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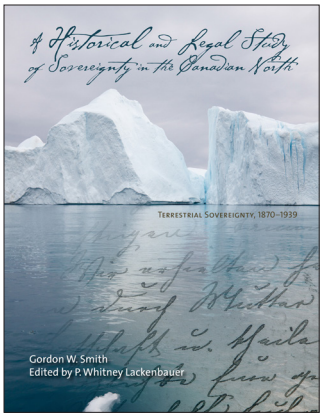

A HISTORICAL AND LEGAL STUDY OF SOVEREIGNTY IN THE CANADIAN NORTH: TERRESTRIAL SOVEREIGNTY, 1870–1939

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The Alaska Boundary Dispute

The Alaska boundary controversy had its origins in complications associated with the period of Russian dominion in Alaska. While explorers from western Europe were moving across the vast expanses of North America and up its Pacific coast towards the northwestern extremity of the continent, Russian adventurers were approaching the same region from the opposite direction, and they got there well in advance of their rivals. In 1639, only about sixty years after the Stroganovs and Yermak the Cossack started the great march from Muscovy eastward across Siberia, a small party under Andrei Kopilov is said to have reached the waters of the Pacific and founded the post of Okhotsk.[1] The Cossack Simeon Dezhnev in 1648 sailed a vessel around the northeastern extremity of Siberia from the Kolyma River to south of the Anadyr, according to records discovered nearly one hundred years after the event is supposed to have taken place. He thus proved that Asia did not join North America in that region.[2] There was desultory Russian activity around the Sea of Okhotsk and in Kamchatka Peninsula during the following years, but the next major advance came with the two great voyages of Vitus Bering. Acting on instructions given by Peter the Great just before his death in 1725, this Danish captain, with his lieutenant Alexei Chirkov, sailed from Kamchatka in 1728 and followed the Siberian coast through Bering Strait, reaching 67° 18' N latitude before turning back. In 1741, after years of delay, they set out from Kamchatka again. Although their two ships became separated, they both succeeded in reaching and cruising along the southern coast of Alaska and the Aleutian Islands, thus accomplishing the modern discovery of North America from the Asiatic side.[3]

After Bering's second voyage, Russian explorers and traders sailed from Okhotsk and Kamchatka to Alaskan waters in increasing numbers, and they gradually extended their activities along the Aleutian chain and to the mainland.[4] Among the key events were the establishment of the first permanent Russian post at Three Saints Bay on Kodiak Island by Gregory Shelikhov in 1784, Gerassim Pribilov's discovery of the Pribilov Islands in 1786, and Alexander Baranov's establishment of a new headquarters, Mikhailovsk (later Novo Archangelsk), on the island of Sitka in 1799. The Russians were primarily interested in furs, especially those of the sea otter; in pursuit of this trade, they not only subdued the indigenous residents with much brutality but also fell into serious quarrels among themselves. They had also to withstand an increasing challenge from foreign rivals, notably British, Spanish, French, and American. In the latter part of the eighteenth century, Cook, Clarke, Portlock and Dixon, Meares, Vancouver, Pérez, Heceta, Quadra, Martinez, Haro, Fidalgo, Malaspina, Caamaño, La Pérouse, Marchand, and others were active in Alaskan waters and

interested in the region.[5] To eliminate internecine strife among themselves, to combat the intrusions of foreign interlopers, and to maintain better control and management of the fur trade, several leading Russian companies took the initiative and in 1798 consolidated into a single organization. On 8 July 1799, an imperial ukase issued by Emperor Paul I confirmed the consolidation and granted the new organization the title "The Russian American Company."

The ukase bestowed upon the Russian American Company a monopoly charter for a period of twenty years over all enterprises, including hunting, trading, settlement, and industry, on the coast of America north of 55° N latitude and the chain of islands extending across the northern Pacific and southwards to Japan. The company could make new discoveries not only north of 55° but south as well, and it could claim and occupy the lands discovered as Russian possessions if they were not already the property of some other nation. It also had judicial, military, and administrative authority in these regions.[6] As the British pointed out in the Fur Seals Arbitration, however, and as had been recognized in the United States at an earlier time, the ukase was intended primarily to regulate the activities of Russian subjects, rather than to interfere with the rights of foreigners.[7]

The ukase did eliminate most of the quarreling among the Russian traders themselves, but it had little effect upon foreign traders (mainly British and American) who came to Alaskan waters. As a result, officials of the Russian American Company complained to their government, which endeavoured – without success – to support their cause through the medium of diplomatic protests.[8] In the meantime, the Russian company tried to extend its own sphere of activity, and in 1812 it established Fort Ross at Bodega Bay on the California coast, this marking approximately the southern limit of Russian enterprise in the region. Primarily to check the "secret and illicit traffic" of foreigners, Emperor Alexander I issued a sweeping ukase on 16 September 1821, which purported to grant Russian subjects the exclusive right to the "pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs including the whole of the northwest coast of America, beginning from Behring's Strait to the 51° of northern latitude," and also the Aleutian Islands and Kurile and other islands off the Siberian coast, from Bering Strait to Urup Island in the Kuriles at 45° 50'. The ukase also prohibited all foreign vessels from landing on all these coasts and islands, and also from approaching them within one hundred "Italian miles," on pain of confiscation.[9] Nine days afterwards, the Tsar issued a second charter to the Russian American Company, renewing the monopoly privileges it had been granted in 1799 for a further period of twenty years. The area subject to the monopoly would be governed by the ukase of 1821 rather than by that of 1799, and thus it would extend down the Pacific coast of North America to 51° (i.e., the northern tip of Vancouver Island) rather than just to 55°.[10]

