' *Treaties* (1790); Lawrence J. Burpee, *An Historical Atlas of Canada* (1927); P. E. Corbett, *The Settlement of Canadian-American Disputes* (1937); *Treaties Conventions International Acts Protocols and Agreements between the United States and Other Powers*, (Washington, Government Printing Office, vols. I and II, 1910; vol. III, 1923; vol. IV, 1938); Canada, Department of Mines and Technical Surveys, Geographical Branch, *Memoir 2, The Boundaries of Canada, its Provinces and Territories* (1954).

through the Great Lakes), for which the existing International Waterways Commission, consisting of three members appointed by each side, was responsible.²⁹ The Commissioners were required to submit reports; these are largely technical, but contain excellent appendices on historical matters and diplomatic negotiations with respect to the regions they cover.³⁰ The terms of the treaty were amended to conform to the geography of the areas they dealt with in 1910 (Passamaquoddy Bay) and in 1925 (Lake of the Woods and Passamaquoddy Bay).

Canada's boundary with Alaska was determined by arbitration under a convention signed in 1903.³¹ Article VI of the convention provided for the demarcation of the boundary in accordance with the decision to be rendered, and in 1906 a convention was signed providing for the section of the boundary formed by the 141st meridian to be laid down. Each party appointed one commissioner, and their report was published in 1918.³² Though the Panhandle section of the boundary was covered by the 1903 convention, it was eventually surveyed by commissioners appointed under the treaty of 1908; their report was published in 1952.³³

B. *From the Atlantic to the St. Lawrence.*³⁴

The problem of fixing the boundaries of modern Canada arose

²⁹ The administration of this part of the boundary was provided for by the creation of the International Joint Commission set up by a treaty signed in Washington on January 11th, 1909, and implemented by S.C., 1911, c. 28, amended by S.C., 1914, c. 5 and S.C., 1952, c. 43. See William L. Griffin, *A History of the Canadian-United States Boundary Waters Treaty of 1909* (1959), 37 U. of Detroit L.J. 76.

³⁰ International Boundary Commission, Joint Report upon the Survey and Demarcation of the International Boundary between the United States and Canada, (Washington, Government Printing Office): From the Source of the St. Croix River to the Atlantic Ocean, 1934 (Treaty, arts I and II); From the Source of the St. Croix River to the St. Lawrence River, 1925, (Treaty, art. III); From the Northwesternmost Point of Lake of the Woods to Lake Superior, 1931, (Treaty, art. V); From the Gulf of Georgia to the Northwesternmost Point of Lake of the Woods, 1937, (Treaty, arts. VI and VII); From the Western Terminus of the Land Boundary along the Forty-ninth Parallel . . . to the Pacific Ocean, 1921, (Treaty, art. VIII). International Waterways Commission, Report of the International Waterways Commission upon the International Boundary between the Dominion of Canada and the United States through the St. Lawrence River and Great Lakes (Ottawa, Government Printing Bureau, 1916) (Treaty, art. IV).

³¹ *Infra*, footnote 60.

³² International Boundary Commission, Joint Report upon the Survey and Demarcation of the International Boundary between the United States and Canada along the 141st Meridian from the Arctic Ocean to Mount St. Elias (Washington, Government Printing Office, 1918).

³³ International Boundary Commission, Joint Report upon the Survey and Demarcation of the Boundary between Canada and the United States from Tongass Passage to Mount St. Elias (Ottawa, Queen's Printer, 1952).

³⁴ A discussion of criminal and civil jurisdiction in international waters is beyond the scope of this article, but reference is made to *R. v. Sharp*.

in 1783, when the independence of the United States of America was recognized by the Treaty of Versailles. Before this date most of the inhabited part of North America was British territory, and the western boundaries between the British possessions and Louisiana and Florida, claimed respectively by France and Spain, were hardly defined at all, the main settlements being on the eastern half of the continent.

Article II of the treaty prescribed a line which, but for minor variations, is part of the present boundary. Since Britain was conceding independence to the United States and retaining sovereignty over its remaining territory, the treaty did not attempt to draw the boundaries of Canada, but of the United States; for this reason it described boundaries with Louisiana and Florida as well as with Canada.

The northern boundary of the United States as provided by the treaty ran from the Atlantic to the Lake of the Woods (on the northern edge of which the town of Kenora now stands) and then due west to the Mississippi. The first place of reference was the head of the St. Croix river, the stream of which forms the boundary between New Brunswick and Maine. The treaty provided the boundary should run:

... from the northwest angle of Nova Scotia, viz. that angle north from the source of St. Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the St. Lawrence from those which fall into the Atlantic Ocean, to the north-westernmost head of the Connecticut River; . . .

However, no machinery for charting the exact location of the boundary was provided, and the two states could not agree which river was referred to.

In 1794 Jay's Treaty provided for commissioners to determine which river was meant by the St. Croix, the existing maps and descriptions being extremely vague.³⁵ Each state was to appoint a commissioner, who together were to agree on a third; the majority decision was to be final and conclusive. This treaty is generally recognized as the first example of modern arbitration.³⁶

(1869), 5 P.R. 135; *U.S. v. Rodgers* (1893), 150 U.S. 249, 14 Sup. Ct. 109; *The Grace* (1894), 4 Ex. C.R. 283; *R. v. Meikleham* (1905), 11 O.L.R. 366; Admiralty Act, R.S.C., 1952, c. 1, s. 18; Waterways Treaty Act, S.C., 1911, Sched., art. I; *The Atlantic* (1827), 1 Ware 121; *The Dunbar Dredging Co. v. The Ship "Milwaukee"* (1907), 11 Ex. C.R. 179; *The Ship "D. C. Whitney" v. St. Clair Navigation Co.* (1907), 38 S.C.R. 303.

³⁵ On this section of the boundary see W. F. Ganong, A Monograph of the Evolution of the Boundaries of the Province of New Brunswick (1901), Trans. R. Soc. of Canada (2nd series), vol. VII, sec. II, p. 139.

³⁶ See John Basset Moore (ed.), International Adjudications, Modern Series, vol. I, The Saint Croix River Arbitration (1929).

In 1797 the agents of the two states presented detailed arguments to the arbitrators appointed under Jay's Treaty, who eventually held the westernmost river draining into Passamaquoddy Bay, known as the Scoodic, to be the St. Croix. This river has two main branches, and the arbitrators in a compromise decision in 1798 agreed unanimously to make the Chiputneticook River, the western branch, the continuation of the boundary.

The situation in 1814, thirty-one years after the boundaries of the United States had been prescribed by the treaty of 1783, was that little more than the starting point for their delimitation had been fixed. The Treaty of Ghent in 1814, terminating the War of 1812, provided for three pairs of commissioners, with a member from each of the two states, to determine the boundaries in three areas. In the case of disagreement, the commissioners were to report to their own and the other government stating the points of difference and the justifications for each point of view. In such a case the reports were to be referred to some friendly sovereign or state to decide the dispute.

It is obvious from their constitutions that these commissions were less likely to reach agreement than the one with three members set up under Jay's Treaty. This was in fact the case, only the one dealing with the least amount of territory coming to a decision, largely as the result of a United States compromise. The other commissions agreed on most of the boundary, but the land on which they disagreed was not apportioned until 1842.

The Treaty of Ghent used words identical with those of the Treaty of Versailles of 1783. This was necessary in order to apportion the boundary between the three commissions, and also served the purpose of defining the boundary anew. The effect of war on treaties is a controversial subject, but it is probable that a treaty defining a boundary between two states will be abrogated by a war in which one repeatedly attempts to invade the other.³⁷

The task of the first commission³⁸ was to establish the boundary of the United States so as to,

. . . comprehend all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida [Maine] on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such islands as now are, or heretofore have been, within the limits of Nova Scotia.

³⁷ *Supra*, footnotes 15 and 18.

³⁸ See John Basset Moore, *op. cit.*, footnote 36, vol. 6, *The Title to Islands in the Bay of Fundy and Passamaquoddy Bay* (1933).

The line as described would give all the islands to the United States, and it was therefore important to establish the ones over which Nova Scotia had claimed jurisdiction. In 1817 the arbitrators reached their decision, awarding some islands to the United States, others to Britain. The award was based on an attempt to apply the principle of occupation as a mode of acquiring territory, but the result was an achievement of diplomacy rather than law.³⁹

In their decision the arbitrators held that the determination of the boundary in the waters of Passamaquoddy Bay was beyond their terms of reference. Eventually the Treaty of Washington of 1908 provided that the parties should state their claims and attempt to reach a settlement by negotiation. In 1910 a treaty was signed which fixed the line, but it was later found not to extend to the limit of territorial waters; this defect was remedied by the Treaty of Washington in 1925.

The second commission was to start where the one set up by the 1794 Treaty had stopped. The source of the St. Croix had been determined, and now a line had to be drawn due north from it to the "northwest angle of Nova Scotia", that is, the angle formed by the intersection of the due north line with the watershed dividing the rivers running north and south, then along the watershed to,

... the northwesternmost head of the Connecticut River; thence down along the middle of that river, to the 45th degree of north latitude;⁴⁰ from thence, by a line due west on said latitude until it strikes the River Iroquois or Cataraguay [now the St. Lawrence]. . . .

The two commissioners could reach no agreement, one of the reasons being that surveys conducted by them had revealed no clear highlands along which the boundary could be drawn or which could form the point of intersection, the "northwest angle of Nova Scotia".

At this period the rivers were the main lines of communication, and when the St. Lawrence was frozen the St. John River was the only way contact could be maintained between Britain and Canada. By the treaty of 1783 this river ran partly through the United States, and to avoid this Britain contended that the range of hills, called the Mars Hills, lying to the south of the watershed, were the watershed referred to by the treaty. In 1820 eastern Massachusetts

³⁹ F. J. Alcock, *The Isles of Fundy* (1949), 39 *Can. Geographical J.* 92, gives an account of the history of the settlement of these islands, and in doing so shows the problems facing the arbitrators.

⁴⁰ This is the first time a latitude was used in any international agreement, though one was used in the Royal Proclamation of October 7th, 1763, discussed below. See Jesse S. Reeves, *International Boundaries* (1948), 38 *Am. J. of Int. L.* 533.

was constituted as the State of Maine, and it adopted an intransigent attitude which prevented the United States from making any compromise. In 1828 a convention to refer the disagreement to the King of the Netherlands was ratified. He could not decide on the differences as required by the treaty since there were no readily distinguishable highlands, and so in 1831 he fixed a compromise boundary. This was rejected by the Senate of the United States on the grounds that he had not decided the question submitted to him.

