

REGIONAL SELF-GOVERNMENT, MANTARIO OR CANADA'S 11TH PROVINCE?

AN ANALYSIS OF SELF-DETERMINATION FOR NORTHWESTERN ONTARIO

Adam Jantunen, University of Victoria - Faculty of Law

Adam Jantunen, originally from Thunder Bay, Ontario, is a third-year law student at the University of Victoria. He holds degrees in History (Hons.) and Political Science from the University of Ottawa. Upon graduation, he will be articling with Stikeman Elliott LLP in Ottawa.

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"The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada."

– Supreme Court of Canada, 1998¹

"[S]overeignty is no value in itself. It's only a value insofar as it relates to freedom and rights, either enhancing them or diminishing them."

– Noam Chomsky² "Control of Our Lives" Lecture, February 26, 2000.

Canada is often described as a nation of nations, because of its geographic size and cultural diversity. By making Canada a federal state, the drafters of the *Constitution Act, 1867* sought to balance regional interests with the desire to create a strong, united country. However, after more than a century of constitutional litigation, attempts at constitutional reform, and federal-provincial power-sharing arrangements, the proper balance is anything but clear.

The same tensions exist within many provinces. Unlike provinces and the federal government, sub-provincial entities such as regions, municipalities, and cities have no constitutionally guaranteed powers, and sometimes regional grievances are even more pronounced than provincial complaints against the federal government.

One such region is Northwestern Ontario. Professor Livio Di Matteo, a Lakehead University economist and leading authority on Northwestern Ontario, defines Northwestern Ontario

¹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 85 [Secession Reference].

² Noam Chomsky, "Control of Our Lives" (Lecture delivered at the Kiva Auditorium, Albuquerque, New Mexico, 26 February 2000), online: Z Communications <<http://www.zmag.org/chomskyalbaq.html>>.

as the territory covered by the Kenora, Rainy River and Thunder Bay census districts.³ Using this definition, Northwestern Ontario runs from the Manitoba border, east to the Wawa area and north to Hudson Bay and James Bay.⁴ This appears to be the most commonly accepted definition of the region, though different organizations have used different definitions for administrative purposes.⁵

From the time Northwestern Ontario was annexed to Ontario to the present day, many Northwesterners have felt alienated and neglected by Southern Ontario. Though all of Ontario's northern regions have been said to experience a certain degree of alienation relative to the economically and politically dominant South, Di Matteo *et al.* note that "this alienation is often more keenly felt in the northwest portion of the province rather than the northeast, which is immediately adjacent to the south".⁶

As a result, since its annexation to Ontario, groups in Northwestern Ontario have alternatively called for the region to be granted some type of regional autonomy, become a separate province, join with the northeast to create a province of Northern Ontario (under various names, such as Algoma, Huronia or New Ontario), or join Manitoba (to form a province of "Mantario").⁷ Recently, the region's severe economic decline has fuelled the latent desire of many in the region for such political change.⁸ Many Northwesterners feel that Ontario has failed to respond adequately to this decline. In a recent *Economist* article, Di Matteo suggested that support for separation from Ontario is at an all-time high.⁹ However, to my knowledge, this support does not extend to the creation of an independent country of Northwestern Ontario.¹⁰

The proposed alternative governance structures are all technically possible. First, regarding regional autonomy, the City of Toronto recently gained broad powers of regulation, the ability to engage in inter-governmental relations, and increased fundraising capabilities through Ontario's passage of the *Stronger City of Toronto for a Stronger Ontario Act*.¹¹ Di Matteo has suggested that if Toronto can gain increased regional powers, not only could Northwestern Ontario gain the same, but that it would be irresponsible not to give similar grants of power to the Northwest.¹² He notes that "[c]reating what amounts to regional government for Toronto without creating regional governments in the rest of the province is asymmetrical federalism at its worst".¹³ Second, provisions for creating new provinces and for redrawing provincial boundaries are contained in Part V of the *Constitution Act, 1982*.¹⁴ Subsection 42(1)(f) provides that,

3 Livio Di Matteo, J.C. Herbert Emery & Ryan English, "Is It Better to Live in a Basement, an Attic, or to Get Your Own Place? Analysing the Costs and Benefits of Institutional Change for Northwestern Ontario," 32 (2006) 2 Can. Pub. Policy at 174 [Di Matteo, Emery & English].

4 See Appendix A – Figure 1.

5 The Ontario government uses the same definition of Northwestern Ontario, online: MAH - OnRAMP - Northwestern Ontario <http://www.mah.gov.on.ca/userfiles/HTML/nts_1_17375_1.html>. Parks Ontario uses a slightly different definition of Northwestern Ontario, drawing the region's southeastern border at Marathon and the northeastern border due north from Highway 11 east of Longlac. See Appendix A – Figure 2.

6 Di Matteo, Emery & English, *supra* note 3 at 174.

7 Gordon Brock, *The Province of Northern Ontario*, (Cobalt: Highway Book Shop, 1978) at 72 [Brock].

8 See e.g. "The Lumberjacks Are Not OK" *Economist* (9 March 2006), online: Fissiparous Canada: The lumberjacks are not OK <http://www.economist.com/World/na/displayStory.cfm?story_id=5609889> [The Economist].

9 *Ibid.* Note that Di Matteo himself favours regional autonomy within Ontario over separation from Ontario.

10 Note that the term "sovereignty", as it appears in this paper in the context of Northwestern Ontario self-determination, will refer to the sovereign right of people to control their future, as contemplated in the *Secession Reference*, *supra* note 1 and not to political independence.

11 *Stronger City of Toronto for a Stronger Ontario Act*, S.O. 2006, c. 11 [*City of Toronto Act*].

12 Livio Di Matteo, "The Northern Ontario Party?" *Northern Ontario Business* (December 2005), online: Northern Ontario Business - The Northern Ontario Party? <<http://www.northernontariobusiness.com/regionalReports/ThunderBay/12-05-party.asp>>.

13 *Ibid.*

14 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

in order to create a new province, resolutions must be passed by the Senate, House of Commons and two-thirds of the legislative assemblies of provinces that have at least 50 per cent of the population. Subsection 43(a) requires that any change to boundaries between provinces must be approved by the Senate, House of Commons, and the legislative assemblies of the provinces to which the alteration of boundaries applies.

This essay will address three major questions. First, I will examine the historical issues surrounding Northwestern Ontario's accession to Ontario. Second, I will look at the issues, historical and contemporary, which have led to calls for Northwestern Ontario regional autonomy and/or provincial realignment. Third, I will address the question of whether Northwestern Ontario has a right to self-determination, based on international and domestic law and Canadian political history.

PART I: Northwestern Ontario's Accession to Ontario

From Confederation to the late 1880s, the Dominion of Canada and Ontario fought an often-fierce political, legal and sometimes physical battle for control of Northwestern Ontario. Though the federal government and Ontario provided a wealth of legal arguments to support their cases, their motivations were far more economic and political than legal.

In Ontario's case, from the 1850s onwards, many influential Torontonians believed that Ontario's economic future depended on its annexation and conquest of the Northwest. In December 1856, publisher, politician and future Father of Confederation George Brown stated in his newspaper, *The Globe*, "[l]et the merchants of Toronto consider, that if their city is ever to be made really great—if it is ever to rise above the rank of a fifth rate American town—it must be by the development of the great British territory lying to the north and west".¹⁵

Viewing the north as a vast, untamed *terra nullius*, Ontario considered it vital to acquire the Northwest as an agricultural frontier and a source of natural resources.¹⁶ The discovery of Silver Islet, which from 1870 to 1884 was the richest silver mine in the world, spawned further interest in the region. Ontario Premier Oliver Mowat sought to emulate European leaders who were acquiring new territories in Africa and Asia, and American politicians who believed that expansion and settlement west to the Pacific Ocean was part of America's "manifest destiny".¹⁷ During this era, "maps made heady reading which showed the doubled area of Ontario with appended comment suggesting that, were it not for the obstruction of malevolent forces in Ottawa and other provinces, Ontario would be fulfilling its manifest destiny".¹⁸

The federal government of John A. Macdonald also wanted to open up the frontier for settlement and development. However, for various reasons, Macdonald opposed Mowat's plans. Control of Northwestern Ontario was part of a larger provincial rights struggle;¹⁹ while Mac-

15 Randall White, *Ontario 1610-1985* (Toronto: Dundurn Press, 1985) at 110 [White].

16 Di Matteo, Emery & English, *supra* note 3 at 175. See also H.G. Nelles, *The Politics of Development* (Toronto: Macmillan, 1974) [Nelles].

17 See Michael T. Lubragge, "Manifest Destiny: The Philosophy that Created a Nation", online: From Revolution to Reconstruction: Essays: Manifest Destiny: The Philosophy That Created A Nation <<http://www.let.rug.nl/usa/E/manifest/manif1.htm>>.

18 Kenneth MacKirdy, "National vs. Provincial Loyalty: The Ontario Western Boundary Dispute, 1883-1884" 11 (1959) 3 *Ontario History* at 194 [MacKirdy].

19 For a detailed analysis of the boundary dispute's significance in federal-provincial relations, see Chapter 3 of J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study of Dominion-Provincial Relations, 1867-1896", in *Three History Theses* (Toronto: Ontario Department of Public Records and Archives, 1961) at 1 [Morrison].

donald sought to create a strong federal government, exercising federal disallowance powers²⁰ and pursuing other centralist policies, Mowat advocated for increased provincial powers and suggested that “the Provincial Governments of all parties should always diligently watch over and maintain the rights of the Provinces”.²¹ By opposing Mowat’s expansionism, Macdonald was likely sending a message to Ontario that Canada, and not any one province, would determine the nation’s geographic future. On a similar note, if Ontario gained control of the Northwest, Macdonald feared that the balance of Confederation would be tipped and that Ontario’s power would rival even that of the federal government. Balance of power considerations also applied at the interprovincial level. Christopher Robinson, counsel for the Dominion in the 1884 Judicial Committee of the Privy Council (“J.C.P.C.”) arbitration of the boundary dispute (which will be discussed later), stated that “Confederation was formed under a great deal of difficulty, and it is carried on under some difficulty”.²² Specifically, Macdonald knew that if Ontario got its way, Quebec would be opposed to Ontario being larger than it was when it entered Confederation, and that Manitoba would lose land that it desired, and even “required”²³ for its future growth. With this in mind, Macdonald sought to quell interprovincial rivalries by opposing Ontario’s expansionist plans. A final reason for Macdonald’s position was that the Dominion would control Northwestern Ontario’s resources if the territory were either part of Manitoba or a Crown Territory.²⁴ Given Northwestern Ontario’s immense natural resources, this is perhaps the most logical of Macdonald’s reasons. Allocation of lands and the resources they contained was an extremely important political issue post-Confederation.²⁵

After Confederation, Manitoba became the third player in the boundary dispute. Section 1 of the *Manitoba Act*, passed in May 1870, provided that Her Majesty the Queen “by Order in Council ... admit Rupert’s Land and the North-Western Territory into the Union or Dominion of Canada, [and that] there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba”.²⁶ Originally, Manitoba was known as the “Postage Stamp Province”, because it was only about

20 Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 90. Hogg notes that “[t]he federal power to disallow provincial statutes was frequently exercised by the dominant federal government in the early years of confederation”. However, he goes on to say “modern development of ideas of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance” and suggests it is obsolete as an instrument of federal policymaking.

21 White, *supra* note 15 at 164.

22 Legislative Assembly of Ontario, *The Proceedings Before The Judicial Committee of Her Majesty’s Imperial Privy Council of the Special Case Respecting the Westerly Boundary of Ontario* (Toronto: Warwick and Sons, 1889) at 399.

23 *Ibid.*

24 Morris Zaslow, “The Ontario Boundary Question,” in *Profiles of a Province: Studies in the History of Ontario* (Toronto: Bryant Press Ltd., 1967) at 112 [Zaslow].

25 Nelles, *supra* note 16 at 2.

26 *Manitoba Act, 1870*, 33 Vict., c. 3, s. 1 (Canada). I would argue that the *Manitoba Act*’s wording is incorrect, and that Rupert’s Land and not the North-Western Territory covered all of modern-day Manitoba. Rupert’s Land and the North-Western Territory were geographically separate. The former consisted of lands within the Hudson Bay drainage basin, which covers all of Manitoba, along with much of modern-day Northern Ontario, most of Saskatchewan and part of Southern Alberta. The North-Western Territory consisted of lands to the north and west of Rupert’s Land, which lay within the Arctic and Pacific drainage basins. For more information, see Library and Archives Canada, “The North-Western Territory and Rupert’s Land”, online: Library and Archives Canada <<http://www.collectionscanada.ca/confederation/023001-2994-e.html>>. Both territories were property of the Hudson’s Bay Company and were admitted to Canada in June 1870 with the passage of the *Rupert’s Land and North-Western Territory Order*.

Adding to the confusion is the fact that some sources use “North-Western Territory”, “Northwest Territory” and “Northwest Territories” interchangeably (for example, see “Atlas of Canada – Territorial Evolution 1870”, online: Natural Resources Canada <<http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1870/1>>). However, the three regions were distinct entities. The Northwest Territory was a region south of the 49th parallel, ceded to Britain by France in the 1763 Treaty of Paris, and which later became the American states of Ohio, Illinois, Michigan, Wisconsin, Indiana and Minnesota (source: “History – Northwest Territory,” online: MariettaOhio.info: History: Northwest Territory <<http://mariettaohio.info/history/northwest/index.php>>). The Northwest Territories was the name given to the sections of Rupert’s Land and the North-Western Territory controlled by the federal Crown after being admitted to Canada in 1870.