Both the British and American governments protested strongly against these measures as quickly as possible after receiving official notification of them. Although efforts to coordinate their protests fell through because of the evident conflict between their own claims, their separate negotiations soon caused the Russian government to moderate its stand. In a letter to Russian Ambassador Pierre de Poletica on 25 February 1822, American Secretary of State John Quincy Adams expressed his president's concern about the terms of the ukase and inquired whether he was "authorized

to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and regulations contained in it."[11] De Poletica's "explanations," given in a letter of 28 February,[12] were firmly rejected by Adams in a further letter of 30 March,[13] and lengthy negotiations followed which involved mainly a Russian retreat from their original position. While this dispute was in progress, and partly because of it, President James Monroe proclaimed his famous "doctrine" to the effect that the American continents were "henceforth not to be considered as subjects for future colonization by any European powers" in his message to Congress on 2 December 1823.[14] When the two powers agreed upon a settlement, as embodied in the treaty of 17 April 1824, Russia abandoned her extreme claims. It specified that the entire Pacific Ocean should be open for navigation and fishing by the citizens of both nations. The treaty also established the parallel of 54° 40' N latitude as the dividing line between Russian and American settlements on the northwestern coast of North America and adjacent islands.[15]

The British government received official word of the ukase on 12 November 1821 in a letter from Russian Ambassador Baron de Nicolay to Foreign Secretary Lord Londonderry (Viscount Castlereagh).[16] Londonderry was advised by King's Advocate C. Robinson to declare Britain's intention of upholding ordinary principles of international law and protesting any infringement of British rights.[17]

Ambassador Sir Charles Bagot in St. Petersburg informed him that the main purpose of the ukase was to prevent the "commerce interlope" of American adventurers and that the justification for the measure was supposed to be Article 12 of the Treaty of Utrecht.[18] He then wrote to the new Russian ambassador Count Christopher Lieven on 18 January 1822 "to make such provisional protest against the enactments of the said Ukase as may fully serve to save the rights of His Majesty's Crown." Specifically, he said that Great Britain reserved all her rights regarding Russian claims to exclusive sovereignty over the land and exclusive right of navigation in the water, as described in the ukase, and could not admit that non-Russian trade therein was illicit or that Russia could legally prevent foreign ships from approaching within one hundred Italian miles of the coast.[19]

The Russian claims, and also those of the Americans in the same region, greatly concerned the Hudson's Bay Company (HBC), which had joined with the Nor'Westers in the territories west of the Rocky Mountains.[20] Later in 1821, the new coalition received Imperial authorization to monopolize trade in these same territories.[21] Deputy Governor J. H. Pelly wrote urgently to Londonderry on 27 March 1822 to put the company's case before him,[22] and in this and later communiqués,[23] he included much supporting evidence which, although it was not always strictly accurate, the British government relied upon extensively in developing its own case.

The Duke of Wellington, who had been appointed to represent Great Britain in conferences at Vienna and Verona following the suicide of Londonderry in August 1822,[24] was given verbal assurances by Count Lieven that the Russian emperor "did not propose to carry into execution the Ukase in its extended sense" and that Russian ships "had been directed to cruise at the shortest possible distance from the shore."[25] The new Foreign Secretary, George Canning, derived similar impressions from a talk with Count Lieven, and he was confident that, so far as their extreme claims at sea were concerned, the Russian government was "prepared entirely to waive their pretensions."[26]

Wellington was far from satisfied, however, with verbal assurances that left the ukase itself in being. In a note to Russian Foreign Secretary Count Karl Nesselrode on 17 October, he expressed strong objections to the claims of exclusive sovereignty, as set forth in the ukase, over both land and sea.[27] When Nesselrode replied in rather conciliatory fashion, offering to negotiate boundaries but in effect reasserting the terms of the ukase,[28] Wellington countered by restating his objections in a stiff note to Count Lieven. He also wrote, in blunt language more characteristic of the general than the diplomat:

> I must inform you that I cannot consent, on the part of my Government, to found on that paper the negotiations for the settlement of the question which has arisen between the two Governments on this subject…. I think, therefore, that the best mode of proceeding would be that you should state your readiness to negotiate upon the whole subject, without restating the objectionable principle of the Ukase, which we cannot admit.[29]

One day later, Wellington sent word to Canning that he had won his point and that the Russian emperor now desired to negotiate "upon the whole question of the Emperor's claims in North America."[30] Russia was willing to abandon completely her "extravagant assumption of maritime jurisdiction,"[31] but Sir Charles Bagot, the British Ambassador to Russia, who had been given the responsibility of conducting negotiations,[32] had much greater difficulty in arranging an agreeable disposition of the claims to land. Canning had directed him to suggest the 57° parallel as the dividing line,[33] whereas the Russian officials had spoken among themselves of the 55th degree, or preferably "the southern point of the archipelago of the Prince of Wales and the Observatory Inlet," as the most northerly limit they could concede.[34] In preliminary conversations with Nesselrode and Poletica, Bagot indicated that although Britain had always claimed up to 59° N latitude, she would accept a line at 57°, or perhaps at Cross Sound at 57-½°, with a meridian line drawn north from Lynn Canal at about 135° W longitude.[35] Poletica, who had been designated to carry on negotiations for Russia, replied with suggestions that his government would like to fix the line of latitude at 55° or 54°.[36]