Oppenheim treats an arbitrator's failure to follow his instructions as an obvious reason for the invalidity of a decision; this is clearly correct, otherwise the basic principle of state sovereignty would be violated. However, since this question was in fact insoluble, it might nowadays be argued that the decision was justifiably made *ex aequo et bono*.⁴¹

The unsettled boundary was a continual source of friction, and in 1842 on American initiative the Ashburton-Webster Treaty was signed, article I giving Canada nearly 900 square miles more territory in this area than the King of Holland had awarded. No principle of international law was involved in the final settlement, which was purely a diplomatic compromise.

The third commission, once it had found where the forty-fifth parallel met the St. Lawrence, had to fix the boundary,

. . . along the middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie,⁴² through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through Lake Superior northward of the Isles Royal and Phelipeaux, to the Long Lake, thence through the middle of said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most northwestern point thereof, and from thence on a due west course to the river Mississippi. . . .

Most of this part of the boundary was to run over water, and by 1827 the commissioners had reached agreement but for two points. The first was the sovereignty of St. George's Island, just

⁴¹ *Op. cit.*, footnote 9 (7th ed., 1952), vol. II, p. 27. It is unlikely that such an argument would be accepted, since the arbitrators are only to decide in this way when the treaty appointing them expressly authorizes them to do so.

⁴² *Re Village of Fort Erie and Buffalo and Fort Erie Public Bridge Co.*, *supra*, footnote 11, held that the boundary is the centre of the navigable channel. So also *People ex rel. Grand Trunk Ry. v. Gilchrist* (1927), 221 N.Y.S. 613, *rev'd* on other grounds, 161 N.E. 242.

to the south of Sault Ste. Marie between Lakes Huron and Superior; the second was the course the boundary was to follow from Lake Superior to the Lake of the Woods, no water channel being mentioned in the treaty. Each question was finally settled by the Ashburton-Webster Treaty of 1842, St. George's Island becoming part of the United States, and the boundary between the Lake of the Woods and Lake Superior following the water-system of Rainy River and Pigeon River, the latter draining into Lake Superior about thirty miles southwest from Port Arthur.

When the boundary was surveyed by the International Boundary Commission it was found that some small adjustments had to be made. There were two small areas of water totalling two and one half acres in the Lake of the Woods which were part of the United States, but were surrounded by Canadian waters. The Treaty of Washington in 1925 provided that these should become part of Canada.⁴³ It was also found that some small islands in Lake Saganaga which had been thought to be in the United States were in fact in Canada. When the treaty of 1842 was signed, a line was drawn on a chart, but the chart was neither attached to the treaty nor referred to by it. It was therefore not part of the treaty and did not fix the boundary in relation to the line drawn on it. The effective date of the determination of the boundary was the time the International Boundary Commission filed its report. Some years after the report had been filed the owners of the islands tried to sell their property, and on discovering that it had been part of Canada for some years, unsuccessfully sued the Minnesota county to which they had been paying taxes.⁴⁴

The Ashburton-Webster Treaty also provided that:

... all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

A distinction must be drawn between rivers which at the time the treaty was signed were used for floating logs and those which were not. Those which were used were clearly to be kept "free and open" under the treaty, but when those which in 1842 were unusable were improved so as to be able to carry logs the issue of whether this was a violation of the "as now actually used" provision was brought before the courts of both Canada and the United States. There has in fact been some litigation, mainly

⁴³ See *infra*, footnote 148.

⁴⁴ See *Pettibone v. Cook County* (1941), 120 F. 2d 850.

arising from logging operations, in connection with both usable and unusable rivers. The Rainy River was navigable in 1842, whereas the Pigeon River was not usable at Grand Portage. The cases concerning the Rainy River will be discussed first.

The Rainy Lake River Boom Corporation, incorporated in Minnesota, built a boom which extended from the United States side across the Rainy River into Canadian waters. It collected all logs floated down the river and sorted them, charging the logging companies for this service and claiming a lien until it was paid. In *International Boom Co. v. Rainy Lake River Boom Corp.*⁴⁵ the company was sued in replevin to compel it to give up some logs it was holding. One of the grounds relied on by the plaintiff was an allegation that the boom infringed the treaty by preventing the free use of the river. However, the Supreme Court of Minnesota held that the plaintiff by its past conduct in sending its men to help the defendant and in paying tolls had acquiesced in the presence of the boom and could not rely on the treaty. Having reached this decision, the court did not deem it necessary to consider the effect of the treaty. There were two appeals, but both were on points of evidence.⁴⁶ However, in *Rainy Lake River Boom Corp. v. Rainy River Lumber Co. Ltd.*⁴⁷ the Circuit Court of Appeals held that the boom was illegal under the treaty, and Canadian companies could not be subjected to tolls.

In *Namakan Lumber Co. v. Rainy Lake River Boom Corp.*⁴⁸ the Supreme Court of Minnesota held the company was not authorized by the Minnesota statutes then in force to operate a boom and charge logging companies for sorting their logs, a point which had not been raised in the earlier cases. The result of this decision also was that the court was not forced to make any finding as to the international boundary.

The company then amended its charter, and in *Rainy Lake River Boom Corporation v. Rainy River Lumber Co.*⁴⁹ it sued in Ontario a Canadian company to recover its tolls. Mulock C.J. held that the thalweg of the Rainy River constituted the international boundary, and that, by virtue of the express provision of the Ashburton Treaty for free and open navigation, a foreign boom company could not build works on the river in Canada, and the charter authorizing it to improve the river was *ultra vires* and void.

⁴⁵ (1906), 107 N.W. 735.

⁴⁶ (1908), 116 N.W. 221; (1910), 127 N.W. 382.

⁴⁷ (1908), 162 F. 287.

⁴⁸ (1911), 132 N.W. 259.

⁴⁹ *Supra*, footnote 12. See however *Isherwood v. Ontario and Minnesota Power Co.* (1911), 2 O.W.N. 651, where Meredith C.J.C.P. erroneously

The legality of booms across the Pigeon River and improvements to it was finally determined by the Supreme Courts of both Canada and the United States. The main issue in these cases was whether the phrase "as now actually used" in the treaty applied to "all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods", in which case tolls could be charged on any river not used in 1842, or only to "Grand Portage, from the shore of Lake Superior to the Pigeon River", in which case tolls could not be imposed on any river, used or not, nor on Grand Portage. The American company Pigeon River Improvement, Slide and Boom Co. had agreed with the Canadian Arrow River and Tributaries Slide and Boom Co. Ltd. that each should build complementary booms on their respective sides of the river. In *Clark v. Pigeon River Improvement Slide and Boom Co.*⁵⁰ the Circuit Court of Appeals held that "as now actually used" referred only to Grand Portage, with the result that the Pigeon River must be kept "free and open", so that it could not be obstructed, nor could tolls be imposed on any part of it, by Canadian or United States citizens.

The Supreme Court of Canada came to the opposite conclusion in *Arrow River and Tributaries Slide and Boom Co. Ltd. v. Pigeon Timber Co. Ltd.*⁵¹ The decision was unanimous that an Ontario company could build a boom and charge tolls on the Canadian side of the Pigeon River. Anglin C.J. held that all the "free and open" provision meant was that citizens of each country should have equal rights and equal liabilities to pay tolls to either country. The remaining four members of the court were evenly divided over the scope of "as now actually used". Rinfret and Smith JJ. held that the phrase applied to all water communications used at the time the treaty was signed, and, since the area in question here was not navigable and was not used, tolls could be imposed. Lamont and Cannon JJ. held that the phrase was a specific reference to Grand Portage, and did not apply to all possible water communications in use. They then went on to say the expression "free and open" was inconsistent with the imposition of any tolls, but The Lakes and Rivers Improvement Act⁵² of Ontario under which the company had acted was validly passed by the province, and though it was inconsistent with the treaty, that part of the

said, in an *obiter dictum* at p. 653, that the boundary in the Rainy River was "the middle of the river."

⁵⁰ (1931), 52 F. 2d 550.

⁵¹ *Supra*, footnote 21.

⁵² R.S.O., 1927, c. 43, s. 32, now R.S.O., 1960, c. 203, s. 36.

treaty was unenforceable in the absence of any Imperial or Canadian legislation implementing it.

The result of these two decisions was,

. . . the extraordinary situation that as to these improvements at the same place on the boundary stream — improvements necessarily complementary to each other — the Ontario Company may impose charges on the citizens of the United States for the use of its works on the Canadian side of the line while the Minnesota Company may not charge citizens of Canada for the use of its corresponding works on the Minnesota side.⁵³

In *Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox Ltd.*⁵⁴ the United States Supreme Court held that Grand Portage was an impassable section of the river, and that the expression “as now actually used” was ambiguous and did not preclude an improvement of that section of the Pigeon River by sluiceways to enable it to carry logs, nor did it prevent a non-discriminatory charge being imposed for the use of such an improvement.

The judicial decisions of the United States and Canada are therefore in harmony in deciding that the Rainy River, which was navigable in 1842, cannot be obstructed, but the Pigeon River, which was unusable at that date, may have booms built across it.

There have been some other cases involving the application of the Ashburton Treaty to this part of the boundary. In *Smith v. Ontario and Minnesota Power Co. Ltd.*⁵⁵ the defendant company had erected a dam and so operated it that the plaintiffs' lands were flooded. The plaintiffs relied on the treaty to show that the dam was illegal, but the court held that the treaty was not intended to benefit riparian owners, and the plaintiffs therefore could not rely on it. In *Perko v. U.S.*⁵⁶ an Executive Order of the President banning flying at a height of less than 4,000 feet in the Pigeon River area was objected to as being inconsistent with the treaty and therefore unconstitutional on the grounds that it prevented planes from landing on waters declared by the treaty to be “free and open”. The United States Court of Appeals held that this Order was not an instance of one country imposing unilateral obligations on the citizens of another, and therefore was not a violation of the treaty.

⁵³ *Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox Ltd.* (1934), 291 U.S. 138, at pp. 156, 157, 54 Sup. Ct. 361, at p. 366.

⁵⁴ *Ibid.*

⁵⁵ (1918), 44 O.L.R. 43, 45 D.L.R. 266. Approved on another point in *Ontario and Minnesota Power Co. v. R.*, [1925] A.C. 196.

⁵⁶ (1953), 204 F. 2d 446; cert. denied (1953), 346 U.S. 832.