33,280 square kilometres,²⁷ surrounded by the Northwest Territories. Rapid population growth, combined with other limitations inherent in a small, landlocked territory, led to calls by the Manitoba government for its borders to be expanded by the federal government. As early as 1873, Manitoba was lobbying for territorial expansion that would give it control of much of Northwestern Ontario, including a much-coveted port facility at the Lakehead.²⁸

The fourth party to the dispute, and arguably the most influential, was the British Crown. In many ways, Canada was still effectively a colony until well into the twentieth century,²⁹ and the admission of new territories to Canada was an area over which the British Crown had particular influence. Section 146 of the *Constitution Act, 1867* provides that:

It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council ... on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.³⁰

Even after Rupert's Land became a Dominion territory, Clement writes that the order of legislative hierarchy in the acquired territory was 1) the Imperial Parliament; 2) the Canadian Parliament and 3) the Lieutenant-Governor of Manitoba, who was appointed to oversee the Northwest Territories.³¹

The one party not yet mentioned is, of course, the people of Northwestern Ontario. By 1867, Ontario had granted 35,000 acres of land to homesteaders in the region of modern-day Thunder Bay, and municipal institutions had been established by the province at Prince Arthur's Landing (now Thunder Bay North). However, Ontario, Manitoba and the Dominion largely ignored the inhabitants of Northwestern Ontario during the territorial dispute. In fact, it appears that many Northwesterners, such as M.P. Simon Dawson, opposed the Northwest being part of Ontario.³² Dawson had moved to the Northwest after he was hired by the federal Department of Public Works to construct a road between the Lakehead and the Red River Settlement, and his concern for the future development of the region is said to be what inspired him to enter politics.³³ He served as Member of Parliament for the Algoma riding (which covered all of modern-day Northern Ontario) provincially between 1875 and 1878 and federally between 1878 and 1891. During this time he lobbied for Northern Ontario to be a separate province, both as an independent M.P. (until 1887) and as chairman of the parliamentary committee that examined Ontario's boundary claims in 1880.³⁴ However, the creation of a northern province

27 Association of Manitoba Land Surveyors, "Manitoba's Boundaries", online: Manitoba Land Surveyors <<http://www.aml.ca/>>.

28 *Ibid.* Di Matteo, Emery & English note that "in 1905, while introducing a series of resolutions calling for the northern extension of the province's boundaries Manitoba's Attorney General C. H. Campbell made reference to the award of 1884 and how it had deprived Manitoba of its 'own port facilities' at the Lakehead." See Livio Di Matteo, J.C. Emery & Ryan English, "Is it Better to Live in a Basement or an Attic? Analysing the Costs and Benefits of a Union of Northwestern Ontario and Manitoba" (2005) at 10, online: University of Calgary <<http://econ.ucalgary.ca/fac-files/jche/wp-11-05.pdf>>.

29 Many historians have argued that Canada did not become fully independent until 1931, when the *Statute of Westminster* provided that Imperial laws would not extend to a dominion unless "it is expressly declared in that Act that the dominion has requested, and consented to, the enactment thereof", *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4, reprinted R.S.C. 1985, App. II, No. 27, s. 4.

30 *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3, s. 146.

31 W.H.P. Clement, *The Law of the Canadian Constitution*, 3rd ed. (Toronto: Carswell, 1916) at 853 [Clement].

32 Elizabeth Arthur, "Dictionary of Canadian Biography Online (Simon Dawson)", online: Dictionary of Canadian Biography Online <<http://www.biographi.ca/EN/ShowBio.asp?Bioid=40790>>. Arthur notes that "the eastern part of the riding had never been caught up in the boundary dispute".

33 *Ibid.*

34 *Ibid.*

appears never to have been seriously considered by the authorities responsible for its future. Rather, the three disputing parties saw Northwestern Ontario as virgin territory ripe for political division, and conveniently ignored the presence of a settler population and, of course, the region's large Aboriginal population.

Most modern sources agree that at Confederation, most of Northwestern Ontario was owned by the Hudson's Bay Company ("H.B.C.") as part of Rupert's Land.³⁵ Zaslow notes that "[c]ontemporary maps, notably the famous Arrowsmith map of 1857, showed the limits of the Province of Canada as being the "height of land" separating the Great Lakes and St. Lawrence drainage basin from that of the rivers flowing into Hudson and James Bays".³⁶ By the same token, the Atlas of Canada's map of Canada in 1867 shows Ontario's Northwest border as corresponding to the boundary of the St. Lawrence drainage basin.³⁷ In an earlier constitutional law text, Clement also notes that, "speaking roughly, the country known [as Rupert's Land] comprised the territory watered by streams flowing into Hudson's Bay".³⁸

However, even before Canada came into existence, there were challenges to this interpretation. In 1857, the Canadian Commissioner of Crown Lands, Joseph Cauchon, began to develop a case against the H.B.C. claim to all lands outside the height of land. Cauchon argued that, after the Seven Years' War, Canada had acquired more land from France than previously thought. This was because French exploration and fur trading activity in Northwestern Ontario had given France title to unoccupied H.B.C. lands.³⁹ Cauchon also argued that the H.B.C. Charter did not give it automatic title to land, but rather, that sovereignty was based on settlement and occupation. Finally, he argued that legislation had extended Canadian sovereignty over the Company lands over the previous century.⁴⁰ Ironically, the same arguments were raised by Ontario post-Confederation, in its claim to the Northwest.⁴¹

In 1868, the Imperial Parliament in Great Britain passed the *Rupert's Land Act*.⁴² This empowered the Crown to negotiate the entry of Rupert's Land into Canada and provided that Canada would have governmental authority over the territory after it was acquired. The admission of Rupert's Land to Canada in 1870, by way of an Imperial Order-in-Council, forced all parties to strive for a solution to the boundary question, in order to decide to whom the new territory would be assigned.⁴³ In September 1872, the Dominion and Ontario appointed boundary commissioners to determine Ontario's western border. The Canadian representative argued that the border lay to the east of Prince Arthur's Landing (longitude 89° 9' 30" west), which would have excluded all of modern-day Thunder Bay.⁴⁴ The Ontario representative suggested that Ontario's boundary lay at the northwest angle of Lake of the Woods (longitude 95° 13' 48" west).⁴⁵

Both interpretations were likely based on the 1774 *Quebec Act*.⁴⁶ After the 1763 *Treaty*

35 See map of Rupert's Land, online: University of Calgary <http://www.ucalgary.ca/applied_history/tutor/imagealta/rup-map2.jpg>.

36 Zaslow, *supra* note 24 at 107.

37 See Appendix A – Figure 3.

38 Clement, *supra* note 31 at 848.

39 This included La Vérendrye's 1731–1739 expedition from Montreal to the Missouri River via Northwestern Ontario, and the construction of forts at Abitibi (Zaslow, *supra* note 21 at 108).

40 Zaslow, *supra* note 24 at 108.

41 Legislative Assembly of Ontario, *supra* note 22 at 19.

42 *Rupert's Land Act*, 1868 (U.K.) 31–32 Vict., c. 105.

43 *Imperial Order In Council Respecting Rupert's Land and the North-Western Territory*, 1870 (bound with the *Statutes of Canada*, 35 Vict., 1872 at 63).

44 Zaslow, *supra* note 24 at 108.

45 *Ibid* at 109.

46 *Quebec Act*, 1774 14 Geo. 3, c. 83.

of *Paris* assigned all French territories which lay within modern-day Canada (along with the Northwest Territory and certain others) to Britain, the *Quebec Act* created the original province of Quebec out of the former French colony. Upper and Lower Canada were later carved out of this territory, only to be rejoined to form the Province of Canada in 1840. The *Quebec Act* stated that the northwest boundary between the British and French colonies ran as follows: "along the bank of the [Ohio River], westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay".⁴⁷

Two wildly different interpretations of the above provision emerged. Ontario argued that the *Treaty of Paris* set the border due north from the source of the Mississippi, at Lake of the Woods. Canada and Manitoba took the position that the *Quebec Act* intended the border to be due north of the junction of the Mississippi and Ohio rivers. It is unclear where the drafters of the *Quebec Act* intended the northwest border to be. However, note that the source of the Mississippi was not discovered until 1832, when Henry Rowe Schoolcraft and his Ojibwa guide Ozawindib correctly identified Lake Itasca (in what is now north-central Minnesota) as the river's headwaters.⁴⁸ This would suggest that if the *Quebec Act's* drafters intended the border to have any precision, the correct legislative interpretation was that of the Dominion and Manitoba.

In 1873, the Macdonald Conservatives lost the federal election to Alexander Mackenzie's Liberals. The following year, Ontario and Canada agreed to appoint a board of arbitrators to decide on the boundary. Di Matteo *et al.* question this board's neutrality, noting that Mackenzie was openly supportive of Ontario's claims, and that "the Board did not have a single representative from either Manitoba or the District of Keewatin".⁴⁹

Also in 1874, an agreement was struck between the Dominion and Ontario to enact a temporary border. In 1872, Ontario agreed to a request by the federal Department of Public Works to pay for construction at Prince Arthur's Landing and to set up a police force there. Of course, Ontario questioned why it was asked to pay for infrastructure in an area that the Dominion claimed was outside of Ontario's borders. In response to Ontario's concerns, after taking power the Mackenzie Liberals struck an interim agreement with Ontario to extend the province's northwestern borders even beyond the St. Lawrence drainage basin.⁵⁰ Zaslow writes:

The agreement continued for four years until the three arbiters (none of whom had been designated to the original panel) met for three days in Ottawa, August 1-3, 1878, and issued their decision, unaccompanied by supporting reasoning or explanations. The award was wholly in the province's favour. On the west it gave Ontario the line of the Northwest Angle [from Lake of the Woods]; and on the north the English and Albany Rivers, the coast of James Bay east to the meridian of Lake Temiskaming, thence south to that point and along the Ottawa River.⁵¹

The arbitration decision was issued shortly before Mackenzie's Liberals were defeated by the Macdonald Conservatives in 1878, and Mackenzie did not have time to implement its find-

47 *Ibid.*, s. 1.

48 MSNBC.com, "River's headwaters were devilishly hard to find" online: Mile zero: The river's elusive source - The Mighty Miss <<http://www.msnbc.msn.com/id/5539776/>>.

49 Di Matteo, Emery & English, *supra* note 3 at 25.

50 Government of Ontario, *Documents Respecting the Northern and Western Boundaries of Ontario* (Toronto: Hunter, Rose and Co., 1878) at 347: "Provisional Conventional Boundaries of Ontario, 1874". See also Atlas of Canada - Territorial Evolution, 1874 online: Natural Resources Canada - Atlas of Canada <<http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1874/1>>; See also Appendix A - Figure 5.

51 Zaslow, *supra* note 21 at 109.

ings.⁵² Because the decision was non-binding and Macdonald opposed its findings,⁵³ the new government ignored it. Macdonald himself suggested that the arbitrators acted with “utter disregard to the interests of the Dominion as a whole”.⁵⁴ Manitoba was similarly disappointed by the decision, as it had been lobbying for territorial expansion for several years.

Consequently, in a legislative *tour de force*, the re-elected Macdonald Conservatives passed *An Act to Provide for the Extension of the Boundaries of the Province of Manitoba* (“*Manitoba Boundary Act*”) in 1881.⁵⁵ Manitoba passed similar legislation authorizing the Dominion to expand its borders.⁵⁶ This statute expanded Manitoba’s boundaries to the “westerly boundary of the Province of Ontario”.⁵⁷

The exact location of this boundary was and still is unclear, though most sources place it at or near present-day Thunder Bay. MacKirdy suggests that “[i]f the extreme claim of the Dominion government were upheld the boundary of Manitoba would extend to Lake Superior, embracing the present Lakehead ports”.⁵⁸ Zaslow also suggests that the *Manitoba Boundary Act* would have taken away the port facilities⁵⁹ of what is now Thunder Bay. Brock, somewhat confusingly, provides one map which outlining the boundary “advocated by the Government of Canada” which places the Lakehead in Manitoba, and another map, from 1881, which has a different western boundary.⁶⁰ White argues that “[f]or Macdonald, Ontario’s northern boundary was the height of land that marked the Hudson Bay watershed, while its western boundary ended some half a dozen miles west of Fort William”.⁶¹ White’s interpretation probably would have denied Manitoba access to Lake Superior at modern-day Thunder Bay, though the other interpretations of the *Manitoba Boundary Act* would have given Manitoba lake frontage. Interestingly, the Atlas of Canada’s 1881 map of Canada does not acknowledge the shrinking of Ontario’s borders, but mentions simply that “Manitoba is enlarged in 1881 by extending its boundaries westward, northward and eastward”.⁶² With respect, I think that the Appendix A – Figure 6 depiction of the “Disputed Area” is incorrect, and the Disputed Area should be extended to the east of modern day Thunder Bay.