In the formal talks that followed, Bagot modified the British proposals on three occasions. He found the Russians adamant, at least so far as the southern boundary was concerned. On the other hand, they were less worried about the eastern boundary, and from the start they were willing to accept a line that would leave the entire Mackenzie River in British possession.[37] Bagot's three modifications were:

(1) a line through Chatham Strait and Lynn Canal, northwest to the 140th meridian and along that meridian to the Arctic Ocean;

(2) a line through Sumner Strait north of Prince of Wales Island to the mainland coast, then northwest following the sinuosities of this coast at a distance of ten marine leagues from shore as far as the 140th meridian, and then along this meridian to the Arctic Ocean; and

(3) a line south and east of Prince of Wales Island through Dixon Entrance and Clarence Strait to

Sumner Strait, and then as in (2) above.[38]

The Russians proposed a line running from the southern extremity of Prince of Wales Island to and up Portland Canal, along the mountains paralleling the coast to the 139th meridian, and thence along this meridian as far as the Arctic Ocean.[39] Feeling that he had already conceded more than he was authorized to do, Bagot suspended negotiations for the time being. On 29 March 1824, he wrote to Canning saying that he had "entirely failed" to get an acceptable agreement from the Russians.[40]

After receiving advice from the HBC,[41] Canning decided that it would be wise to bring matters to a conclusion largely on Russian terms, although with some "qualifications." These qualifications were mainly (1) a more definite description of the Russian strip of territory on the mainland, with its width to be limited to a maximum of ten leagues; (2) a more westerly meridian of longitude for the boundary in the northwest; (3) free use of all rivers flowing through the Russian strip and of all Russian waters; and (4) trade advantages not inferior to those granted to any other nation.[42] With new instructions along these lines to guide him, Bagot tried once more. The negotiations broke down on his insistence that Britain should have a perpetual right of access to the part of the Novo Archangelsk and to navigation and trade along the coast of the strip or *lisière*, as well as a temporary right, which was to be reciprocal, to visit all other parts of the northwestern coast.[43] Shortly afterwards, Bagot was transferred to a different post, and Canning sent his cousin Stratford Canning to St. Petersburg as special emissary to finalize an agreement.[44] With Bagot's last demands put aside, a treaty was framed without great difficulty and signed on 28 February 1825.

Apart from being obliged to bow to Russian wishes regarding the southern boundary and the creation of the *lisière*, the British could point with satisfaction to the acceptance of much of what they wanted in the arrangement that was made. The treaty recognized their freedom to navigate, fish, and trade throughout the Pacific Ocean, thus removing the most objectionable feature of the 1821 ukase. It limited the breadth of the *lisière* to a maximum of ten marine leagues; it conceded their right to navigate "for ever" the rivers flowing through the *lisière*; and it moved the northwestern boundary westward to the 141st meridian. It also omitted, at British insistence, an article in a Russian "counterdraft" of 21 August 1824, which seemed to imply that freedom of navigation in Bering Strait was being conceded "as a boon from Russia."[45]

Article 1, regarding freedom of navigation, fishing, and trading throughout the Pacific, and Article 2, regarding the requirement of permission to land at each other's establishments, were almost identical with the same articles in the Russian-American treaty of the preceding year. The important provisions for the boundary line were in Articles 3 and 4:

3. The line of demarcation between the possessions of the High Contracting Parties, upon the coast of the continent, and the islands of America to the north-west, shall be drawn in the manner following:

   Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes, north latitude,

and between the 131st and 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and, finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongations far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

4. With reference to the line of demarcation laid down in the preceding Article it is understood:

1st. That the island called Prince of Wales Island shall belong wholly to Russia.

2nd. That whenever the summit of the mountains which extend in a direction parallel to the coast, from the 56th degree of north latitude to the point of intersection of the 141st degree of north latitude to the point of intersection of the 141st degree of west longitude, shall prove to be at the distance of more than 10 marine leagues from the Ocean, the limit between the British possessions and the line of coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings of the coast and which shall never exceed the distance of 10 marine leagues therefrom.[46]

What the treaties of 1824 and 1825 meant to Great Britain, so far as boundary problems were concerned, was that henceforth any such problems north of 54° 40' would be with Russia, and any south of 54° 40' would be with the United States. In this connection, it is necessary to recall that in earlier times two other nations, France and Spain, had shown developing interest in this region, but by now their pretensions had been eliminated. During the eighteenth century, French explorers and fur traders led by the Vérendryes had moved westward across the continent and had almost reached the Rocky Mountains, but any further action France might have taken on the other side of the Rockies became an impossibility after the Seven Years War and the Peace of Paris in 1763. Henceforth, the possibility of French involvement was limited to whatever fishing and trading interests might develop as a result of sea voyages, such as those of La Pérouse and Marchand. Spain had been the first European state to sail in the waters west of North America, and she had gradually extended her activities and aspirations northward by both land and sea, but the treaty of 22 February 1819 with the United States placed the northern boundary of her Pacific coast territories along the parallel of 42°.[47] Her position respecting more northerly regions thus became comparable to that of France.