C. From the Lake of the Woods to the Pacific Ocean.

The treaty of 1783 had assumed that a line due west from the northwest angle of the Lake of the Woods would intersect the Mississippi, but when it was found that all the sources of the river were to the south of such a line a new scheme was adopted. By a convention in 1818 it was agreed that,

... a line drawn from the most northwestern point of the Lake of the Woods, along the forty-ninth parallel of north latitude, or, if the said point shall not be in the forty-ninth parallel of north latitude, then that a line drawn from the said point due north or south as the case may be, until the said line shall intersect the said parallel of north latitude, and from the point of such intersection due west along and with the said parallel shall be the line of demarcation between the territories of the United States and those of his Britannic Majesty, from the Lake of the Woods to the Stony Mountains.

The northwesternmost point of the Lake of the Woods had been fixed by the commissioners appointed under the Treaty of Ghent; since it is to the north of the forty-ninth parallel the boundary runs due south for a few miles, forming a spur of United States territory into Canada.

The boundary between Canada as ceded to Britain in 1763 and Louisiana as retained by France had never been fixed.⁵⁷ Since the Treaty of Versailles only defined the boundaries of the United States, the Louisiana Purchase in 1803 created a new possibility for disputes between Britain and the United States.

In the negotiations preceding the convention of 1818 the United States had proposed extending the forty-ninth parallel to the Pacific, but Britain did not accept this since it would have cut off the southern part of Vancouver Island. No agreement could be reached, so it was agreed that the boundary should be the forty-ninth parallel as far as the Rocky Mountains, and beyond them the land and harbours should be open to the subjects of both states for the next ten years, without prejudice to any claims or accrued rights.

In 1819 Spain ceded to the United States all her territorial claims to the northwest coast of the Pacific, and in 1824 and 1825 Russia had agreed with the United States and Britain respectively that the southern boundary of Russian territory should be the parallel 54° 40', which runs close to the City of Prince Rupert in British Columbia.

The Convention of 1818 was to remain in force for ten years,

⁵⁷ France ceded Louisiana to Spain in 1762 by a secret treaty, but Spain ceded it back in 1800.

but it was renewed in 1827, subject to abrogation by either side on a year's notice. The territory south of 54° 40' and west of the Rocky Mountains, known as Oregon, attracted many settlers, and the settlement of the boundary became even more important on the election of President Polk, when the slogan "fifty-four forty or fight" was frequently heard. Britain claimed all the territory north of the mouth of the Columbia River by virtue of five voyages of exploration and survey between 1579 and 1792 and the establishment of trading posts. The United States' claim was based on the cession of Louisiana, three voyages of discovery at the turn of the century, the establishment of a few trading posts, and by virtue of contiguity, which is not recognized as giving a claim to title in international law.⁵⁸ The settlers in the region, who had arrived in the early 1840's, were American citizens, but this was irrelevant to the question of sovereignty since the renewed 1818 convention was still in force. Each side therefore could claim the first prerequisite of sovereignty, that of discovery, but neither had been in effective occupation so as to exclude the other. The Treaty of Washington of 1846 eventually fixed the boundary as continuing from the Rocky Mountains along the forty-ninth parallel,

. . . to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly, through the middle of the said channel, and of Fuca's Straits to the Pacific Ocean.

However, there were two possible channels with several islands between them; no agreement could be reached and there was a period of joint military occupation before the matter was settled by the Emperor of Germany, who was agreed on as an arbitrator in the 1871 Treaty of Washington. He rejected the British contention that the treaty referred to the most frequently used channel and upheld the United States claim, which was that the forty-ninth parallel was the main boundary and was only deflected to prevent the division of Vancouver Island, so the channel which followed the least departure from this line was the one intended.

D. *The Alaska and Northern Boundaries.*

In 1867 the United States bought Russia's territory in North America, but it was not until the gold rush that the problem of drawing the boundary between Alaska and Canada became important.⁵⁹ The 1825 Treaty between Russia and Britain, mentioned above, drew the boundary-line:

⁵⁸ Hackworth, *Digest of International Law* (1940), vol. I, pp. 406, 407. See also Oppenheim, *op. cit.*, footnote 9 (8th ed., 1955), vol. I, p. 560.

⁵⁹ The documents published by the parties in connection with this

A partir du point le plus méridional de l'île dite Prince of Wales, lequel point se trouve sous la parallèle du 54° 40' de latitude nord, et entre le 131^e et le 133^e degré de longitude ouest (méridien de Greenwich), la dite ligne remontera au nord le long de la passe dite Portland Channel, jusqu'au point de la terre ferme où elle atteint le 56^e degré latitude nord; de ce dernier point la ligne de démarcation suivra la crête des montagnes situées parallèlement à la côte, jusqu'au point d'intersection du 141^e degré de longitude ouest (même méridien); et, finalement, du dit point d'intersection, la même ligne méridienne du 141^e degré formera, dans son prolongement jusqu'au la Mer Glaciale, la limite entre les possessions Russes et Britanniques sur le Continent de l'Amérique Nord-ouest.

Il est entendu, par rapport à la ligne de démarcation déterminée dans l'Article précédent:

1. Que l'île dite Prince of Wales appartiendra toute entière à la Russie;
2. Que partout où la crête des montagnes qui s'étendent dans une direction parallèle à la côte depuis le 56^e degré de latitude nord au point d'intersection du 141^e degré de longitude ouest se trouverait à la distance de plus de 10 lieues marines de l'Océan, la limite entre les possessions Britanniques et la lisière de côte mentionnée ci-dessus comme devant appartenir à la Russie sera formée par une ligne parallèle aux sinuosités de la côte, et qui ne pourra jamais en être éloignée que de 10 lieues marines.

A dispute developed between Britain, in right of Canada, and the United States as to the part of the boundary from the mouth of the Portland Channel to the point where it reached the one hundred and forty-first meridian.

In 1903 a convention provided for a commission of six members, three appointed by each side, to determine "judicially" the questions submitted to them.⁶⁰ Seven questions were set out in the convention, the three most important being what channel was the Portland Channel referred to in 1825, whether the boundary line was to follow each indentation of the coast or its general direction only, and what, if any, were the mountains parallel to the coast which were to form the boundary if they were within ten leagues of the coast. On the first question the dispute was only as to the mouth of the channel, which Britain contended was in line with the main channel, but the United States argued that the channel as named turned between two islands before reaching the sea. The single English member of the commission, Lord Chief Justice Alverstone, sided with the three United States members and against the two Canadians and upheld the United States' view. His decision

dispute are so numerous that space does not permit a list of even the most important.

⁶⁰ See F. W. Gibson, *The Alaskan Boundary Dispute* (1945), *Annual Report Canadian Historical Association*, p. 25; *The Alaska Award*, Sessional Paper No. 46a (1904), Printed by Order of Parliament, Ottawa.

was widely criticized as being not judicial, but a diplomatic compromise. On the second question, the Canadian and British argument was that the line should follow the general direction of the coast and not be more than ten leagues from it, cutting across any deep inlets which extended more than ten leagues inland. The United States took the view that the boundary was to follow every indentation, and this was the opinion of the majority of the Commission, the two Canadian members again dissenting. On the third question, since there were some mountains within the ten league limit along parts of the boundary, Britain contended the line should be drawn between their summits; the United States, however, maintained that a line between isolated mountains was not what was intended, and only a recognizable range of mountains was meant by the signatories to the 1825 treaty. The commission, by the same majority, upheld the United States' position. The actual award, as drawn on a map by the majority of the commission, did not concede to the United States all the territory it claimed; the line runs between the two boundaries claimed for almost all its length.

The northern boundaries of Canada are the coasts of the Arctic Islands. These became part of Canada by an Order in Council in 1880.⁶¹ The North Pole itself cannot be owned by any state since in spite of the ice-cap it is part of the high seas.⁶²

III. *The Internal Boundaries.*

A. *Constitutional Law.*

The present method of constituting new provinces is contained in the British North America Act of 1871;⁶³ section 146 of the 1867 Act⁶⁴ dealt only with the admission of other colonies into the Dominion. The Dominion Parliament by section 2 has the power to establish new provinces in any territory in Canada not already part of an existing province, and by section 3 can alter the boundaries of any province provided the provincial legislature gives its consent. The Dominion Parliament would therefore need the consent of any province concerned for a change in Canada's international boundaries.

⁶¹ R.S.C., 1952, vol. VI, p. 6281.

⁶² See A. R. Clute, *The Ownership of the North Pole* (1927), 5 Can. Bar Rev. 19; W. Lakhtine, *Rights over the Arctic* (1930), 24 Am. J. of Int. L. 703; Robert D. Hayton, *Polar Problems and International Law* (1958), 52 Am. J. of Int. L. 746; Gordon Ward Smith, *The Historical and Legal Background of Canada's Arctic Claims* (1953).

⁶³ 34 & 35 Vict., c. 28 (Imp.), R.S.C., 1952, vol. VI, p. 6269.

⁶⁴ 30 & 31 Vict., c. 3 (Imp.), R.S.C., 1952, vol. VI, p. 6187.

Once the boundaries of a province have been defined or altered a survey is usually made which is then adopted by statutes of the provinces concerned. The Dominion Parliament may also, depending on the circumstances, pass a statute adopting the survey; this will be referred to in the discussion of each boundary.⁶⁵

In the event of a dispute between provinces as to their boundary, the common-law situation is that,

... the original and exclusive jurisdiction in cases relating to boundaries between provinces in the plantations [colonies], the dominion, or proprietary government therein, is vested in the King in Council.⁶⁶

In 1833, some years after this quotation was first published, the Judicial Committee of the Privy Council was set up to decide any matter referred to it by the Crown. As far as Canada is concerned the Privy Council has been replaced by the Supreme Court of Canada, to which the Governor General may refer any matter for decision.⁶⁷ If a dispute were to arise this is probably the course which would be taken. In the only controversy which has occurred since Confederation (between Manitoba and Ontario) the Ontario and Dominion governments (Manitoba being the successor to the latter) came to an executive agreement to submit the matter to mutually acceptable arbitrators. However, the Privy Council later held, as a result of the British North America Act of 1871, that the award of the arbitrators was not binding unless both the Dominion Parliament and the province enacted legislation adopting it.⁶⁸ For any decision to be binding it is therefore necessary for the Dominion and the province involved to adopt it by legislation; there seems to be no legal reason why this cannot be done in advance, as Ontario did in 1874.⁶⁹

There have been two other disputes involving territory which is now part of Canada. The first was between the Provinces of Canada and New Brunswick before Confederation. It was settled by arbitrators appointed under an executive agreement between the two governments, and their award was adopted by an Act of the Imperial Parliament.⁷⁰ The Labrador boundary was settled after an executive agreement⁷¹ referred the matter to the Judicial Committee of the Privy Council. No statute was passed adopting the decision.