Any boundary at or near modern day Thunder Bay would put territory which was outside the Hudson Bay watershed in Manitoba, even though Ontario had established settlements at the Lakehead before 1881. Referring to the Dominion’s assertion of the same borders in 1872 (as mentioned earlier), Zaslow notes that “as this would have removed the Lakehead centres of Fort William and Prince Arthur’s Landing, over which the sovereignty of the old province of

52 Morrison, *supra* note 19 at 97.

53 *Imperial Order In Council, Embodying Her Majesty’s Decision*, August 11, 1884: “Legislation by the Dominion of Canada, as well as by the Province of Ontario, was necessary to give binding effect as against the Dominion and the Province to the Award of the 3rd August, 1878, and that, as no such legislation has taken place, the Award is not binding”.

54 Cited in John Burchill, “The Rat Portage War”, online: Winnipeg Police Service :: UD :: The Rat Portage War <<http://winnipeg.ca/police/history/story13.stm>> [Burchill].

55 *An Act to Provide for the Extension of the Boundaries of the Province of Manitoba*, 1881 44 Vict., c. 14.

56 *Ibid.*, at s. 1.

57 *Ibid.*

58 MacKirdy, *supra* note 18 at 195. For the benefit of readers from outside Northwestern Ontario, note that until Thunder Bay was created by the amalgamation of Port Arthur and Fort William in 1970, the Thunder Bay area was colloquially known as the Lakehead. In 1970, a referendum was held to determine the name of the new city, and voters were asked to choose between “Lakehead”, “The Lakehead” and “Thunder Bay”. Though a majority preferred either “Lakehead” or “The Lakehead” as the new name, the vote split between those two options, and “Thunder Bay” was the winner. Many older people from the Thunder Bay area still refer to the city and its surrounding area as the Lakehead, and this author has always had a preference for the Lakehead name.

59 Zaslow, *supra* note 24 at 113.

60 Brock, *supra* note 7 at 10, 12.

61 White, *supra* note 15 at 165.

62 Atlas of Canada – Territorial Evolution, 1881, online: Natural Resources Canada – Atlas of Canada <<http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1881/1>>. See also Appendix A – Figure 6.

Canada had never been challenged, this was clearly unacceptable to Ontario".⁶³

The Ontario government was outraged by the *Manitoba Boundary Act*. Coming on the heels of the federal government's decision to disallow Ontario's *River and Streams Act*, Mowat saw the boundaries legislation as an attempt by Macdonald to assert federal dominance over Ontario and to punish the province for electing his political arch-rival.⁶⁴ Many Southern Ontarians also believed that the *Manitoba Boundary Act* was influenced by Quebec, which feared Ontario's expansion.⁶⁵ Consequently, Ontario chose to ignore the *Manitoba Boundary Act* and argued that the 1878 arbitration award should stand. In 1882, the Ontario legislature approved a reference to the J.C.P.C. regarding the boundary, but agreed that the federal government's claim was "unfounded"⁶⁶ and that in the interim, the disputed area should be under Ontario's jurisdiction.⁶⁷

As a result, the Dominion, Ontario and Manitoba all sought to assert jurisdiction over the disputed area. Between 1881 and 1884, parts of Northwestern Ontario resembled the Old West, with no effective government and "potentially dangerous elements" drawn to the region by construction, logging, prospecting and other opportunities available in a booming frontier economy.⁶⁸ Because of its close proximity to Manitoba, Rat Portage (now Kenora) was the centre of conflict between the three parties. In May 1881, when Ontario Magistrate W.D. Lyon attempted to hold court in Rat Portage, his bailiff was arrested and imprisoned by federal agents.⁶⁹ In another case, Manitoba Constable Patrick O'Keefe seized four barrels of moonshine, but when he brought the offending substance back to his office, he was arrested by Dominion agents for having possession of liquor in the jurisdiction of a federal public work. When he went to trial, O'Keefe waited until the federal magistrate left the bench, then charged him with possessing the same alcohol. Subsequently, a Manitoba magistrate fined his federal counterpart \$100.⁷⁰

Historian Alexander Begg describes the following scenario:

One day a Manitoba constable would be arrested for drunkenness by an Ontario constable, the next, Manitoba would reciprocate by arresting an Ontario official, or this dull routine would be enlivened by an assault on a newspaper correspondent, or the apprehension of one of the magistrates on some trumped-up charge, to be followed by a general swearing out of information and wholesale arrests all around the official circle. While these interesting proceedings commanded the strict attention of the magistrates and police, it may be imagined that the gamblers and whisky pedlars enjoyed complete immunity, for it was next to impossible for a constable, zealous as he might be in the discharge of his duty, to observe the actions of evil-doers, while he himself was a fugitive from justice, engaged in dodging a warrant for his own arrest.⁷¹

Despite the comedic ridiculousness of the situation, Evans notes that "the series of arrests and counter-arrests which ensued [regarding liquor licences] did end the lengthy impasse on

63 Zaslow, *supra* note 24 at 108.

64 A. Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992) at 158–159 [Evans].

65 *Ibid.*

66 Journals of the Assembly, (1882), at 154–156.

67 Evans, *supra* note 64 at 161.

68 Zaslow, *supra* note 24 at 111.

69 *Ibid.* at 112.

70 *Ibid.*

71 Alexander Begg, *History of the North West* (Toronto: Hunter, Rose and Co., 1894–95) at 79.

the boundary question".⁷² Fearing that the situation in the North was getting out of control, in December 1883, Manitoba Attorney General and Rat Portage M.L.A. J.A. Miller agreed with Oliver Mowat to submit the boundary dispute to the J.C.P.C. for arbitration.

Miller had to persuade Macdonald to submit to J.C.P.C. arbitration, even though Parliament had approved a resolution in April 1882 calling for the Supreme Court of Canada or the J.C.P.C. to address the boundary question. The major sticking point was interim control of the disputed lands. While Ontario demanded full control of the disputed territory pending a final decision, the Dominion resolution called for the territory to be administered by a joint commission appointed by the Ontario and federal governments.⁷³ There were also issues surrounding which boundaries were to be determined.⁷⁴ Originally, the parties had agreed to refer the northern border question to the J.C.P.C. along with the other questions because Mowat wanted a final resolution to all of his province's border issues. On March 7, 1884, Alexander Campbell, a cabinet minister and top advisor to John A. Macdonald, wrote to Mowat "I am also very glad personally to be able to say that we are ready to agree to the reference of the Northern and the remainder of the Western boundary to the same tribunal at the same time".⁷⁵ However, the northern border reference was withdrawn at the last minute, presumably because Macdonald thought that a single reference would resolve the issue in the Dominion's favour.⁷⁶ However, despite their disagreements on the questions to be addressed by the J.C.P.C., by 1884 all three parties had agreed to send the case to the Law Lords ("*Ontario Boundary Case*").⁷⁷

The J.C.P.C. decision in 1884 apparently put an end both to the aforementioned lawlessness and chaos in Rat Portage and to the aspirations of Manitoba and Canada to extend the former's territory eastward. The Dominion, Manitoba and Ontario agreed to submit three questions. These were: 1) is the 1878 award binding; 2) if the award is not binding, then what is the true boundary between Manitoba and Ontario; and 3) whether federal and provincial legislation would suffice to give the decisions legal effect (as per the *British North America Act, 1871*)⁷⁸, or whether a new Imperial Act would be necessary.⁷⁹ On the first question, the 1878 award was held to be non-binding. However, on the second question, its results were upheld. Regarding the third question, the Law Lords stated:

[W]ithout expressing an opinion on the sufficiency or otherwise of concurrent legislation of the Provinces of Ontario and Manitoba, and of the Dominion of Canada (if such legislation should take place), their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual.⁸⁰

Unfortunately, neither the arbitrators' award nor the J.C.P.C. decision provides reasons. Zaslow and others have suggested that the "surprising"⁸¹ result was due to Ontario's superior research, organization and advocacy.⁸² Evans writes that "[a]s senior counsel for Ontario, [Oliver Mowat] had prepared the case for his province with minute care, using skillfully the mass of evidence in the acts, charters, commissions, proclamations, treaties and maps which he

72 Evans, *supra* note 64 at 172.

73 Morrison, *supra* note 19 at 150.

74 *Ibid.*, at 154–158.

75 *Ibid.* at 157.

76 *Ibid.* at 158.

77 *Ibid.* at 173.

78 *British North America Act, 1871* (U.K.), 34–35 Vict., c. 28.

79 Legislative Assembly of Ontario, *supra* note 23 at 2.

80 *Imperial Order In Council, Embodying Her Majesty's Decision*, August 11, 1884, s. 4.

81 Zaslow, *supra* note 24 at 113.

82 *Ibid.*; Evans, *supra* note 64 at 173.

had been collecting for over a decade".⁸³ Note that Ontario produced at least two volumes of documentary information relating to the boundary,⁸⁴ while it appears that neither the Dominion nor Manitoba had done such research. MacKirdy goes so far as to suggest that Manitoba was relatively uninterested in Northwestern Ontario, as it was "preoccupied with wheat land" and it did not want to acquire vast territories over which it would have to administer without the corresponding access to resource revenues.⁸⁵ I disagree with this assertion, and would note that, as mentioned earlier, Manitoba had been lobbying Ottawa for territorial expansion since 1873 and desired access to the Great Lakes. I would also note that Manitoba was the only party to send militia to the disputed area. In 1883, Manitoba dispatched sixty armed men from the Winnipeg Field Battery to Rat Portage to keep the peace during the provincial elections.⁸⁶ Additionally, after Ontario authorities arrested a group of Manitoba police and burned down the Manitoba jail during the Rat Portage War, Manitoba Premier John Norquay personally led an expedition of Manitoba police to the town and arrested those thought to be responsible.⁸⁷ However, I would agree with MacKirdy insofar as Ontario had spent more time and effort preparing its case.

Though it is difficult to determine which arguments were the most persuasive, both parties' arguments may be grouped into two major categories: arguments advocating for a particular interpretation of the *Treaty of Paris*, and arguments surrounding the assertion of sovereignty (or lack thereof) by various parties. First, in support of his interpretation of the *Treaty of Paris*, Mowat cited the *Quebec Act, 1774*, and suggested that its plain language and its purpose (namely, to transfer French territories to the British Crown) advocated for the Ontario interpretation. Additionally, according to Morris Zaslow, the Ontario interpretation had been accepted in the 1783 *Treaty of Versailles*.⁸⁸

Second, Ontario argued that the H.B.C. had failed to assert sovereignty over its lands, and that "the grant [of lands, in the 1670 Charter incorporating the Hudson's Bay Company, by King Charles II] was to be commensurate only with their actual appropriation or possession".⁸⁹ Ironically, these were the same arguments raised by Joseph Cauchon for Canada in its dispute with the H.B.C. over control of Rupert's Land. Consequently, Mowat argued that Upper Canada stretched to the Rocky Mountains,⁹⁰ by virtue of French fur trade operations in the west⁹¹ and the H.B.C.'s failure to assert control of its territory beyond the perimeter of Hudson Bay.⁹² However, acknowledging that awarding Ontario most of modern-day western Canada would be "inconvenient",⁹³ Mowat was perfectly happy to accept the arbitrators' award of 1878.⁹⁴

Manitoba's strongest argument also related to sovereignty; namely, the 1818 decision of the courts of Lower Canada in *De Reinhard's Case*.⁹⁵ In this case, the defendant was charged

83 Evans, *supra* note 64 at 172.

84 See Government of Ontario, *Statutes, Documents and Papers Bearing On The Discussion Respecting the Northern and Western Boundaries of the Province of Ontario* (Toronto: Hunter, Rose and Co., 1878); see also Legislative Assembly of Ontario, *Correspondence, Papers and Documents of Dates from 1856 to 1882 Inclusive, Relating to the Northerly and Westerly Boundaries of the Province of Ontario* (Toronto: C. Blackett Robinson, 1882).

85 MacKirdy, *supra* note 18 at 195–196.

86 Burchill, *supra* note 54. This area is part of the Canadian Shield and could not be characterized as "wheat land".

87 Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis, 1972) at 155.

88 Zaslow, *supra* note 24 at 112.

89 Legislative Assembly of Ontario, *supra* note 23 at 54.

90 *Ibid.* at 45.

91 *Ibid.* at 88–97.

92 *Ibid.* at 53.

93 *Ibid.* at 33.

94 *Ibid.* at 77.

95 Reproduced in the Legislative Assembly of Ontario, *supra* note 23 at 207.

with a murder that occurred in the disputed territory. The court held that it had jurisdiction because the murder was not committed in Upper Canada.⁹⁶ Therefore, Manitoba and Canada argued that Ontario had no claim to the disputed territory, because Ontario was formed from what had originally been Upper Canada. This “finding of law”, as it was subsequently deemed in *McLennan’s Case*, was never overturned nor challenged. However, Ontario alleged that *De Reinhard* was bad law because it had never been cited, and because it had been referred to England for interpretation. Apparently no opinion was provided by the English authorities regarding the verdict in *De Reinhard’s Case*.⁹⁷

However, Zaslow and others have argued that Manitoba and the federal government discredited their case by claiming land commonly assumed to be part of Ontario, in the St. Lawrence drainage basin west of the junction of the Ohio and Mississippi rivers. Counsel for Manitoba, Mr. D. McCarthy, was forced to concede that that “up to the height of land—that is between Lake Superior and the height of land—Upper Canada *did* exercise jurisdiction”.⁹⁸ When asked if any act of Parliament referred to the “height of land”, McCarthy stated that “there was a treaty with the Indians in 1850, and that treaty took in all the land”.⁹⁹ Most certainly McCarthy was referring to the Robinson-Superior Treaty, which covers lands up to the southern and western border of Rupert’s Land and embraces Thunder Bay.¹⁰⁰ Counsel for the Dominion, Mr. Christopher Robinson, concurred with Manitoba’s position on the geographical questions.¹⁰¹ However, though admitting that Canada and later Ontario had controlled lands now claimed by Manitoba, both McCarthy and Robinson argued that the “proper line” was due north from the junction of the Ohio and Mississippi rivers.