For Great Britain and the United States, the question of boundaries west of the Rocky Mountains involved the whole of the so-called "Oregon country," from the northern limit of

Spanish territory to the southern limit of Russian territory, that is, as these limits came to be determined, from 42° to approximately 54° 40'. By the convention on 20 October 1818, the 49th parallel was established as the dividing line between British and American territories from the Lake of the Woods to the Rocky Mountains. Since agreement could not be reached on the territories west of the mountains, it was stipulated that these territories should be open for joint occupation for a period of ten years:

> It is agreed, that any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens, and subjects of the two Powers.[48]

When it became apparent that no definitive settlement could be made before the ten years had expired, another convention was signed on 6 August 1827, extending the provisions of the above-quoted third article indefinitely, but with the prevision that either party could terminate the arrangement after one year's notice.[49] The Oregon Treaty of 15 June 1846 fixed the reminder of the boundary by extending it along the 49th parallel from the Rocky Mountains to the middle of the channel separating the continent from Vancouver Island, and thence through the middle of this channel to the Pacific Ocean, so as to leave all of the island as British territory.[50] Apart from the dispute over San Juan Island, which was settled by arbitration in 1872, British and Canadian boundary disputes in this part of the continent were henceforth to be over the Alaskan Panhandle, first with Russia and then, after 1867, with the United States.

Disagreement with Russia was not long in coming after the treaty of 1825 had been signed – not so much over the boundary, however, as over the interpretation of the treaty and what it implied for navigation and trade. The HBC began to construct a chain of posts along the coast north of the Columbia River, and in 1834 it sent Chief Trader Peter Skene Ogden in the brig *Dryad* to build a fort on the Stikine River. Although the fort was to be constructed on British territory, up the river and beyond the point where it flowed into the Russian *lisière*, Lieutenant D. F. Zarembo of the armed ship *Chichagov* refused, with threat of force, to let Ogden proceed. Ogden was obliged to retreat without carrying out his assignment, and the HBC appealed to the British government for help, claiming damages of more than £22,000. The company charged specifically that the Russians had violated three provisions of the 1825 treaty: Article 6 guaranteeing British subjects freedom of navigation in the rivers crossing the *lisière*, Article 7 guaranteeing for ten years freedom to fish in the coastal waters of the same, and Article 11 renouncing use of force.[51] The British government pressed these charges upon the Russian government, which initially admitted their validity but then tried ingeniously, although with lessening confidence, to avoid admitting the claim for damages.[52] Finally, through direct negotiations between the HBC and the Russian American Company in St. Petersburg and Hamburg, and doubtless to the great relief of the Russian government, the two companies themselves were able to make a settlement. By an agreement signed at Hamburg on 6 February 1839, the Russian American Company leased to the HBC the coastal strip north to Cape Spencer for ten years beginning