⁶⁵ See *infra*, footnotes 119, 159 and 165.

⁶⁶ Chitty, *Prerogatives of the Crown* (1820), p. 410. See also Thomas Hodgins, *The Boundaries of Manitoba* (1905), 25 Can. L. T. 200.

⁶⁷ Supreme Court Act, R.S.C., 1952, c. 259, s. 55.

⁶⁸ See *infra*, footnote 142.

⁶⁹ S.O., 1874, (2nd Sess.), c. 6.

⁷⁰ 14 & 15 Vict., c. 3 (Imp.).

⁷¹ See *infra*, footnote 81.

A boundary between a province and a territory can only be fixed by the Dominion Parliament, acting for the territory, and by the Legislature of the province concerned. At present only the Yukon Territory has boundaries as such assigned to it, and these are contained in an Act of Parliament;⁷² The Northwest Territories include, in effect, that part of Canada not in any province or other territory, and have no boundaries assigned by statute.⁷³ There are plans for the Northwest Territories to be divided into two new territories; this is discussed later.

B. *The Labrador Boundary.*⁷⁴

Newfoundland first came under British rule when Elizabeth I issued letters patent to Sir Humphry Gilbert, who formally took possession of the island in her name. British sovereignty was confirmed when France relinquished all her claims by article XIII of the Treaty of Utrecht in 1713. Since Newfoundland proper is an island no problem as to its boundaries can arise.

The last of Canada's boundaries to be determined was that with Labrador, which was fixed in 1927, Labrador being part of the then Colony of Newfoundland. The discovery of large mineral deposits in the area has made the precise location of the boundary of increasing importance.⁷⁵

In February 1763 France ceded Canada to Britain by the Treaty of Paris, the cession including what is now Labrador. The British government, having obtained a declaration from the Hudson's Bay Company that it claimed only the territory west of the entrance to Hudson's Straits (Cape Chidley), issued in March 1763 a new commission to the Governor of Newfoundland appointing him,

... Governor and Commander-in-Chief in and over our said island of Newfoundland and all the coasts of Labrador from the entrance of Hudson's Straits to the river St. John's, [Romaine River] which discharges itself into the sea nearly opposite the west end of the island of Anticosti, including that island with any small islands on the said coast of Labrador. . . .

In a proclamation of October 7th in the same year,⁷⁶ setting up governments for the rest of the new territory, it was provided that,

⁷² S.C., 1952-53, c. 53.

⁷³ R.S.C., 1952, c. 331, s. 2(1)(i).

⁷⁴ The report of the dispute and all relevant documents are in *In the Matter of the Boundary between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula* (1927), vols. I-XII. (Cited as *In re Labrador Boundary*).

⁷⁵ See *The Globe and Mail*, Toronto, February 10th, 1962, and *infra*, footnotes 88, 89 and 90.

⁷⁶ R.S.C., 1952, vol. VI, p. 6127.

... to the end that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands, we have thought fit, with the advice of our said Privy Council, to put all that coast, with the river St. John's to Hudson's Straights, together with the islands of Anticosti and the Madeleine and all other smaller islands lying upon the said coast, under the care and inspection of our Governor of Newfoundland. . . .

In the Governor's commission, Newfoundland and Labrador were treated as forming a single unit. This means the annexation of Labrador to Newfoundland took place on the issue of the Governor's commission, so the expression "under the care and inspection of our Governor of Newfoundland" in the later document did not affect the initial powers of the Governor, and was considered by the Privy Council not to have lessened his powers.

The Quebec Act of 1774⁷⁷ transferred the whole of Labrador to Quebec, but the Newfoundland Act of 1809⁷⁸ re-annexed it to Newfoundland. The area was eventually partitioned in 1825 by the British North America (Seignorial Rights) Act,⁷⁹ which provided,

... that so much of the said coast [of Labrador] as lies to the westward of a line to be drawn due north and south from the Bay or Harbour of Ance Sablon [Blanc Sablon], inclusive, as far as the fifty-second degree of north latitude, with the Island of Anticosti,⁸⁰ and all other islands adjacent to such part as last aforesaid, of the coast of Labrador, shall be and are re-annexed to and made a part of the said province of Lower Canada. . . .

The last document affecting the boundary before its determination was the Order in Council of 1880 making all British territory in North America, apart from Newfoundland and its dependencies, part of Canada. This had the effect of causing any dispute to be between Canada and Newfoundland, without involving the Imperial Crown. The controversy arose soon after the turn of this century, when both Newfoundland and the government of Quebec claimed the right to issue licences to cut timber in Labrador. The main issue was the extent of territory described by the word "coast" in connection with Labrador.

The two governments agreed to submit the matter to the Crown for a reference to the Privy Council;⁸¹ they also agreed that "coast"

⁷⁷ 14 Geo. III, c. 83 (Imp.), R.S.C., 1952, vol. VI, p. 6133.

⁷⁸ 49 Geo. III, c. 27 (Imp.). ⁷⁹ 6 Geo. IV, c. 59 (Imp.).

⁸⁰ Anticosti Island had previously followed Labrador in these transfers.

⁸¹ Canada proposed submitting the matter to the Privy Council in 1904, and Newfoundland agreed in principle in 1907. A detailed agreement was signed in 1920 and amended in 1922. In *re Labrador Boundary*, vol. I, pp. 125, 140, 141, and 144.

was capable of meaning the hinterland as well as the actual coast, and that Newfoundland did possess some territory in Labrador; the issue to be decided by the Privy Council was the location and definition of the boundary. Newfoundland claimed the fifty-second parallel as the southern boundary, and, as the western boundary, running north from this parallel, the watershed of the rivers flowing into the Atlantic. Canada claimed that only the "coast" which was immediately useful to sailors and fishermen, extending at most five miles inland, was included in the annexation to Newfoundland. Each party based their claim on the interpretation of the relevant documents, rather than on principles of international law.

The Privy Council held on several grounds that the word "coast" referred to the area between the shoreline and the watershed.⁸² First, the terms of the commissions issued to the Governors of Newfoundland were appropriate to an inland area; they included setting up courts, keeping the peace, and reporting on population and trade, all of which would be meaningless if confined to a narrow coastal strip. In terms of international law, this constituted an intention to occupy the inland areas, and after 1824 a judge appointed by the Newfoundland government frequently sat in court some distance inland, which constituted occupation in fact. In addition, in 1765 and 1774 the Governor had made grants of land extending thirty and sixty miles inland which would have been divided into two if the Act of 1825 had given Newfoundland only the coastal strip proposed by Canada.

Second, by international law, occupation of a seacoast carries with it occupation of the hinterland, which includes all territory drained by the rivers along the coast; reference was made to textbooks by Hall,⁸³ Westlake,⁸⁴ and Lawrence.⁸⁵

Third, many of the old maps to which the Privy Council was referred showed that watersheds were commonly used as boundaries in North America, and part of the territory granted to the Hudson's Bay Company and ceded to Canada in 1870 had the watershed in northern Labrador as its boundary.

In view of this, and the above principle, it could be said that the adoption of the watershed as a boundary constituted a customary rule of international law, since there is proof that it was a constant and uniform usage regarded as binding.

⁸² [1927] 2 D.L.R. 401, (1927), 5 Can. Bar Rev. 335, 137 L.T.R. 187, 43 T.L.R. 289, *In re Labrador Boundary*, vol. XII, p. 1005.

⁸³ *International Law* (7th ed., 1917), pp. 107, 108.

⁸⁴ *International Law* (1904), Part I, pp. 112, 113.

⁸⁵ *Principles of International Law* (7th ed., 1923), p. 153. See also Oppenheim, *op. cit.*, footnote 9 (8th ed., 1955), vol. II, pp. 60 and 534.

Fourth, the statute of 1825 re-annexing Labrador to Newfoundland was passed only sixty years after the original annexation, when its motives and meaning could easily be discovered. This statute clearly gave Newfoundland territory 100 miles from the shore. This was the document which weighed most heavily with the Privy Council.

The Privy Council therefore upheld the claim of Newfoundland, and described the boundary as,

... a line drawn due north from the eastern boundary of the bay or harbour of Ance [Blanc] Sablon as far as the fifty-second degree of north latitude, and from thence westward along that parallel until it reaches the Romaine river, and then northward along the left or east bank of the river and its headwaters to their source and from thence due north to the crest of the watershed or height of land there, and from thence westward and northward along the crest of the watershed of the rivers flowing into the Atlantic Ocean until it reaches Cape Chidley.⁸⁶

In 1949 Newfoundland became a province of Canada.⁸⁷

Though the Premier of Quebec was present during the argument before the Privy Council, the Quebec government has never marked the boundary on its official maps, apparently on the ground that it has never been demarcated.⁸⁸ There have been reports of negotiations between the two provinces to define or renegotiate the boundary.⁸⁹ Though Newfoundland clearly has the legal right to all the territory awarded to it, Quebec could perhaps refuse to allow hydro-electric power generated in Labrador to be used within or transmitted across its borders and could tax all the ore gained from the iron-fields crossed by the boundary.⁹⁰ The legal aspects of the dispute have been settled by Privy Council, and any further developments will have to depend on political action.

The Quebec Territorial Division Act⁹¹ does not acknowledge the decision of the Privy Council and merely recites the Act of 1898⁹² as to the northeastern boundaries of the province; no ac-

⁸⁶ *Supra*, footnote 82, at pp. 428, 429 (D.L.R.), 360, 361 (Can. Bar Rev.), 200 (L.T.R.), 299 (T.L.R.), 1026 (In re Labrador Boundary).

⁸⁷ 12 & 13 Geo. VI, c. 22 (Imp.), R.S.C., 1952, vol. VI p. 6399; S.C., 1949, (1st Sess.), c. 1; S.N., 1948, No. 9.

⁸⁸ See The Montreal Gazette, Sept. 16th, 1947, Sept. 26th, 1947.

⁸⁹ See The Globe and Mail, Toronto, Dec. 14th, 1949, Oct. 9th, 1956, Feb. 9th, 1961.

⁹⁰ See The Globe and Mail, Toronto, Oct. 9th, 1956, Dec. 3rd, 1959, July 27th, 1960, July 12th, 1963.