It is beyond the scope of this paper to re-argue the *Ontario Boundary Case*, but a few comments should be made regarding the J.C.P.C.’s findings. Morrison points out several flaws with the J.C.P.C.’s description of the awarded territory, which did not conform to the 1878 award even though it claimed to do so. He also argues that the Law Lords exceeded their terms of reference.¹⁰² First, Morrison argues that the following phrase implied giving Manitoba a piece of the United States: “their Lordships find 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 ...[emphasis added]”.¹⁰³ My interpretation of this statement is that Lake of the Woods marks the southeast corner of Manitoba, and that it is not problematic. Second, Morrison points out that, by ruling on a northern border for Ontario, the J.C.P.C. exceeded the scope of the second reference question, which was “[i]n 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”.¹⁰⁴ Of course, Ontario and Manitoba have never had a northern border, and adjudication of the Dominion-Ontario dispute over Ontario’s northern border was not included in the terms of reference. Third, Morrison correctly points out that the J.C.P.C.’s description of Ontario’s western border as “a line drawn due north from the confluence of the Rivers Mississippi and Ohio which forms the boundary eastward of the province of Manitoba”¹⁰⁵ is, of course, inaccurate, as that border was proposed by Manitoba and the Dominion,

96 Jurisdiction was granted by the *Imperial Act*, 43 Geo. III, c. 138, to the courts of Lower Canada for crimes committed in “Indian territory”.

97 Legislative Assembly of Ontario, *supra* note 23 at 102.

98 *Ibid* at 103.

99 *Ibid*.

100 Appendix A – Figure 4.

101 Legislative Assembly of Ontario, *supra* note 23 at 338.

102 Morrison, *supra* note 19 at 160.

103 *Imperial Order In Council, Embodying Her Majesty’s Decision*, August 11, 1884, s. 3.

104 Legislative Assembly of Ontario, *supra* note 23 at 2. Evans notes the same concern (*supra* note 64 at 173).

105 Legislative Assembly of Ontario, *supra* note 23 at 2.

and would run somewhere near the Lakehead.¹⁰⁶

Aside from ending hostilities in Rat Portage, what was the effect of the *Ontario Boundary Reference*? Needless to say, Macdonald disagreed with the J.C.P.C. decision. Rather than acting on it, he waited for nearly five years before his government finally passed such a resolution calling for Imperial legislation on the boundaries issue. Macdonald took particular issue with its decision on the northern borders, in addition to asserting that the Dominion controlled all resource revenues between the height of land west of Lake Superior and the present-day Manitoba border¹⁰⁷ because Canada had gained title to that land in the Northwest Angle Treaty of 1873. This contention was laid to rest in the 1888 decision in *St. Catherine's Milling and Lumber Company*,¹⁰⁸ in which the J.C.P.C. held that title to the resources of Aboriginal lands acquired by the Dominion via treaties lay in the hands of the provinces under the *British North America Act, 1867*.

In all likelihood, Macdonald was allowed to stall for as long as he did because the J.C.P.C. decision was a recommendation rather than a ruling. Specifically, it stated that "their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual".¹⁰⁹ However, shortly after the J.C.P.C. issued its findings, an Imperial Order-in-Council was passed, stating that:

Her Majesty, having taken the said Report into consideration, was pleased by it and with the advice of Her Privy Council to approve thereof and to order, as it is hereby ordered, that the same be punctually observed, obeyed and carried into execution. Whereof the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario, the Lieutenant-Governor of the Province of Manitoba and all other persons whom it may concern, are to take notice and govern themselves accordingly.¹¹⁰

My reading of this Order is that the J.C.P.C. ruling was *ordered* to be carried into execution. Oliver Mowat apparently thought the same, and in 1885, he attempted to go over Macdonald's head by requesting that the Colonial Secretary arrange for Imperial legislation to be passed to implement the J.C.P.C. ruling.¹¹¹ However, this request was ignored.¹¹² It was not until the aforementioned resolution was passed that the Imperial Parliament passed the *Canada (Ontario Boundary) Act* in 1889, which set Ontario's current western border.¹¹³ The province's final border change was made in 1912, when the Dominion handed over its remaining territories south of the 60th parallel to Ontario, Manitoba and Saskatchewan.¹¹⁴

In the final analysis, Ontario was very lucky to win control of a vast territory beyond its historical borders. In particular, had Alexander Mackenzie not won the 1873 election and appointed a board of arbitrators who decided as they did, the J.C.P.C. may well have ruled differently given the general reluctance of appeal courts to overturn original decisions. However, full credit must be given to Oliver Mowat for legally and politically outgunning his opponents on this issue. From Confederation onwards, Mowat lobbied hard for Ontario's territorial expansion. Even after the Dominion attempted to strong-arm him out of all of the territory awarded

106 Morrison, *supra* note 19 at 160.

107 Zaslow, *supra* note 24 at 114.

108 *St Catherine's Milling and Lumber Co v Queen, The (PC (Can)) Privy Council (Canada)* (1888), 14 App. Cas. 46 (J.C.P.C.).

109 *Imperial Order In Council, Embodying Her Majesty's Decision*, August 11, 1884, s. 4.

110 *Ibid.*

111 Morrison, *supra* note 19 at 168.

112 *Ibid.* at 169.

113 *Canada (Ontario Boundary) Act*, 1889 52-53 Vict., c. 28 (U.K.).

114 *The Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40.

in 1878, Mowat not only refused to back down, but sent law enforcement officials to the farthest reaches of the Ontario claim in order to assert Ontario's control.¹¹⁵ His work in researching and personally arguing the boundary case before the J.C.P.C. is fairly unique in Canadian history. Further, he was prepared to pull out of Confederation in order to win the dispute, stating that "if they could only maintain Confederation by giving up half of their Province, then Confederation must go".¹¹⁶ Though it is unclear why the federal government did not take more forceful measures to enforce the *Manitoba Boundary Act*, a likely explanation is that doing so may well have led to armed conflict with Ontario and the destruction of Canada. For its part, Manitoba did what it could to assert sovereignty over the western regions of the disputed area, but its physical, political and economic resources paled in comparison to Ontario's.

PART II: Northwestern Ontario Post-Annexation to Ontario

In the early years, Northwestern Ontario was unquestionably a valuable economic acquisition for Ontario. Between 1871 and 1914, Northern Ontario forestry and mining revenues accounted for 25 per cent of Ontario's revenue, despite the fact that the region made up, at most, 10 per cent of Ontario's population.¹¹⁷ The region's manufacturing sector grew rapidly, and railway construction created employment and opened up new land for settlement.¹¹⁸

However, since the 1950s, Northwestern Ontario has grown at a slower rate than the rest of the province.¹¹⁹ Between 1996 and 2001, the population of Northwestern Ontario fell by 3.8 per cent, a net loss of 9,348 people.¹²⁰ The economy throughout most of the region has experienced similar declines. In the second quarter of 2006, the Service Canada Labour Market Bulletin for the region noted that Northwestern Ontario has the highest unemployment rate of any region in the province.¹²¹ This is due in large part to a decline in the forest industry, which forms the core of the region's economy and has lost thousands of jobs across the region in recent months.¹²² Over the longer term, other traditional industries such as grain handling, shipbuilding and agriculture have also experienced significant declines.

Not surprisingly, one often hears comments such as the following from Northwestern Ontarians:

Last August at the Association of Municipalities of Ontario conference in

115 Some have argued that Mowat was less than successful in asserting control over the western part of Northwestern Ontario, at least in the early years of the Rat Portage dispute. First, Rat Portage incorporated as a Manitoba town in July 1882. Second, in the January 1883 murder trial of Thomas Drewes of Rat Portage, the accused was convicted in a Manitoba court, with no challenge by Ontario to the court's authority. Third, both provinces held elections in Rat Portage on September 28, 1883, and though the Ontario and Manitoba candidates were obviously not running against each other, some argued that because the Manitoba MLA-elect (Attorney-General J.A. Miller) won more votes than his Ontario counterpart, the Manitoba result was more valid (source: Burchill, *supra* note 51). Morrison further argues "that bloodshed and open warfare did not result was due partly to the good sense of officials on the spot, but more specifically to the fact that Ontario did not attempt to press her claims with the degree of forcefulness exhibited by her leaders in their public utterances" (Morrison, *supra* note 16 at 98).

That being said, Ontario's presence in Rat Portage, and its willingness to resist the authority of Manitoba and Dominion agents, was pivotal in forcing Manitoba and later, Canada, to submit to the 1884 J.C.P.C. arbitration, for which Mowat likely believed that he was better prepared and had a good chance of winning.

116 Quoted in Evans, *supra* note 64 at 161.

117 Di Matteo, Emery & English, *supra* note 3 at 175.

118 *Ibid.*

119 *Ibid.* at 4.

120 Ontario Region Census Products, "Population Characteristics for Northwestern Ontario, Economic Region 595, Census 2001" online: Service Canada <<http://www1.servicecanada.gc.ca/en/on/lmi/eaid/ore/cen01/no/595pop.shtml>>.

121 Service Canada, "Labour Market Bulletin Thunder Bay – Second Quarter 2006", online: Service Canada <<http://www1.servicecanada.gc.ca/en/on/offices/0602lmb/thunderbay.shtml>>.

122 Ontario Forestry Coalition, online: Ontario Forestry Coalition <<http://www.forestrycoalition.com>>.

Toronto, the points of the crisis in the forestry industry were brought to the attention of all delegates. I can assure you that by the end of the conference most people understood the situation; it would appear that further up University Avenue at Queen's Park the message was lost. ...

Over the past 12 months the word "separation" has been heard again. Maybe it is time. Maybe Northwestern Ontario should ask Manitoba if we can "get in" or maybe Northern Ontario should say to the rest of Ontario, "We want out" and establish the 11th province.

Yes, I know there are some who will think this a crazy idea, but we cannot be any worse off than we are now.¹²³

Though there is frustration with the provincial government's perceived inability and unwillingness to deal effectively with local economic issues, it would be simplistic to dismiss such attitudes as mere irrational frustration. In his 1977 article "Hinterland Politics: The Case of Northwestern Ontario", Geoffrey Weller argues that Northwestern Ontario's economy is based on extraction—of raw materials, people and money—which has caused deep-seated disillusionment amongst Northwesterners.¹²⁴ As a "hinterland", Weller suggests that Northwestern Ontario and other regions like it are designed to serve the needs of the "metropolis", namely, Southern Ontario.¹²⁵ Weller sets out a model which illustrates how the "economics of extraction" cut to the heart of Northwestern Ontario politics. Though I disagree with some of Weller's conclusions, I believe that the extraction model (reproduced in Appendix B) is extremely useful in understanding the alienation felt by many Northwestern Ontarians, the desire for major political change in the region, and the successes and failures of regional secession movements.

ECONOMICS OF EXTRACTION

Northwestern Ontario's main industries in terms of economic output traditionally have been forestry and mining.¹²⁶ Both sectors exist to produce raw materials for outside owners and purchasers, many of which have been based traditionally in Southern Ontario. In addition, people have been a major export for the region; one Government of Canada report notes that "[u]pon graduation, most of the region's best and brightest prospects leave the North, looking for better employment opportunities. This results in an increasingly older regional population and a less skilled work force".¹²⁷ Weller also argues that the tourism industry, long touted as the future of the Northwestern Ontario economy, primarily caters to Southern Ontario interests.¹²⁸ However, it is important to note that in recent years, increasing numbers of tourists have come from the U.S. Midwest.

Because extractive industries are capital-intensive and often tend to be located in close proximity to their source of raw materials, the region's population has grown more slowly than the rest of the province (and is now, in fact, declining), and is unevenly distributed. Northwestern Ontario's transportation infrastructure has been built around moving goods out to the metropolis rather than moving people and goods into the region. As a result, the region has one

123 Bill Bartley, "'We Want Out.' Time to Separate?" *Thunder Bay Chronicle-Journal* (28 January 2006).

124 Geoffrey Weller, "Hinterland Politics: The Case of Northwestern Ontario" (1977) 10 *Can.J.Pol.Sci.* 4 at 732 [Weller, "Hinterland Politics"].

125 *Ibid.* at 731.

126 *Ibid.* at 734.

127 Government of Canada, "Innovation Performance – Northwestern Ontario" (July 2002), online: Government of Canada – Innovation in Canada <<http://innovation.gc.ca/gol/innovation/site.nsf/en/in02011.html>>.