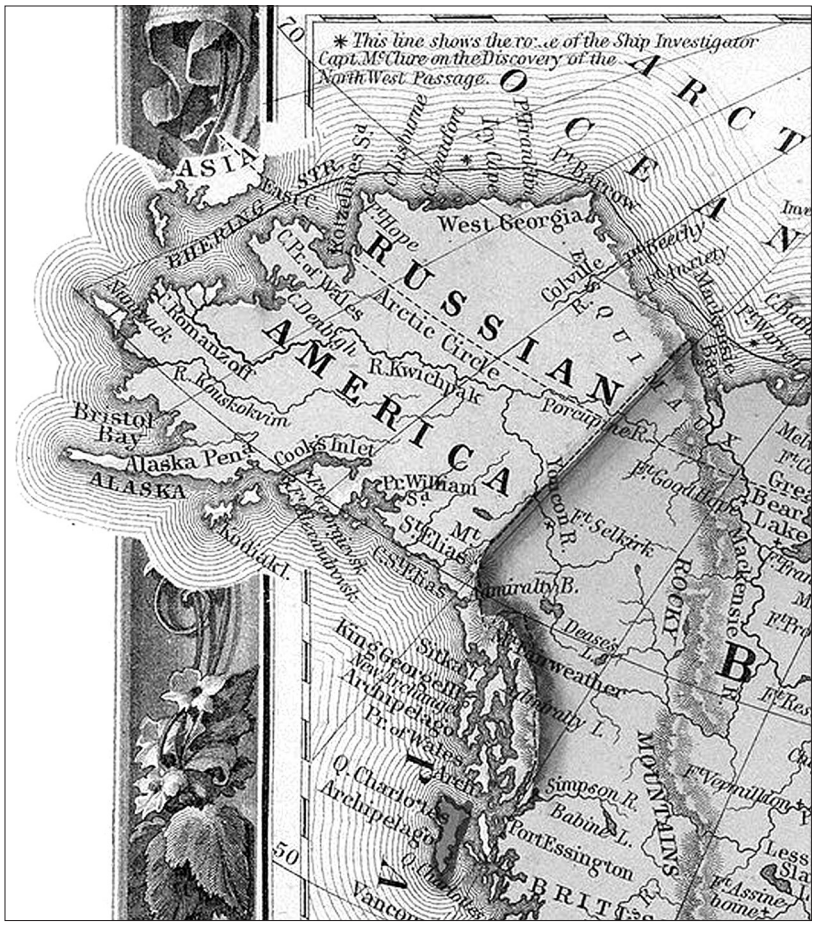

Figure 5-1: Russian American in 1860. Excerpt from the "Map of North America. Showing its Political Divisions, and Recent Discoveries in the Polar Regions," in Mitchell's *New General Atlas, Containing Maps Of The Various Countries Of The World, Plans Of Cities, Etc.* (New York: S. Augustus Mitchell, Jr., 1860).

on 1 June 1840, in return for an annual rent of 2,000 otter skins plus the guaranteed sale of various commodities including food and more otter skins. The HBC also relinquished its claim to damages for the *Dryad* affair.[53] The lease was renewed or extended in 1849, 1858, 1862, 1865, and 1866 for varying lengths of time, the last to terminate on 31 May 1867.[54] It was thus still in existence when the sale of Alaska was made. One of the interesting sidelights of the *Dryad* episode, of considerable consequence for the later events, was that both British and Russian officials in their negotiations not only accepted the existence of the *lisière* but also seemed to agree that its breadth along the Stikine should be ten marine leagues.[55]

Through arrangements initiated before the Crimean War broke out in 1853, the two companies maintained an agreement that their possessions on the northwest coast of America should be neutralized. Both the British and Russian governments approved the agreement, although the British refused to extend it to the adjacent high seas and joined their French allies in attacks upon Russian establishments on the Kuriles and the Siberian coast.[56]

The sale of Alaska to the United States in 1867 brought to an end the proximity of British and Russian territory in North America and meant that henceforth British and Canadian dealings in this part of the continent would be with the United States. In 1862, the HBC had

informed the Russian American Company that it did not plan to renew the lease arrangement;[57] although the lease was renewed for a period of two years, every indication suggested that further renewals were doubtful.[58] For this reason and various economic, political, and strategic considerations, the Russian government began to give increasing thought to disposing of its distant colony. The idea of selling it to the United States, far from being new, had been under contemplation for at least several years; nevertheless the actual negotiations for the sale took place rather quickly early in 1867.[59]

At four o'clock in the morning on 30 March 1867 at Washington, DC, Secretary of State Seward and Russian Ambassador Baron de Stoeckel signed the document providing for the cession of Alaska to the United States in return for $7,200,000 in gold.[60] Ratifications were exchanged on 20 June, and the formal ceremony of the transfer took place at Sitka (Novo Archangelsk) on 18 October.[61] Article 1 of the treaty specified that the land being transferred comprised "all the territory and dominion now possessed by his said [Russian] Majesty on the continent of America and in the adjacent islands" and that its eastern limit should be "the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28–16, 1825, and described in Articles III and IV of said convention." The treaty did not specifically retain any other existing arrangements between Great Britain and Russia, and Article 6 stated that the cession was to be "free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other." After the expiration of its third charter on 1 January 1862, the Russian American Company had existed only "on sufferance,"[62] and although steps were taken to renew the charter in 1866, these were nullified by the cession.[63] Also nullified was the still-existing lease of the *lisière* by the HBC, along with new plans by the British company for yet another extension of the lease.[64] Nevertheless, HBC officials assumed that the United States would be bound by the Anglo-Russian treaty of 1825 as Russia's successor, and when their steamship *Otter* was deterred by American regulations and dues from ascending the Stikine River in 1867, they protested to the British government that the Americans were violating the treaty. They were informed that by the terms of the cession the United States was bound only by the boundary provisions of the 1825 treaty and that Russian concessions including the right of navigation were no longer in effect.[65]

Apart from the *Otter* affair and a few other events, such as the expedition of Captain Raymond in 1869 to remove the HBC from its post at Fort Yukon, the change of ownership in Alaska caused little difficulty over the boundary for several years. The transfer of Rupert's Land and the North-Western Territory to Canada, along with the extension of British Columbia's northern boundary to the 60th parallel, eliminated the HBC as a political factor in the area almost as thoroughly as the sale of Alaska had eliminated the Russian American Company. There was little American interest in the newly acquired territory, and less American immigration into it, while the majority of Russians departed. As time went on, however, a succession of events focused attention upon boundary problems once more.