⁹¹ R.S.Q., 1941, c. 3, s. 3. For a favourable, but unofficial, Quebec view of the decision see G. Gardner, *La Frontière Canada-Labrador* (1938), 24 *La Revue Trimestrielle Canadienne* 72.

⁹² *Infra*, footnote 112.

count is taken of the Act of 1912.⁹³ Quebec's river boundaries are mentioned below.⁹⁴

C. *The Maritime Provinces and Southeastern Quebec.*⁹⁵

Since Prince Edward Island is an island its boundaries have caused no problems. The island was ceded to Britain as Ile de Saint Jean in the Treaty of Paris in 1763, and by the Royal Proclamation of October 7th, 1763,⁹⁶ was included in Nova Scotia. It was set up as a separate colony in 1769, though it remained subordinate to Nova Scotia. The Magdalen Islands were added to it in 1840,⁹⁷ and the Island was admitted into the Dominion by an Order in Council in 1873.⁹⁸

Nova Scotia did not permanently come under British rule until its cession to Britain by the Treaty of Utrecht in 1713, but no boundaries, other than those of parts of Newfoundland on which French fishermen could land to dry fish, were defined in the treaty. Cape Breton Island was reserved to France, but was ceded to Britain in 1763 and annexed to Nova Scotia by the Royal Proclamation of October 7th in that year. An Order in Council in 1784 set it up as a colony separate from but subordinate to the government of Nova Scotia.⁹⁹ The commission issued in that year to the Governor-in Chief of Nova Scotia provided for an elected Assembly, a Council, and a Lieutenant-Governor to rule Cape Breton, but no assembly was ever convened. In 1820 the commission to the Governor-in-Chief of Nova Scotia re-annexed the island to Nova Scotia. The inhabitants petitioned Her Majesty in Council against this change of constitution, but were unsuccessful.¹⁰⁰

New Brunswick was originally part of Nova Scotia, but was separated from it by the Order in Council of 1784, which adopted a report of the Lords of Trade and Plantations recommending the creation of a new government for the Loyalists and disbanded

⁹³ *Infra*, footnote 113.

⁹⁴ See *infra*, footnotes 121 and 122.

⁹⁵ As a curiosity, see Reginald V. Harris, *The Union of the Maritime Provinces* (1906), 5 Can. L. Rev. 475 and (1907), 6 Can. L. Rev. 8.

⁹⁶ *Supra*, footnote 76.

⁹⁷ By 3 & 4 Vict., c. 35, s. 60 (Imp.). These islands were made part of Quebec by the Quebec Act, and confirmed as part of Lower Canada in 1809 by 49 Geo. III, c. 27 (Imp.).

⁹⁸ R.S.C., 1952, vol. VI, p. 6271.

⁹⁹ R.S.N.B., 1952, vol. 4, p. 5.

¹⁰⁰ *In re Cape Breton Island* (1846), 5 Moore P.C. 569, 13 E.R. 489. The inhabitants' argument was that once a constitution had been granted the only way it could be withdrawn was by an Act of Parliament, not an act of the prerogative such as a Governor's Commission. The Privy Council gave no reasons for their decision, but the arguments are fully reported. See *Taylor v. A.-G.* (1837), 8 Sim. 412, 59 E.R. 164.

soldiers settled on the banks of the St. John and St. Croix Rivers.¹⁰¹

Nova Scotia objected to the proposed boundary on grounds of convenience, but no change was made. Considerable difficulty was experienced in demarcating it, and eventually two commissioners appointed for the purpose defined a boundary which, though it differed in some details from that described by the Order in Council, was accepted by New Brunswick in 1858 and by Nova Scotia in 1859.¹⁰² The boundary is described as follows:

Commencing at the mouth of the Missiquash River in Cumberland Bay, and thence following the several courses of said river to a post near Black Island; thence north fifty-four degrees twenty-five minutes east, crossing the south end of Black Island, two hundred and eighty-eight chains, to the northerly angle of Trenholm Island; thence north thirty-seven degrees east eighty-five chains and eighty-two links, to a post; thence north seventy-six degrees east forty-six chains and twenty links to the portage; thence south sixty-five degrees forty-five minutes east three hundred and ninety-four chains and forty links, to Tidnish Bridge; thence following the several courses of Tidnish River along its northern upland bank to its mouth; thence following the north-westerly channel to the deep waters of the Bay Verte.

The Treaty of Paris of 1763 has already been mentioned as the way in which Prince Edward Island and Cape Breton Island became British possessions, but the main cession made by the treaty was of "Canada, with all its dependencies". The boundary of the territory ceded by France was,

... a line drawn along the middle of the River Mississippi, from its source to the River Iberville, and from thence, by a line drawn along the middle of this river, and the Lakes Maurepas and Pontchartrain,¹⁰³ to the sea.

The boundaries of Quebec were first defined by the British government in a Royal Proclamation of October 7th, 1763. The Proclamation provides for

... the Government of Quebec bounded on the Labrador Coast by the River St. John flowing into the north shore of the St. Lawrence opposite Anticosti Island, and from thence by a line drawn from the Head of that River through the Lake St. John, to the South end of the Lake Nipissim [just to the east of Georgian Bay]; from whence the said Line, crossing the River St. Lawrence, and the Lake Champlain, in 45 Degrees of North Latitude, passes along the High Lands which divide the Rivers that Empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to

¹⁰¹ *Supra*, footnotes 35 and 99.

¹⁰² 21 Vict., c. 14, (N.B.); 22 Vict., c. 9, (N.S.). The boundary is recited in S.N.B., 1896, c. 8, which divides New Brunswick into counties.

¹⁰³ The Iberville and the two lakes are in the State of Louisiana.

Cape Rosières, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti; terminates at the aforesaid River of St. John.¹⁰⁴

The substance of this Proclamation was to give to Quebec a wide strip of territory on either side of the St. Lawrence; to the south lay Nova Scotia and the New England colonies, to the north the grant to the Hudson's Bay Company, and to the east Labrador and Newfoundland.

The Quebec Act of 1774¹⁰⁵ enormously enlarged the province. The southern boundary remained the same until it reached the St. Lawrence, when it ran through Lake Ontario and the Niagara River to the intersection of the western boundary of Pennsylvania with the south shore of Lake Erie. It then ran due south to the Ohio River, and followed it westwards until its meeting with the Mississippi, and from there went "northward" to the territory granted to the Hudson's Bay Company. The Treaty of Versailles in 1783 drew the boundary through the Great Lakes, where it now runs.

It was clear from the Proclamation of 1763 and the Quebec Act that the southeastern boundary of Quebec was the watershed of the St. Lawrence, and therefore that this was also the northern boundary of the part of Nova Scotia which was made into New Brunswick. By the Treaty of Versailles in 1783 the westward continuation of this watershed was the boundary between British North America and the United States. The British government in its negotiations with the United States contended that the Mars Hills, well to the south of the actual watershed, were the hills referred to by the treaty. This meant that if these hills were in fact the "Highlands" referred to in the Proclamation, Act, and Treaty, Quebec would gain a considerable extent of territory at the expense of New Brunswick.

The Ashburton Treaty of 1842 split the difference between the American and British claims, since the boundary settled by it ran between the watershed and the Mars Hills. The effect of the treaty was to give to Britain a piece of territory, south of the watershed and west of the line from the St. Croix, claimed by each province.

Several unsuccessful attempts were made to settle the dispute in Canada, and eventually the matter was referred to the Imperial government. An arbitration was agreed on in 1850, with each side appointing one arbitrator, the two arbitrators then appointing a third. The decision of the majority was given in 1851, and the

¹⁰⁴ *Supra*, footnote 96.

¹⁰⁵ *Supra*, footnote 77.

boundary was fixed by an Act of the Imperial Parliament in that year.¹⁰⁶ The relevant part reads as follows:

New Brunswick shall be bounded on the west by the boundary of the United States, as traced by the Commissioners of Boundary under the Treaty of Washington dated August 1842, from the source of the Saint Croix to a point near the outlet of Lake Pech-la-wee-kaa-co-nies, or Lake Beau . . . ; thence by a straight line connecting that point with another point to be determined at the distance of one mile due south from the southernmost point of Long Lake; thence by a straight line drawn to the southernmost point of the fiefs Madawaska and Temiscouata, and along the southeastern boundary of those fiefs to the southeast angle of the same; thence by a meridional line northwards till it meets a line running east and west, and tangent to the height of land dividing the waters flowing into the River Rimouski from those tributary to the Saint John; thence along this tangent line eastward until it meets another meridional line tangent to the height of land dividing waters flowing into the River Rimouski from those tributary to the Saint John; thence along this meridional line eastward until it meets another meridional line tangent to the height of land dividing waters flowing into the River Rimouski from those flowing into the Restigouche River: thence along this meridional line to the 48th parallel of latitude; thence along that parallel to the Mistouche [Patapedia]¹⁰⁷ River; thence down the centre of the stream of that river to the Restigouche; thence down the centre of the stream of the Restigouche to its mouth in the Bay of Chaleurs; and thence through the middle of that bay to the Gulf of the St. Lawrence; the islands in the said rivers Mistouche and Restigouche to the mouth of the latter river at Dalhousie being given to New Brunswick.

Quebec's river boundaries are mentioned below.¹⁰⁸

D. Northern Quebec and the Ontario-Quebec Boundary.¹⁰⁹

The Quebec Act of 1774 provided that Quebec should extend northward to the territory granted to the Hudson's Bay Company, and the Proclamation of 1791 provided that the boundary between Upper and Lower Canada should run to "the boundary line of

¹⁰⁶ 14 & 15 Vict., c. 63 (Imp.), repealed as one of a class of Acts "obsolete, spent, unnecessary or superseded by other enactments" by 7 & 8 Eliz. II, c. 68, (Imp.).

¹⁰⁷ The Patapedia was substituted for the Mistouche by 20 & 21 Vict., c. 34 (Imp.), repealed by 8 & 9 Eliz. II, c. 56, since the Mistouche was found not to reach the forty-eighth parallel; this change was to the advantage of New Brunswick. See Boundary Line between Canada and New Brunswick, Return to an Address of the Legislative Assembly, (Canada), 19 Vict., Appendix (No. 63), 1856.

¹⁰⁸ *Infra*, footnotes 121 and 122.