128 Weller, "Hinterland Politics", *supra* note 124 at 735.

of the world's largest grain handling ports, but it does not have a four-lane divided highway.¹²⁹ Weller argues that these phenomena have adversely affected regional cohesiveness. Also, "the fact that many of the industries import most of their managerial staff, pollute the environment, set up company towns, and leave when resources are exhausted"¹³⁰ perpetuates the lack of cohesion and causes feelings of alienation and powerlessness. Combined with the fact that most Northwestern Ontario industries are highly sensitive to swings in commodity and energy prices,¹³¹ it is little wonder that the region has a "history of out-migration" and that "dissatisfaction is often marked more by exit rather than voice".¹³²

POLITICS OF EXTRACTION

Weller suggests that Northwestern Ontario's economy has created a "politics of extraction".¹³³ He categorizes the region's political relationship with the South as "politics of futility" and "politics of handouts".¹³⁴ The former type of politics refers to pressure to change the hinterland-metropolis relationship and the pressure to obtain services "that come almost as a right in other regions".¹³⁵ Weller suggests that the relationship might be changed if Northwestern Ontario developed more heavy industry which would support secondary manufacturing, if freight rates were restructured to minimize the adverse impacts of transportation costs on such industries, and if more white-collar positions were created by government. In 2004, I worked for the City of Thunder Bay's economic development office, and in discussions with numerous local business owners and managers, I often heard the view that Thunder Bay needed more industry, and in particular, manufacturing. However, Northwestern Ontario's distance from major markets, combined with increased foreign competition and high input costs mean that such wishes are highly unlikely to materialize. Countless studies have suggested the need for more value-added forestry investment, with few results.¹³⁶ One of the region's few large manufacturers, the Bombardier plant in Thunder Bay, has laid off hundreds of workers in recent years, and may well have shut down entirely had it not landed a recent contract with the Toronto Transit Commission.¹³⁷ Although the Ontario government has made some major investments in Northwestern Ontario in the thirty years since Weller's article was published,¹³⁸ white-collar job opportunities are few and far-between. Regarding the second component of the "politics of futility", namely the lack of adequate services, Weller notes in a subsequent article that Northwestern Ontario's severe shortage of health care professionals, its lack of a university offering law and doctoral programs, and the plight of the region's large Aboriginal population living on under-serviced reserves.¹³⁹ Although some progress has been made since 1977, many Northwestern Ontarians still believe that lobbying the provincial government for economic development assistance or improved service delivery is frustrating at best and futile on average.

The "politics of handouts" may be more of a question of perception than politics. Though

129 Government of Canada, *supra* note 127. In most parts of Northwestern Ontario, even the Trans-Canada remains a two-lane, undivided highway.

130 Weller, "Hinterland Politics", *supra* note 124 at 737.

131 Geoffrey Weller, "Politics and Policy in the North", in Graham White ed., *The Government and Politics of Ontario*, 5th ed. (Toronto: University of Toronto Press, 1997) at 289–290 [Weller, "Politics and Policy"].

132 Di Matteo, Emery & English, *supra* note 3 at 19.

133 Weller, "Hinterland Politics", *supra* note 124 at 738.

134 See Appendix B.

135 Weller, "Hinterland Politics", *supra* note 124 at 738.

136 See e.g. William L. Lees and Associates, "Economic Contribution of the Primary Forest Products Industry to Northwestern Ontario", online: Boreal Forest <<http://www.borealforest.org/blreport.htm>>.

137 Made In Canada BIZ, online: Made in Canada BIZ <<http://www.madeincanadabiz.com>>.

138 For example, note the Ontario government's transfer of certain Registrar-General and Ministry of Education positions to Thunder Bay, along with the construction of the Northern Ontario School of Medicine at Lakehead University.

139 Weller, "Politics and Policy", *supra* note 131 at 290–291.

it would be unfair to demand improved services from the provincial government but then characterize successful lobby efforts as resulting in “handouts”, Weller suggests that “it is a feeling on the part of many residents of the region that the whole objective of a great many governmental actions is to keep open the promise of development and, therefore, a change in the basic relationship, but never to undertake actions designed to achieve such a change”.¹⁴⁰

POLITICS OF FRUSTRATION AND POLITICS OF PAROCHIALISM

The consequence of Northwestern Ontario's political and economic relationship with Southern Ontario has been two major political trends within the Northwest: frustration and parochialism. Weller argues that the frustration of many Northwesterners with their subordinate political and economic status, combined with the region's rebellious, blue-collar culture, has manifested itself in political radicalism over the years. Movements such as the International Workers of the World, the Communist Party and various other radical left-wing causes have enjoyed considerable support, and A.W. Rasporich notes that Thunder Bay's diversity of and support for radical left-wing movements has been considerably higher than in most Canadian cities.¹⁴¹

Frustration has also manifested itself in what Weller calls “fringe movements”, created to bring about change in the region's political status. As noted earlier, Simon Dawson advocated for Northern Ontario to become a separate province from the 1870s onwards. Additionally, in 1911, the Kenora District requested to join Manitoba.¹⁴² The secessionist movements in the late nineteenth and early twentieth centuries were undoubtedly motivated by optimistic views about the region's future, in light of the region's booming economy and rapid population growth.¹⁴³ However, from the 1950s onwards, movements such as Hubert Limbrick's “New Province League” and Ed Deibel's Northern Ontario Heritage Party¹⁴⁴ have formed in reaction to frustration and alienation resulting from the region being largely controlled by Southern Ontario. For example, in 1944, the mayors of Port Arthur and Fort William called for the Northwest to join Manitoba, with Port Arthur's Acting Mayor J.E. Fryer stating “[t]he greatest frontier in Canada is being governed by people who don't know and don't care”.¹⁴⁵ Similarly, Ed Deibel was inspired to campaign for Northern Ontario to become Canada's eleventh province after Ontario introduced a seven per cent tax on heat and energy in the 1973 provincial budget.¹⁴⁶

Although these movements attempted to address concerns about Northwestern Ontario's status as a political and economic¹⁴⁷ hinterland, none have ever achieved any significant support at the ballot box. In fact, Northwestern Ontario has generally elected M.P.'s and M.P.P.'s from the governing party, though C.C.F.-N.D.P. candidates have also been elected in disproportionate numbers over the years.¹⁴⁸ Several theories have attempted to explain why a region that often sees itself as alienated would vote for the government responsible for its marginalization. First, in what he referred to as the “politics of colonialism”, Rasporich has suggested that Northwesterners have been willing to be bought off by the provincial governments of the

140 Weller, “Politics and Policy”, *supra* note 131 at 743.

141 A.W. Rasporich, “Factionalism and Class in Modern Lakehead Politics”, (1974) 7 *Lakehead University Review* at 31–65 [Rasporich].

142 Di Matteo, Emery & English, *supra* note 1 at 176.

143 Weller, “Politics and Policy”, *supra* note 131 at 295.

144 For a detailed profile of Ed Deibel and the Northern Ontario Heritage Party, see Brock, *supra* at 5.

145 Time Magazine Archives, “Secession!” (10 April 1944), online: Time Magazine <<http://www.time.com/time/archive/preview/0,10987,796542,00.html>>.

146 Brock, *supra* note 7 at 36.

147 For example, Deibel called for legislation mandating that half of all raw materials extracted in Northern Ontario be turned into finished products in the North (Weller, “Hinterland Politics”, *supra* note 124 at 748).

148 Weller, “Politics and Policy”, *supra* note 131 at 293–294.

day, stating that “as in other client-patron types of society, the local tribe was satisfied as long as even the illusion of gift-giving paternalism was evident”.¹⁴⁹ Additionally, I would argue that the presence of viable C.C.F.-N.D.P. candidates has decreased support for political realignment by giving voters frustrated with the politics of colonialism the option of electing an opposition party which has often supported major political change.

Further, I believe that the aforementioned lack of cohesion within Northwestern Ontario has made it difficult to organize regional political parties. Cities and towns are separated by vast distances, and due to the nature of the regional economy, many people tend to be transient. In addition, while many secessionist movements rally members of a common ethnic or racial group, the people of Northwestern Ontario, taken as a single group, do not constitute an ethnicity. Finally, after decades of feeling neglected and marginalized, many Northwesterners have either moved on to greener pastures, or turned off politics and resigned themselves to more of the same.

Weller’s final observation on Northwestern Ontario regional politics is that the politics of frustration have led to a “politics of parochialism”. Because many northerners feel neglected by the South, disproportionate attention has been given to local politics. The most well-known example of this is the ongoing rivalry between the former cities of Port Arthur and Fort William.¹⁵⁰

Weller concludes his 1977 article by forecasting that Northwestern Ontario’s marginalization would likely increase in the years to come, due to the region’s decreasing economic significance and proportion of the province’s population.¹⁵¹ Thirty years later, history has, unfortunately, proven him right. According to Weller’s model, Northwestern Ontario can never expect to evolve from an exploited hinterland to an economically and politically independent region without major political realignment. The question many Northwesterners are asking now is, will this ever happen?

RECENT DEVELOPMENTS

Over the past year, Northwestern Ontario secession has raised national and international headlines. A March 2006 article in the *Economist* discussed the growth of secessionist sentiment in Northwestern Ontario,¹⁵² and a C.B.C. poll from the same time showed that 72 per cent of Manitobans supported Northwestern Ontario joining their province.¹⁵³ Also in early 2006, the Central Canadian Public Policy Trust (“C.C.P.P.T.”) was created by a group of regional politicians.¹⁵⁴ The C.C.P.P.T. is now being run as a project of the Northwestern Ontario Municipal Association, and is currently researching alternative governance models for the Northwest.¹⁵⁵

The 2006 study by Di Matteo *et al.* was done in conjunction with the C.C.P.P.T. It focused on the economic impacts of Northwestern Ontario joining with Manitoba or becoming a separate province. By joining Manitoba, Northwestern Ontario would lose \$1,026.53 per capita per year in provincial transfers but would be entitled to federal equalization payments.¹⁵⁶ Manitoba also has higher taxes than Ontario, but has higher program spending. Considering Northwest-

149 Rasporich, *supra* note 141 at 65.

150 Weller, “Politics and Policy”, *supra* note 131 at 296.

151 Weller, “Hinterland Politics”, *supra* note 124 at 754.

152 The Economist, *supra* note 8; Michelle McAfee, “Study finds political merit, economic tradeoff to creation of ‘Mantario’” *Canadian Press* (9 August 2006) [McAfee].

153 CBC Radio-Canada Probe Research Inc. News Release, “Manitobans and the Mantario Question” (March 2006).

154 Duane Hicks, “Majority of Manitobans Would Back Merge with Northwest” *Fort Frances Times* (22 March 2006), online: <http://www.fftimes.com/index.php/1/2006-03-22/24860>.

155 E-mail from Tannis Drysdale to Adam Jantunen (May 9, 2006).

156 Di Matteo, Emery & English, *supra* note 3 at 181.

ern Ontario's centre-left voting record, Di Matteo *et al.* note that "[t]he Manitoba spending mix would appear to reflect the demands of 'alienated northerners' suggesting that Manitoba's spending preferences are closer to their own than to the rest of Ontario".¹⁵⁷ The option of creating a new Northwestern Ontario province was also determined to have no major positive or negative economic benefits.¹⁵⁸

The study found that a merger with Manitoba would benefit Northwestern Ontario politically; if the region joined Manitoba, it would have 16 per cent of the seats in the provincial legislature, compared to its current three per cent share of seats in Queen's Park.¹⁵⁹ Demographically, age distributions in Ontario, Northwestern Ontario and Manitoba are similar, but Northwestern Ontario and Manitoba both have large and growing Aboriginal populations who are increasingly influencing politics and public policy. One-third of Aboriginals in Northwestern Ontario and Manitoba are under the age of age sixteen,¹⁶⁰ and in Northwestern Ontario and Manitoba, Aboriginal people make up 18 per cent and 14 per cent of the provinces' populations respectively. In Ontario, Aboriginals make up just 3 per cent of the population. Considering that Northwestern Ontario's Aboriginal population will continue to increase in absolute and relative terms, any serious discussion of provincial realignment would require Aboriginal participation. For example, a group lobbying for Northwestern Ontario secession would have to include Aboriginal members and take into account issues of particular concern to Aboriginal peoples if it were to have any real public legitimacy and chance of success. During my research, I was unable to find any sources dealing with Aboriginal opinions on Northwestern Ontario secession. This topic should be explored further.

The study offers hope for proponents of secession from Ontario. Co-author Herb Emery summed up its findings by stating "[y]ou have to decide if you want to marry up with someone like you, or someone different from you. ... Northwestern Ontario has this problem—they don't really fit with the rest of Ontario that easily, but they look a lot like Manitoba economically".¹⁶¹ However, it also notes that "there has been little public mobilization toward institutional change".¹⁶² But even before such mobilization occurred, it is necessary to examine whether the people of Northwestern Ontario have the right to determine their political future, and by extension, their economic and cultural futures as well.

PART III: Northwestern Ontario's Right to Self-Determination

This section will address two main questions: who is entitled to self-determination under international law, and who is entitled to self-determination under Canadian law?

Question 1: What does self-determination entail under international law?

The self-determination of peoples is the cornerstone of international law. Though the doctrine of self-determination of nations is commonly thought to have originated with US President Woodrow Wilson's post-World War I advocacy of self-determination of ethnic groups residing in the defeated powers' territories,¹⁶³ its origins can actually be traced to the eighteenth

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* at 189.

¹⁵⁹ *Ibid.* at 178.