On 11 July 1872, Lieutenant-Governor Joseph W. Trutch of British Columbia forwarded a copy of an address from his legislature to the Dominion government in Ottawa asking that, in view of the recent mineral discoveries

in the northern part of the province and the undefined state of the boundary with Alaska, steps be taken to have this boundary properly marked out.[66] Under instructions from the British government, Ambassador Sir Edward Thornton broached the idea of a joint commission in Washington, where it was favourably received, but the proposal fell through because of the unwillingness of Congress to grant the necessary funds for the survey. American officials had suggested that it might be sufficient to locate only particular points, such as those where the boundary line crossed some of the important rivers including the Stikine, but Secretary of State Hamilton Fish feared, rightly, that even this would be considered too expensive by Congress.[67]

In January 1874, the British Columbia legislature presented another address to the Lieutenant-Governor requesting a delimitation of the boundary, and again Trutch sent it to Ottawa, with no more significant result than the first time.[68] Acting on its own, however, the Canadian government in November 1873 appointed Captain Donald Roderick Cameron, who was not only Her Majesty's North American Boundary Commissioner but also the son-in-law of Charles Tupper, to report on the cost and time that a joint commission would require to fix the boundary line.[69] Cameron's report was not submitted until February 1875, and since his estimate of cost ranged from $425,000 to $2,230,000 and of time from two to seven years, it was too vague to be of much help.[70] John Stoughton Dennis, the Surveyor General of Canada, had also submitted a report a year earlier which accepted the American suggestion that only particular points along the boundary needed to be fixed, and he advised that it was unnecessary then "and it may be for all time" to do more.[71]

This point of view was not to prevail. In a conversation with Ambassador Thornton on 23 September 1875, US Secretary of State Hamilton Fish informed him of reports from Sitka to the effect that a party of British subjects had settled on the Stikine below the Canadian custom house and that both the settlement and custom house were within ten marine leagues of the coast and thus on American territory. Thornton replied that the occurrence showed the wisdom of the British recommendation that the boundary should be determined without delay, and he suggested that both countries send officers to settle the problem.[72] Trouble also arose over the trading post of a Canadian named Buck Choquette, which was located on the Stikine about two miles above the custom house, left isolated in 1876 when the Canadian authorities moved it ninety miles upstream. Claiming that his post was clearly within Alaska, American officials ordered Choquette to pay duty on his goods or remove them by spring 1877. Choquette insisted that his post was in British Columbia and held his position when the American customs official at Sitka, hearing that the Canadian government had ordered a survey of the Stikine, temporarily suspended any attempt at enforcement of his decree.[73]

More serious was the case of Peter "Bricktop" Martin, who in 1876 was sentenced to fifteen months' imprisonment on two convictions at Laketon in the Cassiar mining district of British Columbia. Then, after momentarily escaping from and wounding his escort while being taken out via the Stikine River to the Victoria jail, he was convicted of these new offences at Victoria and sentenced to an additional twenty-one months. Secretary of State Fish demanded the release of Martin on grounds that his escape and recapture had taken place on American territory within the Alaskan Panhandle, a point British and Canadian

authorities were not willing to concede. A considerable correspondence ensued, with Ambassador Thornton renewing British suggestions for an accurate delimitation of the boundary line.[74] On 3 March 1877, in an attempt to locate the boundary at least at the point in question, the Canadian government appointed a civil engineer named Joseph Hunter to make a survey of the lower Stikine.[75] Hunter's report, composed after a very rapid and efficient survey, was handed in the following June.[76] In a separate note, he advised that the escape and recapture of Martin had almost certainly taken place on Alaskan soil.[77] Influenced also by a dispatch from Colonial Secretary Lord Carnarvon recommending Martin's release,[78] the Canadian government agreed to set him free shortly afterwards.[79] In February 1878, the American government accepted a suggestion, presented by Thornton on behalf of the Canadian government, that Hunter's demarcation of the boundary at the Stikine should be accepted as a provisional line for that area.[80]

There was confusion and uncertainty not only over the boundary at the Stikine but also over navigation rights upon it. When American customs officials in the Panhandle asserted their intention in 1873 of preventing foreign ships from carrying freight through the American part of this river, Thornton protested on grounds that Article 26 of the Treaty of Washington (8 May 1871) guaranteed free navigation of the Stikine (as well as the Yukon and Porcupine) to subjects and citizens of both Great Britain and the United States.[81] In January 1874, Fish informed Thornton that the customs officials had been instructed "to act in accordance with the provisions of the Treaty of Washington."[82] As already noted, HBC officials had assumed at the time of the cession of Alaska that they would retain their rights under the Anglo-Russian treaty of 1825, but they learned from the British government in 1868 that although the United States was bound by the boundary provisions of this treaty (which were reproduced in the treaty of 1867), other Russian obligations, including those connected with navigation, had not been passed on. Nevertheless, the British government later took the view that although by Article 6 of the 1867 treaty Russia ostensibly revoked the navigation rights granted Britain in 1825, it could not do this legally without British consent. In reality, Britain itself had admitted the abrogation of these rights by the negotiation of the Treaty of Washington in 1871 and by the terms of the treaty itself. Therefore, whatever British rights of this kind presently existed were derived only from the Treaty of Washington, specifically Article 26.[83]

British thought and action on this subject were highly unsatisfactory to some Canadian officials, notably Minister of Justice Edward Blake, who maintained that British rights had continued unimpaired and unrestricted after 1867 but had been given away in return for very little in 1871.[84] The differences between the relevant sections of the treaties of 1825 and 1871 were in fact of considerable significance, since the earlier treaty gave British subjects unrestricted rights of navigation upon all rivers flowing through the *lisière*, whereas the later treaty gave them rights of navigation for commercial purposes only, upon only three specified rivers, and also conceded reciprocal rights to American citizens in the Canadian parts of these rivers.[85] The British government cited the restriction of navigation in the Washington treaty to commercial navigation only as an additional reason for setting Martin free,[86] but it does not appear that the broader question of American inheritance of Russian responsibility was ever conclusively settled.