¹⁰⁹ The sources on the boundaries of Quebec, Ontario and Manitoba were: Charles Lindsey, *An Investigation of the Unsettled Boundaries of Ontario* (1873); David Mills, *A Report on the Boundaries of Ontario* (1873); David Mills, *Report on the Boundaries of the Province of Ontario* (1877); Report of the Select Committee on the Boundaries between the Province of Ontario and the Unorganized Territories of the Dominion

Hudson's Bay".¹¹⁰ The northern boundary of the territory under the government in Quebec therefore excluded Labrador and the Ungava Peninsula, the former being annexed to Newfoundland, the latter coming under the jurisdiction of the Hudson's Bay Company. The boundary in this second area was never defined. After the surrender to the new Dominion of the Company's territory the whole of modern Quebec was part of Canada;¹¹¹ the northern part, however, was under the administration of the Dominion government. In 1898 Quebec's northern boundary was fixed;¹¹² it ran along East Main River (which drains into Hudson's Bay) and approximately eastward from its source. Quebec was given its present limits by the Quebec Boundaries Extension Acts of 1912.¹¹³

In 1791 Quebec was divided into Upper and Lower Canada. The Constitutional Act¹¹⁴ merely authorized the division, and did not attempt to define the boundary. This was done by an exercise of the prerogative with the issue on August 24th in the same year of two Orders in Council; the first defined the boundary, and the second authorized the fixing in Canada of the date on which the Act (and therefore action taken under it) was to be effective.¹¹⁵ The Proclamation required by the second Order in Council was issued by the acting Governor General of Quebec on November 18th, 1791;¹¹⁶ it confirmed the proposed boundary, which is the present one between Ontario and Quebec.

(Printed by Order of Parliament, Ottawa, 1880), cited as 1880 Report; Correspondence Papers and Documents from 1856 to 1882 relating to the northerly and westerly Boundaries of the Province of Ontario (Printed by Order of the Legislative Assembly, Toronto, 1882), cited as Ontario Boundary Papers 1882; David Mills, Speech on the Boundaries of Ontario, March 31st, 1882, 12 House of Commons Debates (Canada) 674; Statutes Documents and Papers bearing on the discussion respecting the Northern and Western Boundaries of the Province of Ontario (undated); Ontario Boundaries before Privy Council (Queen's Printer, Toronto, 1884), this contains the cases submitted by the parties and several appendices, cited as Joint Appendix; Ontario Boundary before Privy Council 1884 (Printed by Order of the Legislative Assembly, Toronto, 1889), also published as The Ontario Boundary Controversy, with notes by John P. MacDonell (1896), cited as Argument; North Western Ontario: its Boundaries, Resources and Communications (Prepared under Instructions from the Ontario Government, Toronto, 1879).

¹¹⁰ This in fact meant the shore of Hudson's Bay (that is, James Bay), and the word "shore" was used in commissions to the Governors after 1838.

¹¹¹ Accepted by an Imperial Order in Council of 1870 (R.S.C., 1952, vol. VI, p. 6237) made under the Rupert's Land Act of 1868, (*ibid.*, p. 6223).

¹¹² S.C., 1898, c. 3; S.Q., 1898, c. 6. See also Argument, p. 363.

¹¹³ S.C., 1912, c. 45; S.Q., 1912, c. 7. The provisions relating to a separate census for the area added by the Act were repealed by S.C., 1946, c. 29 and S.Q., 1947, c. 5.

¹¹⁴ 31 Geo. III, c. 31 (Imp.), R.S.C., 1952, vol. VI, p. 6141.

¹¹⁵ Joint Appendix, pp. 397, 399, Argument, pp. 47, 49.

¹¹⁶ Joint Appendix, p. 401, Argument, p. 50.

The description of 1791 contained some errors, and eventually the report of a commission appointed to describe afresh the boundary from the Ottawa River to Lake St. Francis was adopted by the Province of Canada in 1860;¹¹⁷ a survey to be adopted by Order in Council was also authorized. The precise location of the head of Lake Temiscaming (from which the boundary was to run due north to Hudson's Bay) was not readily ascertainable, so Ontario and Quebec agreed to determine it according to a somewhat complicated formula. The agreement was confirmed by the Legislature of Ontario in 1874 and by that of Quebec in 1875.¹¹⁸ The Acts make provision for approval by the Dominion Parliament, but none seems to have been given.¹¹⁹

The Act of 1860 referred to above contains a detailed description of the boundary; a more recent one is contained in the Canada (Ontario Boundary) Act of 1889, which reads as follows:

... [commencing] at a point where a line drawn due north from the head of Lake Temiscamingue would strike it [James Bay], and thence due south along the said line to the head of the said lake, and thence through the middle of the said lake into the Ottawa River, and thence descending along the middle of the main channel of the said river to the intersection by the prolongation of the western limits of Seigneurie of Rigaud . . . and thence southerly, following the said westerly boundary of the Seigneurie of Rigaud to the southwest angle of the said Seigneurie, and thence southerly along the western boundary of the augmentation of the Township of Newton to the north-west angle of the Seigneurie of Longueil, and thence south-easterly along the south-western boundary of the said Seigneurie of New Longueil to a stone boundary on the north bank of the Lake St. Francis, at the cove west of Point au Baudet.¹²⁰

The Quebec Territorial Division Act enacts that the boundaries of every electoral district bounded by a river shall extend to the middle (*jusqu'au milieu*) of the river.¹²¹ The Quebec Municipal Code has a similar provision.¹²²

E. Northern and Western Ontario and Manitoba.¹²³

The northern and western boundaries of Ontario were the subject of a long dispute over whether the line required by the Quebec

¹¹⁷ 23 Vict., c. 21 (Can).

¹¹⁸ S.O., 1874, (2nd Sess.), c. 5 and S.Q., 1875, (1st Sess.), c. 6, recited in R.S.Q., 1941, c. 3.

¹¹⁹ I understand from the Dominion Department of Mines and Technical Surveys that they have no record of any request for the ratification of the boundary.

¹²⁰ 52 & 53 Vict., c. 28 (Imp.).

¹²¹ R.S.Q., 1941, c. 3, s. 10.

¹²² Art. 16(1). See *A. P. Belair v. La Ville de Sainte Rose* (1922), 63 S.C.R. 526, and *Comm. d'Ecoles de Ville Lasalle v. The Montreal L. H. and P. Co.* (1928), 34 R.L. 73.

¹²³ See *supra*, footnote 109.

Act to be drawn "northward" from the confluence of the Ohio and Mississippi Rivers should be drawn due north or, as Ontario contended, in a northerly direction. The Province of Canada and the Hudson's Bay Company had never agreed on a boundary between their respective territories, and after the cession of Rupert's Land in 1870 to the new Dominion the dispute was continued between the Dominion and Manitoba on one side and Ontario on the other.¹²⁴ In 1870 the Dominion government was preparing to accept the surrender of the Hudson's Bay Company's territory, and had passed a statute providing for its government.¹²⁵ After this, but before the cession, the Dominion Parliament passed the Manitoba Act,¹²⁶ thereby creating the area round Winnipeg the Province of Manitoba.

It was uncertain whether the Dominion had the constitutional power to create new provinces, so the Imperial Parliament passed the 1871 British North America Act.¹²⁷ This confirmed the Manitoba Act, and gave the Dominion Parliament the power to make provision for the government of territory not included in any province and to increase or diminish the boundaries of any existing province with the consent of its legislature. The passage of this Imperial Act meant that, although Ontario had had a claim to the territory of the new province it was now destroyed.¹²⁸ The government of the disputed area was carried on under an agreement setting up provisional boundaries.¹²⁹

In 1874 the Dominion and Ontario governments agreed to submit the dispute to arbitration,¹³⁰ and Ontario passed an Act accepting the award in advance.¹³¹ Each side appointed one arbitrator, and the two arbitrators then agreed on a third. The contentions of

¹²⁴ An account of the history of the dispute will be found in the Report of the Attorney General of Ontario, Sess. Papers, Ont., 1882, No. 23; Ontario Boundary Papers 1882, p. 432.

¹²⁵ The government of the new territory was provided for by the Dominion in S.C., 1869, c. 3.

¹²⁶ S.C., 1870, c. 3, R.S.C., vol. VI, p. 6229; R.S.M., 1954, vol. 4, p. 497. These boundaries were replaced by boundaries described according to the system of Dominion Land Surveys by S.M., 1877, c. 2, and S.C., 1877, c. 6, which also modified the boundaries of the Northwest Territories and the District of Keewatin to conform to the change.

¹²⁷ *Supra*, footnote 63.

¹²⁸ Argument, p. 75.

¹²⁹ Sess. Papers, Ont., 1875-6, No. 14, p. 7, Ontario Boundary Papers 1882, p. 244. See also S.C., 1880, c. 36, continued by S.C., 1880-81, c. 15; S.C., 1882, c. 31; S.C., 1883, c. 33, s. 2; S.C., 1884, c. 24; and S.C., 1885, c. 52. The relevant Ontario statutes are S.O., 1879, c. 19 and S.O., 1880, c. 12. The first was disallowed on the grounds that it purported to operate outside the limits of the province (as recognized by the Dominion); see Ontario Boundary Papers 1882, p. 378.

¹³⁰ Ontario Boundary Papers 1882, p. 246.

¹³¹ S.O., 1874, (2nd Sess.), c. 6. This was never proclaimed in force because the Dominion passed no corresponding legislation.

each side before the arbitrators were substantially the same as those before the Privy Council, and the arbitrators came to the same conclusion¹³² as the Privy Council, whose decision is set out below.

The award was adopted by Ontario,¹³³ but the Dominion Parliament passed no corresponding legislation, the government taking no action, in spite of repeated protests by Ontario. In 1880 an Imperial Order in Council united with the Dominion all the territories in British North America except Newfoundland and Labrador;¹³⁴ this may have been to remove all possible objections to the future extension of Manitoba by including in the Dominion all territory not ceded by the Hudson's Bay Company. Manitoba had, in 1874,¹³⁵ already authorized an extension of its boundaries at the request of the Dominion,¹³⁶ though the terms of the extension still had to be approved. In 1881, after Manitoba had consented,¹³⁷ the Dominion extended Manitoba eastwards to the western boundary of Ontario and to the north.¹³⁸ Since the Dominion had not accepted the award of the arbitrators, which favoured the Ontario claim as to the western boundary, the eastward extension of Manitoba as interpreted by the Dominion took about 85,000 square miles of the territory awarded to Ontario.¹³⁹

This legislation meant that the main dispute, as to the westerly boundary of Ontario, was now between Ontario and Manitoba, the Dominion still being concerned with the eastern part of Ontario's northern boundary. The two provinces agreed to submit the matter to the Judicial Committee of the Privy Council,¹⁴⁰ and the hearing took place in London in 1884.