¹⁶⁰ *Ibid.* at 181.

¹⁶¹ McAfee, *supra* note 152 at 148.

¹⁶² Di Matteo, Emery & English, *supra* note 3 at 191.

¹⁶³ Timothy William Waters, "Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia," (2000) 20:2 *SAIS Review* at 118. See also Woodrow Wilson, "President Wilson's Fourteen Points", online: The Avalon Project – Yale University <<http://www.yale.edu/lawweb/avalon/wilson14.htm>>.

and nineteenth centuries.¹⁶⁴ In *Considerations on Representative Government*, John Stuart Mill stated that “it is in general a necessary condition of free institutions that the boundaries should coincide in the main with those of nationalities”.¹⁶⁵ Sections 1 of both the United Nations Covenant on Civil and Political Rights¹⁶⁶ and the United Nations Covenant on Economic, Social and Cultural Rights¹⁶⁷ illustrate the significance of self-determination in international law in stating that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. Many modern democratic constitutions reflect the view that self-determination in terms of popular sovereignty is a vital human right.¹⁶⁸ In the seminal *Reference re Secession of Quebec* (“*Secession Reference*”), the Supreme Court of Canada stated that “[t]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law”.¹⁶⁹

On the surface, the international law would appear to provide powerful legal ammunition for Northwestern Ontario secessionists. However, in practice, the lofty principles of the aforementioned United Nations covenants have been defined extremely narrowly. According to leading scholar Antonio Cassese, “[s]elf-determination appears firmly entrenched in the corpus of international law in only three areas: as an *anti-colonialist standard*, as a *ban on foreign military occupation*, and as a requirement that *all racial groups be given full access to government*”.¹⁷⁰ For all three areas, self-determination is an external right, and for the last area, it is also an internal right.¹⁷¹ Internal self-determination refers to a people’s right to self-determination *within* a state, while external self-determination suggests a right to secession. The Supreme Court of Canada in the *Secession Reference* suggests that “the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination”.¹⁷² However, Hannum notes that after 1960, the right to self-determination in international law was largely confined to granting colonies the right to independence.¹⁷³

Daniele Archibugi argues for an expansion of the right to self-determination under international law.¹⁷⁴ In addition to giving colonized peoples the right to form a state, Archibugi notes that self-determination has been defined by sovereigntists the world over as giving the minorities the right to become an autonomous state or join another state. He suggests that this interpretation of self-determination has become more popular since the end of the Cold War and the corresponding rise of hitherto suppressed nationalist movements, even though the international community has not recognized a right to unilateral secession.¹⁷⁵ Archibugi also

164 Hurst Hannum, “Rethinking Self-Determination” (1993-1994) 34 Va. J. Int’l L. at 3 [Hannum].

165 *Ibid.*

166 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171.

167 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3.

168 See e.g. Part 2, Section 1 of the *Constitution of the Democratic Republic of East Timor*: “Sovereignty rests with the people, who shall exercise it in the manner and form laid down in the Constitution.”

169 *Secession Reference*, *supra* note 1 at para. 114.

170 Antonio Cassese, *International Law*, 2nd ed. (New York: Oxford University Press, 2005) at 61.

171 *Ibid.* at 62.

172 *Secession Reference*, *supra* note 1 at para. 126.

173 Hannum, *supra* note 164. Note also that the Supreme Court of Canada in the *Secession Reference*, *ibid.* at paras. 132-134, stated that the right of peoples to unilaterally secede under international law exists in circumstances of foreign rule or occupation, “alien subjugation, domination and exploitation outside a colonial context,” and possibly situations in which people are denied the opportunity to exercise a right of self-determination domestically.

174 Daniele Archibugi, “A Critical Analysis of the Self-Determination of Peoples: A Cosmopolitan Perspective”, (2003) 10 *Constellations* 4 at 493. Archibugi suggests that this approach unifies the description presented by Cassese and others, and considers the relationship between internal and external self-determination.

175 *Ibid.* at 496.

suggests that self-determination may refer to a right of ethnic and cultural minorities to certain collective rights within states. He argues that this “meaning of right of peoples concerns not so much international law as internal public law. When internal public law does not provide sufficient protection, minorities can seek protection also in international law and institutions”.¹⁷⁶

However, even if the circumstances in which self-determination rights are available at international law were defined expansively, note that self-determination rights are generally reserved for *peoples*. It is difficult to define what constitutes a “people”; although the Supreme Court of Canada touched on this issue in *Secession Reference* at paras. 123–125, it only notes that a people “may include only a portion of the population of an existing state”.¹⁷⁷ Hannum argues that defining a people has objective and subjective components. The objective components such as race, religion, language and ethnicity may be used to define the “self” part of “self-determination”,¹⁷⁸ and a person may be part of many different, overlapping groups. In an argument popular with proponents of a narrow definition of self-determination, attempting to categorize a people may lead to infinite fragmentation.¹⁷⁹ The subjective component of determining a people is considering which characteristics are relevant in defining a people for the purposes of self-determination. Friedlander suggests that a people consists of “a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory”.¹⁸⁰ That being said, the strongest support for self-determination of peoples in international law has been given to colonies seeking independence. Many former colonies did not consist of a community at all, but rather were comprised of rival ethnic groups with bitter hatreds of one another.¹⁸¹

Could the people of Northwestern Ontario use international law assert a right to self-determination? At first glance, the likely answer is “no”. Using Cassese’s summary of circumstances in which the right to self-determination exists at international law, Northwestern Ontario is neither a former colony, nor under military occupation, nor do its people form a racial group who are denied access to government.

However, international law has been recognized by the Supreme Court of Canada in *Baker v. Canada (Minister of Immigration) (“Baker”)*¹⁸² as providing a moral framework for domestic decision-making. For the majority in *Baker*, L’Heureux-Dubé J. stated that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.¹⁸³ I would submit that the core values of the aforementioned U.N. covenants are democracy, freedom, and the promotion of human development among the peoples of the world. For political reasons, self-determination rights have been defined narrowly in the international jurisprudence; however, I would argue that the moral rationale underlying section 1 of each of the aforementioned U.N. covenants, and not international legal precedent, should be the focus of any analysis of Northwestern Ontario’s right to self-determination.

To this effect, I believe that Archibugi’s broad, expansive analysis of self-determination rights would be the most appropriate framework to analyse Northwestern Ontario’s right to

176 *Ibid.* at 499.

177 *Secession Reference*, *supra* note 1 at para. 124.

178 Hannum, *supra* note 164 at 35.

179 For example, see Brian Slattery, “Paradoxes of National Self-Determination” (1994) 32 Osgoode Hall L. J. at 731.

180 Robert Friedlander, “Proposed Criteria for Testing the Validity of Self-Determination as it Applies to Disaffected Minorities” (1975) 25 Chitty’s L.J. 335–336.

181 Because most colonial borders did not correspond to the boundaries of the ethnic groups living there, I believe that colonized “peoples” should be substituted for “populations”. See Hurst Hannum, “The Right of Self-Determination in the Twentieth Century” (1998) 55 Wash. & Lee L. Rev. at 775 for additional commentary on this topic.

182 *Baker v. Canada (Minister of Immigration)*, [1999] 2 S.C.R. 817.

183 *Ibid.* at para. 70.

self-determination. If Northwestern Ontarians were to make a case for self-determination using international law principles as outlined by Archibugi, such a claim would fall under the third category of self-determination: the right of ethnic and cultural minorities to self-determination within states. This is problematic because Northwestern Ontarians could not be considered a people in the sense envisioned by Wilson, Archibugi and others—namely, an ethnic or cultural group with a defined territorial homeland. If, however, the “community of individuals” standard proposed by Friedlander were used, it might well be possible to establish the existence of a Northwestern Ontario “people”. Although as mentioned earlier, the nature of Northwestern Ontario’s economy and geography has created extensive fragmentation, I believe that any Northwestern Ontario secession movement would be strengthened immeasurably if it articulated how Northwestern Ontario is a cohesive community based on political, economic and cultural commonalities. Again, this expansive analysis of the international law definition of a “people” is in keeping with the moral values underlying the inclusion of self-determination rights in international law.

Question 2: Who is entitled to self-determination under Canadian law?

As noted above, international law provides a moral rather than legal argument that Northwestern Ontario should have a right of self-determination. However, Canadian legal and political history provides far more support for Northwestern Ontario self-determination. The level to which various groups within Canada are entitled to self-determination has been a perennial theme of Canadian history, and Canada’s political development has been heavily influenced by all three types of self-determination described by Archibugi. Canada’s independence from Britain is an example of a colony asserting its right of self-determination, albeit in a much more gradual manner than many other colonies. The Quebec sovereigntist movement is an example of certain members of a minority people seeking self-determination via independence.¹⁸⁴ Demands by many First Nations groups for increased autonomy within Canada fit the third description of self-determination; namely, the right of ethnic and cultural minorities to collective rights within a state.

Further, I believe that, within the Canadian context, the right to self-determination has been extended beyond Archibugi’s three categories. Specifically, throughout Canadian history, various groups have called for increased autonomy from federal and/or provincial authorities without making a case for ethnic or cultural distinctiveness. Rather, their arguments have been based on regional concerns. As an example, the City of Toronto recently gained increased rights to pursue its political, economic, social and cultural development within the framework of Canada (and Ontario) despite the fact that, far from having a distinctive ethnicity, Toronto is the most ethnically diverse city in the world. When Toronto Mayor David Miller stated that the *City of Toronto Act* recognized Toronto’s “uniqueness”,¹⁸⁵ he was likely referring to Toronto’s unique size, status and public policy concerns as a geographical and political entity, and not to any type of ethnic or cultural uniqueness.

The *Secession Reference* defines internal self-determination as “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state”,¹⁸⁶ and Canada’s constitutional structure was created because a unitary system was incapable of accommodating the diversity of Canada’s population. The primary motivation behind

184 The *Secession Reference* upheld the traditional international law principle that groups which are not being colonized or under foreign occupation do not enjoy a unilateral right to independence, though the Supreme Court went further than the international law in requiring Canada to negotiate with Quebec should that province vote to secede (*supra* note 1 at para. 92).

185 City of Toronto, “Mayor Miller comments on the introduction of the new City of Toronto Act” (14 December 2004), online: City of Toronto <http://www.toronto.ca/mayor_miller/speeches/cta_remarks.htm>.

186 *Secession Reference*, *supra* note 8 at para. 123.

Confederation was resolving the Canada West–Canada East rivalry. This conflict involved separate peoples who, in the opinion of most of the Fathers of Confederation, deserved separate provinces. However, as discussed in the aforementioned J.C.P.C. arbitration, it was clear from the beginning that having only two provinces for Canada's two main founding cultures was neither feasible nor desirable. As a result, after Confederation, new provinces such as Saskatchewan and Alberta were created not because they possessed distinctive regional cultures, but because the federal government wanted responsive local governments to serve the hundreds of thousands of settlers who migrated there in the early twentieth century.¹⁸⁷ The creation of new provinces after Confederation, despite the fact that they had only recently been settled by non-Aboriginals, may be seen as the earliest precedent for granting self-determination based on regional concerns.

The drafters of the *Constitution Act*, 1867 were aware of Canada's diversity and need for accommodation of competing interests, and I would argue that domestic and Imperial law and policy-making has recognized a much broader right to self-determination than even the most liberal international legal definition. However, even though the Supreme Court of Canada has recognized federalism as a "fundamental and organizing principle of the Constitution", Canada has not always been guided by such principles.¹⁸⁸ After the rebellions of 1837, Upper and Lower Canada were united into one province. This was largely an attempt to make Canada less diverse by culturally assimilating the Francophones of Lower Canada, which made up the majority of that province's population.¹⁸⁹ In 1840, the British Parliament in the Act of Union divided seat totals in the Legislative Assembly evenly between Canada East and Canada West, despite the East having 190,000 more people, in part to ensure Anglophone dominance of the united province.¹⁹⁰ However, although the francophone Québécois refused to give up their culture for the sake of political efficiency, their proportional share of the Canadian population declined. By the early 1850s, Canada West had the larger population. When this happened, radicals in Canada West such as the Clear Grits advocated more extensive democratic reforms, including representation by population in the Legislative Assembly.¹⁹¹ As a result, in the lead-up to Confederation, the United Province of Canada was wracked with political instability brought about by shaky coalitions between parties from Canada East and West. Historian Randall White notes that "[a]t the bottom of the difficulties was an innate sectionalism that the struggle for responsible government had temporarily papered over".¹⁹² Due to the united Canada's failure to function politically, federalism was seen as the best way to accommodate the diversity of cultures and regional interests that existed at Confederation, in order to create a stable national government and grant certain sections of Canadian society a degree of self-determination.¹⁹³

Federalism has continued to evolve post-Confederation. In the late nineteenth century, the J.C.P.C. expanded provincial powers in a number of decisions.¹⁹⁴ Additionally, with the advent of the modern welfare state, provincial control of social services, licensing, infrastructure, and

187 Of course, both provinces had large Aboriginal populations with distinctive cultures. However, the Canadian government's political approach to Aboriginals on the Prairies was not to grant them provincial status in light of their ethnic and cultural distinctiveness, but rather, to strip them of rights to land and self-government via treaties, the creation of reserve lands and federal legislation such as the *Indian Act*.

188 *Secession Reference*, *supra* note 1 at para. 32.