Little of note respecting the boundary occurred for several years, although some interested individuals realized the danger of leaving it unfixed. Among these was William H. Dall, then a member of the US Coast and Geodetic Survey, who in April 1884 wrote to Canada's George Dawson suggesting that "the matter of the boundary should be stirred up. The language of the Treaty of 1825 is so indefinite that were the region included for any cause to become suddenly of evident value, or if any serious international question were to arise regarding jurisdiction, there would be no means of settling it by the Treaty." He remarked that since there was no natural boundary and since the "long caterpillar" of mountains on Vancouver's charts had no existence as such, the United States would undoubtedly wish to fall back on the wording of the 1825 treaty: "line parallel to the winding of the coast and which shall never exceed the distance of ten marine leagues therefrom." Even this would be impracticable to trace; therefore determinable boundaries should be agreed upon, and perhaps Dawson would "be able to set the ball in motion on your side."[87] It does not appear that the suggestion as made had any immediate consequences in Canada, but the importance of a settlement was apparent to Thomas F. Bayard, the new American Secretary of State, who after consulting with Dall wrote a letter to Ambassador Edward John Phelps in London asking him to suggest to the British government the appointment of an international commission to fix the boundary line.[88] President Grover Cleveland also referred to the matter with some urgency in his first annual message to Congress on 8 December 1885.[89] Impressed by the new American attitude, Lord Salisbury readily agreed to consider Bayard's suggestion.[90] Later, after consultations between British and Canadian officials, word was sent to Washington that the Canadian government would prefer a preliminary survey that could lead to more definitive action afterwards.[91] In the course of the correspondence which followed, Lord Salisbury drew attention to certain remarks made by Lieutenant Frederick Schwatka in his report of his journey through the Yukon and Alaska in 1883, which located Fort Selkirk in Alaska and fixed Perrier's Pass (on the Chilkoot Trail) and 140° W longitude as part of the international boundary. Salisbury noted that Fort Selkirk was actually well within British territory and that Great Britain was not prepared to accept Schwatka's two points as fixing the boundary. Carefully denying that any importance was attached to the omission, Salisbury also observed that Schwatka had failed to inform British authorities of his desire to travel in British territory.[92] Much more significant than the Schwatka affair, however, was the conference held in Washington in late 1887 and early 1888 to settle North American fisheries rights and other outstanding questions between Great Britain and the United States. Participants arranged to bring together Dawson and Dall as experts to discuss the Alaska boundary, and it was through their discussions in Washington that irreconcilable differences of opinion respecting the boundary were brought into the open. In this development the so-called "Coast Doctrine"[93] of Donald Cameron, formerly Boundary Commissioner and now a general, looms very large.

Cameron, who had been appointed an adviser to the Canadian government on the Alaskan boundary and had given the matter much thought, explained his rather facile solution to the Panhandle problem in a lengthy report written in 1886.[94] The main question involved the interpretation to be given the expression "*la côte*" ("the coast" as used in the Anglo-Russian convention of 1825). Cameron disposed of

the question neatly and in a fashion decidedly favourable to Canada by concluding that "the coast" meant the general coastline of the continent, cutting across both promontories and inlets but going around neither. He put forward his argument plausibly and forcefully:

> It can easily be shown that the general coast line of the continent, exclusive of inlets, creeks, and similar narrow waterways, is the sense in which the words were used…. [T]he line, whether marked by mountains or only by a survey line, has to be drawn without reference to inlets…. None of the inlets between Portland Channel and the Meridian of 141° W long. are six miles in width, excepting, perhaps, a short part of Lynn Canal. Consequently, with that possible exception, the width of territory – on the coast assigned under the Convention to Russia – may not be measured from any point within the mouths of the inlets. All the waters within the mouths of the inlets are as much territorial waters, according to any universally admitted international law, as those of fresh-water lake or stream would be under analogous circumstances.[95]

Thus, according to Cameron's interpretation of the convention, inlets less than six miles in width were to be British territorial water, and accordingly Canada would have access to salt water at various places along a relatively narrow panhandle. This was the Coast Doctrine, "in all its mad beauty," as one commentator has remarked,[96] and Dawson adopted this solution to the boundary problem in seemingly uncritical fashion from his former chief and attempted to sell it to Dall during their Washington discussions in February 1888.

It was not difficult for Dall to point out in reply that the history of British-Russian negotiations leading up to the convention showed that "Russia needed, asked, and obtained the possession of the entire undivided coast margin."[97] If the six-mile principle had been applicable and had been applied consistently, most of the offshore islands as well as the inlets would have become subject to British sovereignty. Furthermore, if the inlets had been intended to be British property, then there would have been no need for any special provisions, such as those in the convention, to enable her to reach them. He went on:

> It is, of course, in view of all the facts, nothing less than preposterous to suppose that Russia would have accepted a treaty which cut her "strip" of main-land into several portions, or that Great Britain, having the right to occupy with trading posts the richest fur region of the archipelago, and represented by the Hudson's Bay Company, the keenest corporation of that period, should nevertheless not only not assert and use these rights, but on the other hand pay money and otter skins for these very privileges to a foreign and competing corporation.[98]