The questions submitted were:

- (1) Whether the Award is or is not, under all the circumstances, binding.
- (2) In case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said provinces.
- (3) Whether in case legislation is needed to make the decision on this Case binding or effectual, Acts passed by the Parliament of Canada and the Provincial Legislatures of Ontario and Manitoba, in connec-

¹³² 1880 Report, p. 480, Ontario Boundary Papers 1882, p. 370, Joint Appendix, p. 107, Argument, p. 406. ¹³³ S.O., 1879, c. 2.

¹³⁴ *Supra*, footnote 61.

¹³⁵ S.M., 1874, c. 2.

¹³⁶ Referred to in Address of Manitoba Legislation Assembly of 14th February 1880, Ontario Boundary Papers 1882, p. 385.

¹³⁷ S.M., 1880, (2nd Sess.), c. 1. In the same session c. 6 extended the law of Manitoba to the new area; see *A.-G. for Saskatchewan v. C.P.R.* and *A.-G. for Manitoba*, [1953] A.C. 594, [1953] 3 D.L.R. 785, and *A.-G. for Manitoba v. C.P.R.*, [1958] S.C.R. 744, 15 D.L.R. (2d) 499, and cases cited in these.

¹³⁸ S.C., 1880-81, c. 14, consolidated in S.C., 1886, c. 47.

¹³⁹ Argument, p. 33.

¹⁴⁰ Joint Appendix, p. 1.

tion with the Imperial Act, 34-35 Vict., c. 28, or otherwise, will be sufficient, or whether a new Imperial Act for the purpose will be necessary.¹⁴¹

The Privy Council answered the first question by finding that the award was not binding, since it had not been implemented by Dominion legislation. In answer to the second question they held the award to be substantially correct, and described the boundary themselves as follows:

. . . the true boundary between the western part of the Province of Ontario and the south-eastern part of the Province of Manitoba to be so much of a line drawn to the Lake of the Woods, through the waters eastward of that lake and west of Long Lake, which divide British North America from the territory of the United States, and thence through the Lake of the Woods to the most north-western point of that lake, as runs northward from the United States boundary, and from the most north-western point of the Lake of the Woods a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul, or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and their Lordships find the true boundary between the same two Provinces to the north of Ontario and to the south of Manitoba, proceeding eastward from the point at which the before mentioned line strikes the middle line of the course of the river last aforesaid, to be along the middle line of the course of the same river (whether called by the name of the English River, or as to the part below the confluence, by the name of the River Winnipeg) up to Lake Seul, or the Lonely Lake, and thence along the middle line of Lake Seul, or the Lonely Lake, to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves, until it reaches a line drawn due north from the confluence of the rivers Mississippi and Ohio which forms the boundary eastward of the Province of Manitoba.¹⁴²

In fact the western boundary should have commenced from a point due north of the Mississippi, but since this point was very

¹⁴¹ Joint Appendix, p. 4, Argument, p. 2. The arguments of the parties are too complex to be summarized in this article. One point of interest is the attitude of the Privy Council to international law. Counsel for the Dominion, who supported Manitoba, relied heavily on text books on international law. This did not find favour with the Privy Council; the Lord Chancellor, the Earl of Selborne, remarked at Argument, p. 358, "We really cannot have the laws of the world made by gentlemen, however learned, who have published books within the last twenty or thirty years." However, almost fifty years later, in the Labrador Boundary dispute, the Privy Council's Opinion referred to three text-books on international law as authorities for their decision. See *supra*, footnote 83, 84 and 85.

¹⁴² Imperial Order in Council, August 11th, 1884, Argument, p. 416.

close to the marker on the North-West Angle Inlet the arbitrators adopted the marker on grounds of convenience¹⁴³ and were followed by the Privy Council.

The description adopted by the Privy Council significantly changed the one drawn up by the arbitrators. The amended description clearly gave Manitoba a large area of territory due north of Ontario, with the due north line from the confluence of the Mississippi and Ohio as its eastern boundary, while the arbitrators' version did not. Part of this territory had been set up by the Dominion as the District of Keewatin in 1876. There was therefore some doubt as to where the northeastern boundary of Manitoba was,¹⁴⁴ but this difficulty was ignored when Manitoba and Ontario were extended northwards in 1912.

The Privy Council did not answer the third question, but recommended that an Imperial Act of Parliament be passed to make their decision binding. A joint address requesting an Act of Parliament and describing the westerly, northerly, and easterly boundaries of Ontario was presented by the Parliament of Canada in 1889 to the Imperial Parliament, and in that year an Act was passed.¹⁴⁵ This Act only defined the boundaries of Ontario, and therefore did not deal with the north-eastern boundary of Manitoba. In 1899 Ontario adopted¹⁴⁶ a survey made of the boundary as laid down in the 1889 Act; there does not seem to have been any corresponding legislation by Manitoba or the Dominion.

The next change in the boundary was made in 1912, when both Ontario and Manitoba consented to have their common boundary extended to its present position by the Dominion.¹⁴⁷

In 1925 the Treaty of Washington transferred to Canada two areas of water in the Northwest Angle Inlet of the Lake of the Woods, totalling two and a half acres, which were part of Manitoba as enlarged in 1912. They were accordingly declared to be part of Manitoba.¹⁴⁸

By 1929 a large part of the boundary had been surveyed, and the two provinces adopted the survey as made; no provision was

¹⁴³ Sir Francis Hincks, Lecture delivered in 1881, printed by C. Blackett Robinson (1881), also found in Ontario Boundary Papers 1882, p. 414.

¹⁴⁴ See Materials for a new Boundary Dispute (1884), 20 Can. L. J. 278, and Thomas Hodgins, *op. cit.*, footnote 66. For severe criticism of the decision see R., The Boundary Question (1884), 7 L. N. 313.

¹⁴⁵ *Supra*, footnote 120, R.S.O., 1960, vol. 5, p. 79.

¹⁴⁶ S.O., 1899, c. 2, R.S.O., 1960, vol. 5, p. 81.

¹⁴⁷ S.C., 1912, c. 40, and S.O., 1912, c. 3, R.S.O., 1960, vol. 5, pp. 83 and 85; S.C., 1912, c. 32 and R.S.M., 1954, c. 20.

¹⁴⁸ S.C., 1930, c. 28 and R.S.M., 1954, c. 21. The Manitoba Act was passed in 1928, being c. 3 of that year.

made for the Dominion Parliament to pass any legislation.¹⁴⁹ In 1950 the Dominion and both provinces amended the description in the 1912 Act.¹⁵⁰ By 1953 the whole boundary had been surveyed, and the Dominion and each province declared the boundary as surveyed to be the boundary.¹⁵¹ The boundary between Manitoba and Saskatchewan is discussed below.

In Ontario, The Territorial Division Act¹⁵² provides, with some exceptions, that the boundaries of municipalities on the borders of the province shall be the provincial boundaries. The Beds of Navigable Waters Act¹⁵³ provides that no grant of any land shall pass the bed of any navigable river or stream. In Manitoba, The Municipal Boundaries Act provides that, where a stream is the border of a municipality, the municipality extends to the centre of the stream, and where a stream runs through a municipality the surface and bed of the stream are deemed to be a part of the municipality.¹⁵⁴

F. Saskatchewan, Alberta, and British Columbia.

In 1905 Saskatchewan and Alberta were created provinces in part of the territory which was joined to the Dominion by the Hudson's Bay Company's¹⁵⁵ surrender and the Order in Council of 1880.¹⁵⁶

The description of the boundaries of Saskatchewan contained in the Saskatchewan Act¹⁵⁷ is as follows:

. . . commencing at the intersection of the international boundary dividing Canada from the United States of America by the west boundary of the province of Manitoba, thence northerly along the said west boundary of the province of Manitoba to the northwest corner of the said province of Manitoba . . . thence westerly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the . . . system of Dominion land surveys, as the same may be hereafter defined in accordance with the said system; thence southerly along the said fourth meridian to the said international boundary dividing Canada

¹⁴⁹ R.S.M., 1954, c. 22, and S.O., 1929, c. 3, R.S.O., 1960, vol. 5, p. 87.

¹⁵⁰ S.C., 1950, c. 16; S.M., 1950, c. 3; S.O., 1950, c. 48, R.S.O., 1960, vol. 5, pp. 91 and 93.

¹⁵¹ S.C., 1953-54, c. 9; R.S.M., 1954, c. 23; S.O., 1954, c. 76, R.S.O., 1960, vol. 5, pp. 95 and 99. A very minor error in the wording of the provincial Acts was corrected by S. M., 1955, c. 5, and S.O., 1955, c. 56, R.S.O., 1960, vol. 5, p. 103.

¹⁵² R.S.O., 1960, c. 395. This provision originated in 14 & 15 Vict., c. 5 (Can.), passed in 1851.

¹⁵³ R.S.O., 1960, c. 32, s. 1; see also *Dixson v. Snetsinger* (1873), 23 U.C.C.P. 235.

¹⁵⁴ R.S.M., 1954, c. 176, s. 4.

¹⁵⁵ R.S.C., 1952, vol. VI, p. 6237.

¹⁵⁶ *Supra*, footnote 61.

¹⁵⁷ S.C., 1905, c. 42, R.S.C., 1952, vol. VI, p. 6315, R.S.S., 1953, vol. IV, p. 5208.

from the United States of America; thence easterly along the said international boundary to the point of commencement.

A partial survey of the boundary with Manitoba was adopted in 1937,¹⁵⁸ and the completion of the survey was adopted in 1942.¹⁵⁹

The Saskatchewan Rural Municipalities Act¹⁶⁰ provides that,

... in the case of those municipalities bordering upon the Province of Manitoba, half of the roadway lying to the East of them shall be deemed to be included within their respective boundaries, notwithstanding a nything herein contained.

There does not appear to be any complementary legislation in Manitoba.

The description of the boundaries of Alberta in the Alberta Act¹⁶¹ of 1905 is as follows:

... commencing at the intersection of the international boundary dividing Canada from the United States of America by the fourth meridian in the system of Dominion land surveys; thence westerly along the said international boundary to the eastern boundary of the province of British Columbia, thence northerly along the said eastern boundary of the province of British Columbia to the northeast corner of the said province; thence easterly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the system of Dominion land surveys as the same may be hereafter defined in accordance with the said system; thence southerly along the said fourth meridian to the point of commencement.

A survey of the boundary between Alberta and Saskatchewan was adopted in 1939,¹⁶² and one of the boundary with the Northwest Territories was adopted in 1957.¹⁶³ Surveys of the boundary with British Columbia were adopted in 1931¹⁶⁴ and 1955.¹⁶⁵ In 1957 British Columbia passed an Act¹⁶⁶ providing for an agreement with Alberta for the maintenance of the physical evidence of their common boundary, but Alberta has passed no complementary legislation.