189 White, *supra* note 15 at 100.

190 *Ibid.* at 101.

191 The United Province of Canada was formed in response to the report by Lord Durham, which itself was commissioned in response to the rebellions of Upper and Lower Canada. The Durham Report recommended that Upper and Lower Canada be united "as a first step toward the eventual anglicization of the French-speaking population in Lower Canada" (White, *supra* note 15 at 100). In Durham's view, assimilation was the only way to prevent further rebellions by the Québécois against the primarily Anglophone political and economic establishment.

192 *Ibid.* at 117.

193 *Secession Reference*, *supra* note 1 at para. 43.

194 See e.g. *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96; *Hodge v. The Queen* (1883) 9 App. Cas. 117.

numerous other areas became much more significant in terms of provincial power. As a result, Canada developed a decentralized federal structure likely unforeseen by Sir John A. Macdonald and the other fathers of Confederation. Non-provincial organizations, such as groups representing Aboriginals, women and minorities, have demanded increased representation and autonomy for their members, with varying degrees of success. Parliament sought to respond to these demands in 1982 with the passage of the *Canadian Charter of Rights and Freedoms*¹⁹⁵ and section 35 of the *Constitution Act, 1982*.¹⁹⁶ More recently, Parliament approved a Bloc Québécois resolution to recognize the Québécois as a nation,¹⁹⁷ creating a precedent which many believe should translate into similar recognition for other groups within Canada.

All of this is to say that if the people of Northwestern Ontario wanted regional autonomy or provincial realignment, their best strategy would be to lobby higher levels of government (namely, Ontario and the Government of Canada) for legal and political change. Di Matteo *et al.* suggests that a Northwestern Ontario regional government can and should gain powers over “economic development, environment and energy, municipal affairs, natural resources, northern development and mines, transportation, culture, and tourism and recreation” and should lobby the Province accordingly.¹⁹⁸

However, in order to secede from Ontario, other legal procedures would likely have to be followed. A constitutional amendment would be required, as outlined in the introduction to this paper. Of course, given the constitutional amending formula, if Northwestern Ontario sought to secede from Ontario, the latter would have to consent to its own dismantling. This brings up the following question: if a clear majority of Northwestern Ontarians voted in favour of a clear question regarding secession, would Ontario have to honour the results of such a vote by negotiating a constitutional amendment?

In my opinion, the answer is yes. The *Secession Reference* imposes a duty on governments to negotiate secession if a clear majority supports it. Paragraph 92 states:

The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.¹⁹⁹

The precise nature of the negotiations was not determined by the Court. However, as Chowdry and Howse note:

Contrary to expectations ... the Court decided that in the event of a yes

195 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

196 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

197 CBC News InDepth, “Debate: The motions on the Québécois nation”, online: CBC News <<http://www.cbc.ca/news/background/parliament39/motion-quebecnation.html>>.

198 Di Matteo, Emery & English, *supra* note 3 at 190.

199 *Secession Reference*, *supra* note 1 at para. 92.

vote, the federal government would be under a constitutional duty to negotiate in good faith. The uncertainty of the federal response to a positive referendum result—a source of strategic power for the federal government in the past—has been eliminated.²⁰⁰

In other words, good faith negotiations would necessarily have to take into account majority interests, so long as there was a clear referendum question upon which people could vote. If three of Canada's four core values, as identified in the *Secession Reference*, are federalism, democracy, and constitutionalism and the rule of law, good faith negotiations would have to start with the recognition of a clear majority vote in favour of a clear referendum question. Negotiations would then address not if, but how, secession could be achieved. Such negotiations would likely be easier when dealing with provincial boundary realignment than outright independence. Issues such as border crossings, currency, control of armed forces and other potential sticking points that have arisen relating to Quebec separatism would not apply.

Though the *Quebec Secession Reference* dealt with a province's right to external self-determination, there is no reason why the same "principles of democracy" would not inform a decision by a region to secede from a province but remain in Canada. One might argue that "principles of federalism" only apply to federal-provincial relations, and not to relations within provinces; the fact that most regions and municipalities are, at best, creatures of provincial statute with no constitutional rights might place them at a lower level of the totem pole of Confederation. However, the fact that provincial boundary adjustment was contemplated in the *Constitution Act, 1982* suggests that regions and their inhabitants were meant to have some constitutional right regarding boundary determinations.

All of this still leaves the question of what, if any, remedy Northwestern Ontario would have if Ontario refused to negotiate secession after a referendum with a clear vote on a clear question, and effectively employed a constitutional veto under section 43(a). In my opinion, the options available to the Northwest would be similar to those used in the post-Confederation boundary dispute.

First, the courts could be asked to adjudicate the matter, much as the J.C.P.C. did in 1884. In my opinion, Northwestern Ontario's best argument is that the amending formula was not intended to be used to subvert the underlying values of the Canadian constitution as recognized in the *Secession Reference*—in particular, democracy and minority rights. If successful, Northwestern Ontario might then apply for an injunction requiring that Ontario negotiate secession, or for an order recognizing and giving legal effect to the referendum results.

Second, Northwestern Ontario could appeal to Parliament to decide the matter. In any event, Canada would have to agree to any boundary adjustment in order for a constitutional amendment to pass. As in international law, a region's claim to sovereignty hinges upon recognition from other parties, and the Government of Canada's recognition of "Mantario" or a "Province of Northwestern Ontario" might be compared to the U.N.'s recognition of a newly-formed state. As evidenced by the Quebec-Labrador boundary dispute,²⁰¹ which most would argue was put to rest when Canada enshrined Newfoundland's borders in the Terms of Union after it joined Canada in 1949,²⁰² recognition by Canada is vital to a province's claim to sover-

200 Sujit Choudhry & Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 C.J.L.J. 2 141 at 144.

201 The long-standing dispute between Quebec and Newfoundland over the boundaries of Labrador is described in further detail in St John Chadwick, *Newfoundland: Island Into Province* (London: Cambridge University Press, 1967) at 132–153.

202 For example, Quebec government studied the matter in the early 1970s in the *Commission d'étude sur l'intégrité du territoire du Québec*. According to the Royal Commission on Aboriginal Peoples, "the commission's general conclusion was that, contrary to what many in Quebec felt, no gross legal error had been made by the privy council in its decision and thus no legal option was available to reverse the decision, particularly when successive governments effectively accepted the boundary as the border between the two provinces [emphasis added]", online: and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ch/rcap/sg/sj31_e.html>

eignty over a territory.

Conversely, Northwestern Ontario could not assert a right to unilateral withdrawal from Ontario. A referendum process would have to occur, and likely a clear majority would have to approve secession before Ontario allowed it to proceed. The Court recognized that good faith negotiations could break down, and it provides no suggestions as to how such an impasse might be resolved.²⁰³ Cairns states that “the Court indicated that negotiations would be very difficult and that, among other subjects, the position of Aboriginal Peoples, especially in Northern Quebec, and boundaries could be on the table”.²⁰⁴ The same concerns could easily arise in Northwestern Ontario. To avoid such a situation, supporters of Northwestern Ontario secession would have to obtain considerable support from the region’s Aboriginal peoples. It would also be advantageous, early in the secession process, to get the Ontario government to agree on Northwestern Ontario’s borders, so that Queen’s Park might be prevented from arguing that there is not a clear border during post-referendum negotiations.

CONCLUSION

When Northwestern Ontario became part of Ontario, Oliver Mowat’s legal reasoning was questionable and the J.C.P.C. decision was surprising. His victory before a tribunal appointed by his political ally, Alexander Mackenzie, may have been the most influential factor behind Mowat’s eventual victory on the boundary issue. Certainly it is doubtful that the southeast border of Rupert’s Land was hundreds of kilometres farther west than previously thought, and good luck played a key role in Ontario winning the *Ontario Boundary Case*.

That being said, I believe that Oliver Mowat deserves full credit for taking control of Northwestern Ontario by fighting harder for it than either the Dominion or Manitoba. Had Mowat not sent provincial agents to the farthest reaches of his province’s claim, not prepared an impeccably researched case with virtually every treaty, law, case, letter and other documentary information relevant to the boundary dispute, and not personally advocated for his province before the J.C.P.C., the result might well have been different.

When Mowat returned to Ontario after successfully arguing the boundary case in London, England, MacKirdy writes that “[r]arely have Ontarians indulged in such blatant manifestations of provincial patriotism”.²⁰⁵ Twelve thousand people marched in a parade marking the occasion in Toronto, and the event was witnessed by nearly 100,000. As part of a triumphant tour, Mowat told a crowd in Niagara Falls, “I rejoice to know that the one great cause, the principal cause of your enthusiasm, is that you love Ontario as I love it”.²⁰⁶

Northwestern Ontario has never had such a bright, charismatic and passionate advocate for its rights. Should Northwestern Ontario ever hope to secede from Ontario, it will need an equivalent to the man who brought the region into the province in the first place. Such an advocate will need to be aware of the legalities surrounding self-determination for Northwestern Ontario. But more importantly, that person will have to have a passion for the Northwest, as Mowat had for Ontario.

203 *Secession Reference*, *supra* note 1, at paras. 96–97.

204 Alan Cairns, “The Quebec Secession Reference: The Constitutional Obligation to Negotiate” 10 *Constit. Forum* 1 26 at 27.

205 MacKirdy, *supra* note 18 at 197.

206 Quoted in MacKirdy, *ibid.*

APPENDIX A: Maps

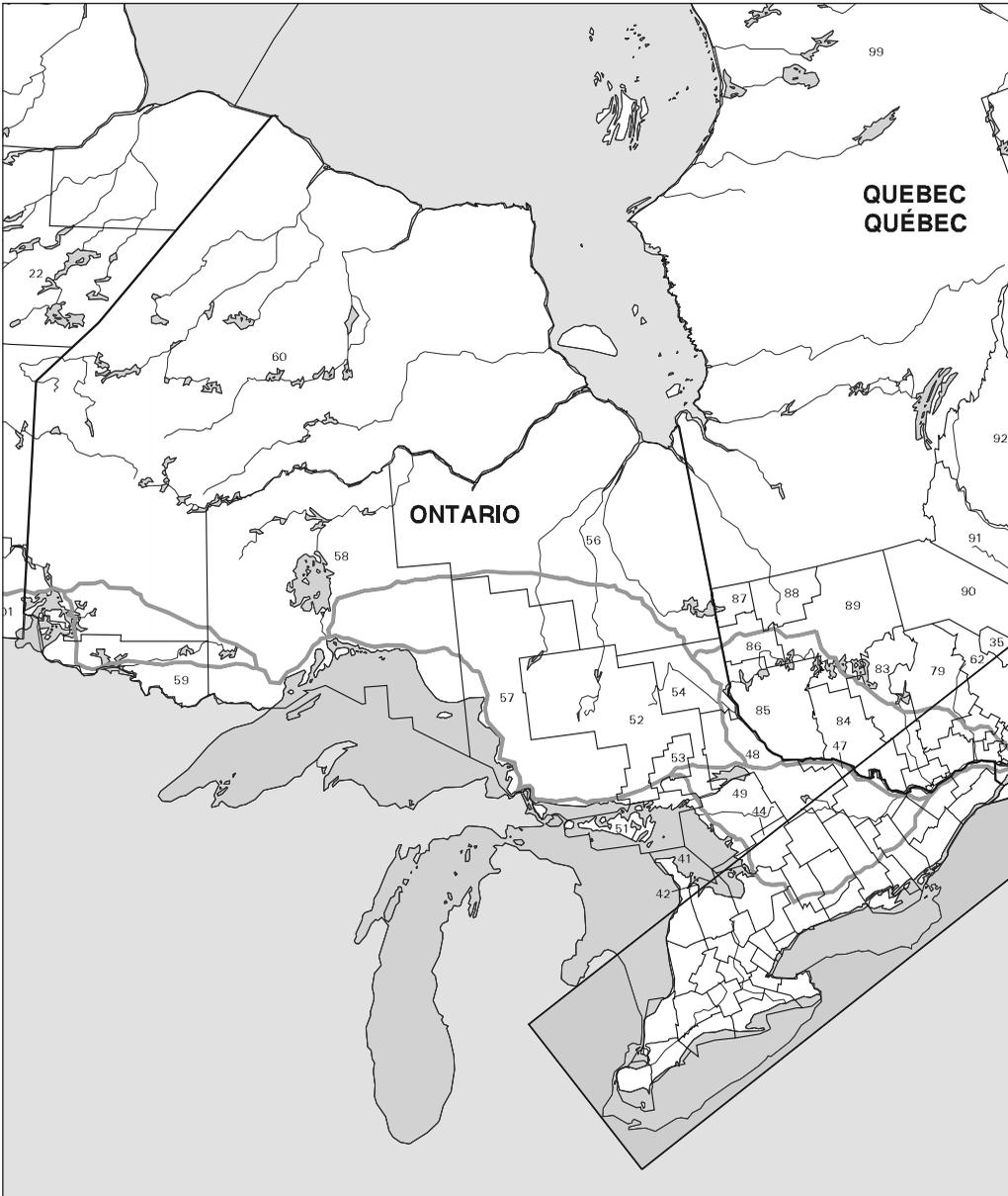


FIGURE 1
MAP OF NORTHWESTERN ONTARIO CENSUS DISTRICTS.
Thunder Bay District is 58, Rainy River District is 59, Kenora District is 60.

Source: Statistics Canada (Unofficial Version)

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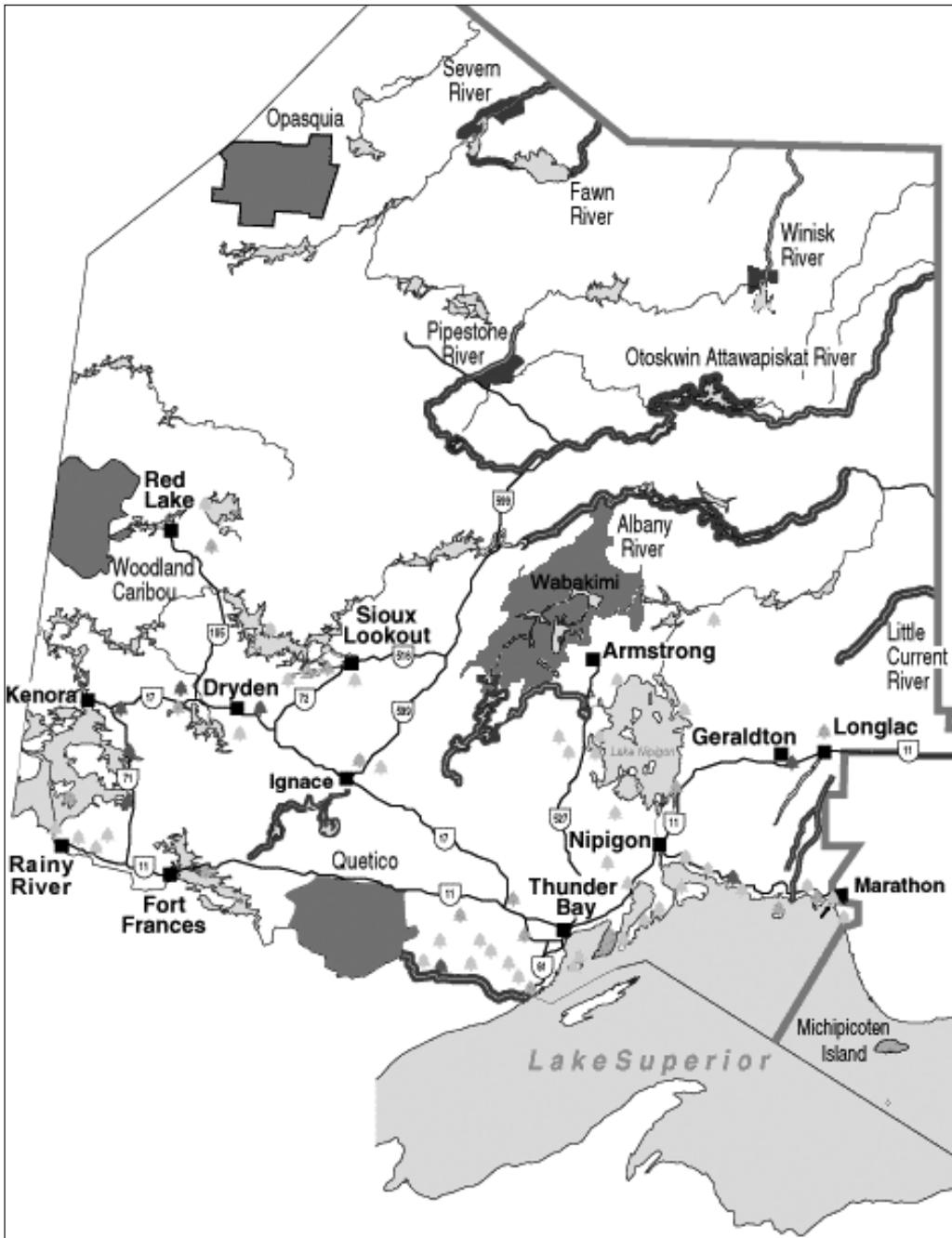


FIGURE 2
ONTARIO PARKS MAP OF NORTHWESTERN ONTARIO.

Source: Queen's Printer for Ontario, 2006 (Unofficial Version)



FIGURE 3
MAP OF ONTARIO, 1867.

Source: Atlas of Canada (Unofficial Version)

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FIGURE 4
ROBINSON-SUPERIOR TREATY AREA.

Source: Treasury Board of Canada (Unofficial Version)

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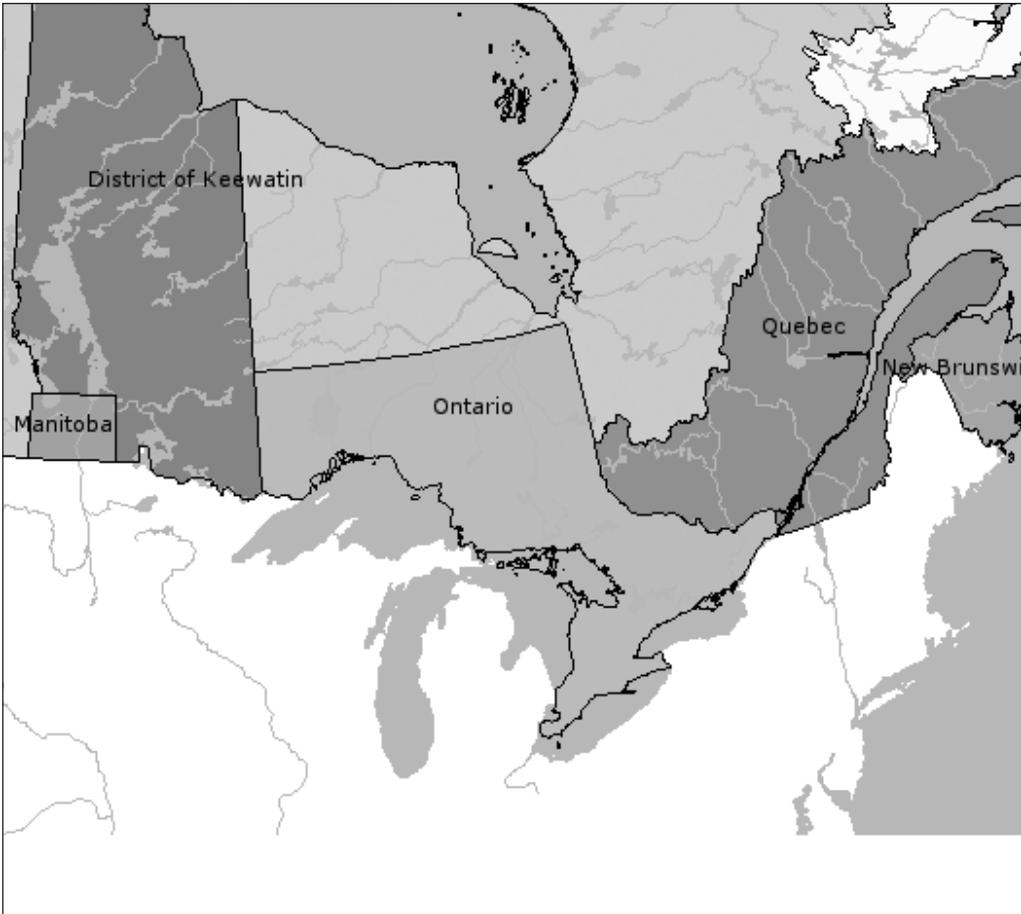


FIGURE 5
MAP OF MANITOBA AND ONTARIO, 1874.

Source: Atlas of Canada (Unofficial Version)

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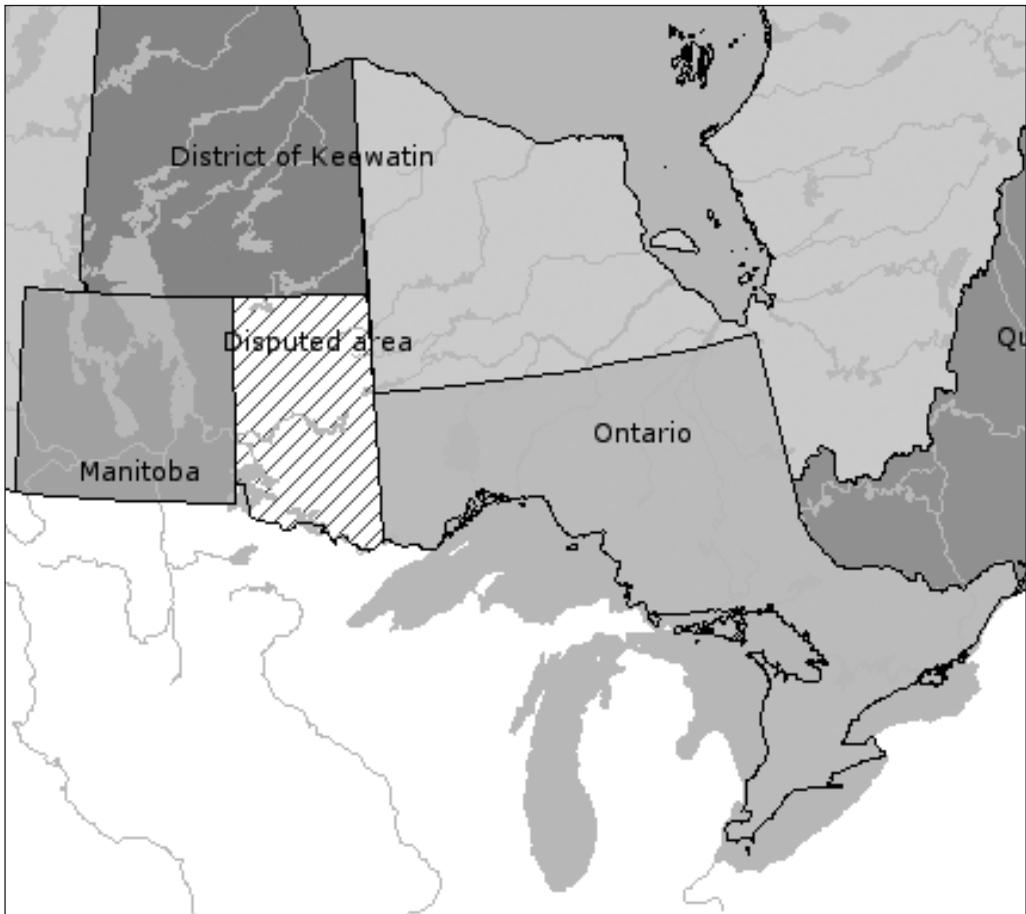
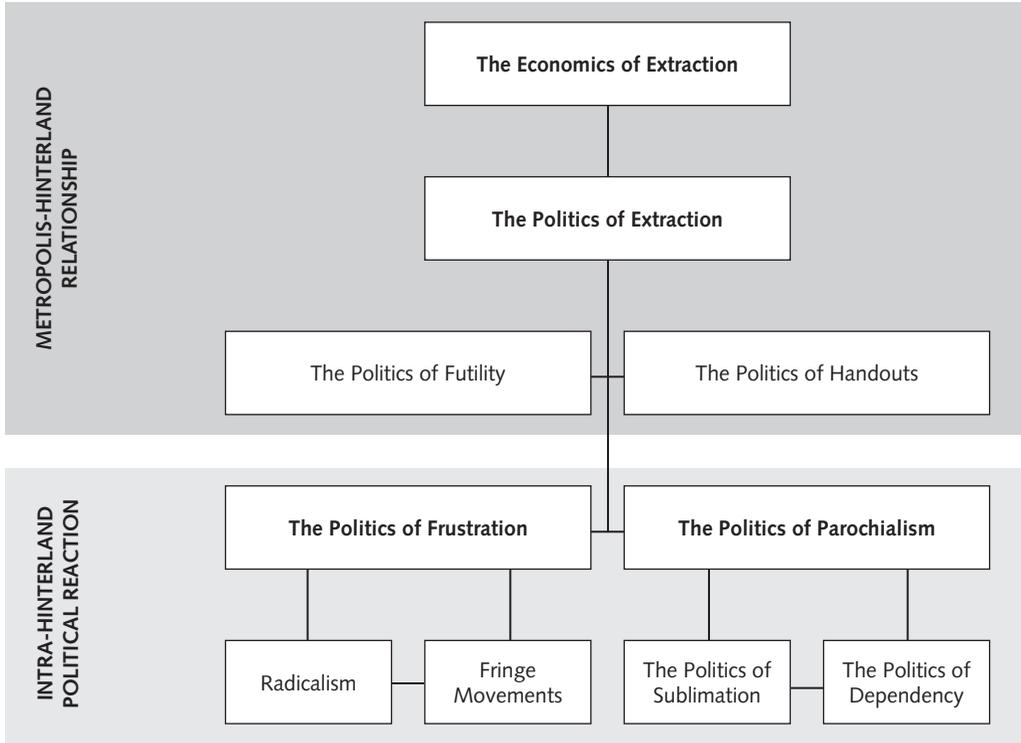


FIGURE 6
 MAP OF MANITOBA AND ONTARIO, 1881.

Source: Atlas of Canada (Unofficial Version)

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APPENDIX B: Economic and Political Effects of Extraction in Northwestern Ontario



Source: Reproduced from Geoffrey Weller, "Hinterland Politics: The Case of Northwestern Ontario" (1977) 10 Can.J.Pol.Sci. 4