¹⁵⁸ S.S., 1937, c. 96, R.S.S., 1953, vol. IV, p. 5220; R.S.M., 1954, c. 24.

¹⁵⁹ S.S., 1942, c. 75, R.S.S., 1953, vol. IV, p. 5221; R.S.M., 1954, c. 25. No Dominion approval was necessary since it had in effect been already given. These surveys were merely the descriptions provided for in the Saskatchewan Act.

¹⁶⁰ S.S., 1960, c. 50, s. 17(4).

¹⁶¹ S.C., 1905, c. 3, R.S.C., 1952, vol. VI, p. 6297; R.S.A., 1955, vol. 5, p. 5671.

¹⁶² S.A., 1939, c. 96, R.S.A., 1955, vol. 5, p. 5687; S.S., 1939, c. 96, R.S.S., 1953, vol. IV, p. 5221.

¹⁶³ S.C., 1957-58, c. 23; S.A., 1957, c. 1.

¹⁶⁴ S.A., 1931, c. 96, R.S.A., 1955, vol. 5, p. 5685; S.B.C., 1931, c. 8; S.C., 1932, c. 5.

¹⁶⁵ S.A., 1955, c. 8, R.S.A., 1955, vol. 5, p. 5689; R.S.B.C., 1960, c. 35; S.C., 1955, c. 24. These surveys were approved by the Dominion Parliament since the geographical description may have been departed from; the approval would avoid any dispute.

¹⁶⁶ R.S.B.C., 1960, c. 7.

The government of British Columbia¹⁶⁷ was set up by an Imperial Act of 1858,¹⁶⁸ and the boundaries were extended northward in 1863,¹⁶⁹ the new description including,

... all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of America, to the West by the Pacific Ocean and the Frontier of the Russian Territories in North America, to the North by the Sixtieth Parallel of North Latitude, and to the East, from the Boundary of the United States Northwards, by the Rocky Mountains and the One hundred and twentieth Meridian of West Longitude, and shall include Queen Charlotte's Island and all other islands adjacent to the said Territories, except Vancouver's Island and the Islands adjacent thereto.

Vancouver Island was granted to the Hudson's Bay Company in 1849, after its recognition as British territory by the Treaty of Washington in 1846. Provision for the administration of justice was made in 1849.¹⁷⁰ In 1850 it was created a colony, and on the proclamation of an Imperial Act in 1866¹⁷¹ was united with British Columbia. In 1871, by an Order in Council, British Columbia became a province of Canada.¹⁷²

G. *The Yukon and Northwest Territories.*

The Northwest Territories and the Yukon became part of Canada by virtue of the Orders in Council of 1870 and 1880.¹⁷³ The government of the new territory was provided for by a temporary Act in 1869,¹⁷⁴ which was replaced in 1870.¹⁷⁵ The present limits of the territories are given in the Northwest Territories Act¹⁷⁶ as being,

... all that part of Canada north of the Sixtieth Parallel of North Latitude, except the portions thereof that are within the Yukon Territory, the Province of Quebec or the Province of Newfoundland, and the islands in Hudson's Bay, James Bay and Ungava Bay, except those islands that are within the Province of Manitoba, or the Province of Ontario or the Province of Quebec.

Keewatin was constituted a separate judicial district in 1876¹⁷⁷ by an Act of the Dominion Parliament, with provision being made for reannexing any part of it to the Northwest Territories by proc-

¹⁶⁷ See Willard E. Ireland, *The Evolution of the Boundaries of British Columbia* (1939), 3 Brit. Col. Hist. Quart. 263.

¹⁶⁸ 21 & 22 Vict., c. 99 (Imp.), R.S.B.C., 1911, vol. IV, p. 245.

¹⁶⁹ 26 & 27 Vict., c. 83 (Imp.), R.S.B.C., 1911, vol. IV, p. 267.

¹⁷⁰ 12 & 13 Vict., c. 48 (Imp.).

¹⁷¹ 29 & 30 Vict., c. 67, R.S.B.C., 1911, vol. IV, p. 271. This repealed the Acts of 1858 and 1863, but the boundary description is the same as that in the 1863 Act.

¹⁷² R.S.C., 1952, vol. VI, p. 6259. ¹⁷³ *Supra*, footnotes 111 and 61.

¹⁷⁴ S.C., 1869, c. 3.

¹⁷⁵ S.C., 1870, c. 3.

¹⁷⁶ *Supra*, footnote 73.

¹⁷⁷ S.C., 1876, c. 21.

lamation. Some territory was detached by a proclamation in 1886.¹⁷⁸ An Order in Council of 1895¹⁷⁹ set up other districts in the Northwest Territories and changed the boundaries of Keewatin. The Order recited that legislation was to be passed, but none was, and the Order was cancelled by another in 1897,¹⁸⁰ which also purported to change the boundaries; no legislation was passed to validate this either. The Keewatin Act was repealed in 1906,¹⁸¹ and in 1918 an Order in Council divided the Northwest Territories into the Districts of Keewatin, Mackenzie and Franklin, and gave them their present boundaries.¹⁸²

Almost all the necessary steps have been taken for the creation of two new territories out of the present Northwest Territories.¹⁸³ The scheme of the proposed legislation is for the new Territory of Nunassiatq to consist of the arctic islands except Banks Island and Victoria Islands and the eastern part of the mainland Northwest Territories (in effect, the present District of Keewatin), and for the new Mackenzie Territory to be formed out of the parts not included in Nunassiatq.

Only the Mackenzie Territory has boundaries assigned to it; they include:

- (i) all that part of Continental Canada north of the Provinces of British Columbia, Alberta and Saskatchewan and west of the one hundred and fifth meridian of west longitude except the portion thereof that is within the Yukon Territory, and
- (ii) all of the Arctic Islands of Canada that are not part of the Yukon Territory and that lie completely within the area described as follows: [an area bounded by geographic lines which includes Banks and Victoria Islands].

The Nunassiatq Territory is described as:

... all that portion of the Northwest Territories as they existed on the 31st day of March, 1964, except the part thereof that comprises the Mackenzie Territory.

The Yukon Territory was formed into a provisional district by the Order in Council of 1895, and was created a judicial district by proclamation in 1897.¹⁸⁴ It was set up as a Territory by the Yukon

¹⁷⁸ Proclamation of May 7th, 1886, 19 Canada Gazette 1649.

¹⁷⁹ Order in Council 2640, October 2nd, 1895, 29 Canada Gazette 683.

¹⁸⁰ Order in Council 3388, December 18th, 1897, 31 Canada Gazette 2613.

¹⁸¹ R.S.C., 1906, p. ix.

¹⁸² Order in Council 655, March 18th, 1918, 51 Canada Gazette 3333.

¹⁸³ See Bills C-83 and C-84 of 1963; (1963), 108 House of Commons Debates 1962-1969, and Council of the Northwest Territories, Votes and Proceedings, Sessions 21-25 (1961-1963).

¹⁸⁴ Proclamation of August 16th, 1897, 31 Canada Gazette 392.

Act in 1898;¹⁸⁵ its boundaries are contained in the Schedule to the present Yukon Act,¹⁸⁶ which reads:

. . . [bounded] on the south, by the province of British Columbia and the United States Territory of Alaska; on the west by the said United States Territory of Alaska; on the north, by that part of the Arctic Ocean called Beaufort Sea; and on the east by a line beginning at that point of intersection of the left bank of the Liard River, by the northern boundary of the province of British Columbia in approximate longitude 124° 16' west of Greenwich; thence northwesterly along the line of the watershed separating the streams flowing into the Liard River below the point of beginning or into the Mackenzie River, from those flowing into the Liard River above the point of beginning or into the Yukon River, to the line of watershed of the basin of Peel River; thence northerly along the line of watershed between the Peel and Mackenzie Rivers to the sixty-seventh degree of north latitude; thence westerly along the parallel of the sixty-seventh degree of north latitude to the line of watershed between the Peel and Yukon Rivers; thence northerly along the said line of watershed to the trail across the portage in McDougall pass between Rat and Bell Rivers, thence due north to the northern limit of the Yukon Territory: the said Territory to include the islands within twenty statute miles from the shores of the Beaufort Sea as far as the aforesaid due north line from McDougall pass.

IV. *Conclusion.*

No distinction in principle appears to have been made between Canada's international and internal boundaries. Both kinds have been defined in accordance with the same concepts, the international law doctrine of the *thalweg* being used for river boundaries,¹⁸⁷ and disputes being settled on the basis of discovery and occupation.

In addition to a general willingness to settle disputes peacefully two tendencies can be found in boundary disputes to which Canada has been a party. The international boundaries were settled by negotiation and arbitration, and there were considerable changes in the composition of the tribunals. In early days, under Jay's Treaty and the Treaty of Ghent, each side appointed an arbitrator, both of whom in the case of Jay's Treaty agreed on a third. During the nineteenth century the two states agreed that a designated foreign monarch should settle the disputes over the "northwest angle of Nova Scotia" and the channel between Vancouver Island and the mainland. To settle the Alaska boundary dispute, at the beginning of this century, each side appointed three arbitrators. From the degrees of controversy aroused by the decisions of these different tribunals, it seems that the developments in their constitution were not for the better.

¹⁸⁵ S.C., 1898, c. 6.

¹⁸⁷ *Supra*, footnote 13.

¹⁸⁶ S.C., 1952-1953, c. 53.

Most problems have arisen between the two states, but where a dispute between individuals developed over rights to charge tolls in an international river the governments of both Canada and the United States were content for it to be settled by litigation in their respective courts between the individuals.¹⁸⁸ The final decisions of the courts in this matter were in harmony, but diplomatic negotiations would have become necessary if the result had been different.

There has been a definite development in the method of demarcating boundaries. Natural features, such as rivers and watersheds, were physical barriers to the early settlers and were obviously the most suitable boundaries. However, as the population increased and the obstacles were overcome, disputes arose over the boundaries, which were shown to be insufficiently precise. As a result of these disputes, later boundaries were drawn by the extremely accurate method of using geographic lines. Canada's older boundaries are therefore described with reference to natural features, but the newer ones, such as the prairie section of the international boundary and those of Manitoba, Saskatchewan, Alberta and Nunassiat Territory, are drawn by geographic lines.

¹⁸⁸ *Supra*, footnotes 51 and 54.