Dall also disagreed with Cameron and Dawson on other points, notably the identification of Portland Channel or Canal, but the most fundamental disagreement respected the *lisière*. He put forward his views in several memoranda to Secretary of State Bayard, which were published in US Senate documents[99] and later in the documents of the Alaska Boundary

Case. Obviously the arguments of Dall on the one side, and Cameron and Dawson on the other, were well known to responsible officials in both Canada and the United States (although probably not to the general public). It seems very unfortunate, in retrospect, that the vacuity and unreality of Cameron's case, and the cogency and logic of Dall's, were not fully appreciated and acknowledged at the time in Canada as well as in the United States. Had this been the case, much of the trouble over the Alaska boundary might have been avoided.

In the meantime, the British Columbia government had adopted and put forward a proposition with even less substance than Cameron's. It was based upon a report written in 1884 by Judge John Gray of the Supreme Court of that province, which argued that the boundary line should not ascend Portland Channel as Article 3 of the Anglo-Russian treaty of 1825 said it should. Instead, Gray suggested that it should go through Clarence Strait just east of Prince of Wales Island and strike the mainland at 56° N latitude, thus making Revillagigedo Island and a large chunk of the mainland part of British Columbia. Gray claimed that the words "Portland Channel" had not really been in Article 3 of the treaty at all but rather were a "subsequent interpolation" because, looking at the rest of the article, a line ascending "to the north" from the "southernmost point" of Prince of Wales Island would not go up Portland Channel, and even if it did, the channel would not take it "as far as" 56°. Gray had an even more vivid imagination than Cameron; nevertheless, in spite of the transparent inaccuracy of his claim, some Canadian government officials took it seriously, and even Dawson recommended that it should be left for the Americans to refute.[100]

Although the Dall-Dawson discussions had shown the wide divergences between American and Canadian views on the Alaska boundary and had, so to speak, established the lines of battle, little of note developed for several years. On 10 September 1888, the Canadian government had received a report that the Alaskan authorities were about to grant a charter for the construction of a trail from Lynn Canal through White Pass to the interior of Alaska. British Ambassador Sir Lionel Sackville-West protested to Secretary of State Bayard that the territory in question was British.[101] Bayard could only reply that the "vague and indefinite" rumour had not come to the notice of his department.[102] On 5 June 1891, Ambassador Julian Pauncefote called the attention of Secretary of State James G. Blaine to a published report of the US Coast and Geodetic Survey referring to a planned survey of the frontier "about 35 miles" from the coast and to the Canadian government's feeling that "the actual boundary line can only be properly determined by an International Commission."[103]

In February 1892, a conference took place in Washington between Secretary of State Blaine, his adviser J. W. Foster, Ambassador Pauncefote, and Canadian ministers John Thompson, George Foster, and Mackenzie Bowell, its outcome being an agreement for a joint survey of the Alaska boundary line.[104] This agreement was formalized by a convention signed at Washington the following 22 July, which provided for a survey of the territory adjacent to the boundary line

> from the latitude of 54° 40' north to the point where the said boundary line encounters the 141st degree of longitude westward from the meridian of Greenwich … with a view to the ascertainment of the facts and data necessary to the permanent delimitation of said boundary line in accordance with the spirit and intent

> of the existing Treaties in regard to it between Great Britain and Russia and between the United States and Russia.[105]

The convention stipulated that the survey was to be completed in two years, but this allotment of time was insufficient so a supplementary convention was signed at Washington on 3 February 1894, extending the time limit to 31 December 1895.[106] As commissioners, the British government appointed Canada's chief astronomer Dr. W. F. King,[107] and the American government appointed Superintendent of the US Coast and Geodetic Survey Thomas Corwin Mendenhall,[108] the latter being replaced by William Ward Duffield in June 1895.[109] Duffield and King duly submitted a joint report, accompanied by maps and photographs, on 31 December 1895.[110] In accordance with the terms of the convention, the survey made no attempt actually to fix the boundary line, and its main value lay in the provision of necessary information about the territory in dispute.

The spectacular gold strike on the Klondike River in 1896, and the inevitable rush that followed, gave a new note of urgency to the need for settlement of the boundary problem. The shortest and fastest route to the region from the west coast of both Canada and the United States passed through the Lynn Canal and over the mountain passes to the headwaters of the Yukon, thus emphasizing in dramatic fashion the importance of the whereabouts of the frontier and also related questions of access, jurisdiction, and customs. Before long, a variety of complaints and rumours of actual or threatened clashes were filtering back to Ottawa and Washington, and it required little imagination to appreciate that the possibility of real trouble had greatly increased.

The portion of the boundary line running north along the 141st meridian from Mount St. Elias posed a much smaller problem than the irregular portion extending southeast from the same mountain, which was supposed to show the limit of the Panhandle to its southern extremity. In the first case, it was only a matter of locating a boundary that was defined in such a way that disagreement about it was, if not impossible, at least most unlikely. In the second case, it was necessary to reach agreement on where the boundary was supposed to run before the practical problem of marking it on the ground could be undertaken. On 1 June 1895, the Canadian government passed an order in council which took note of the need to determine the location of the 141st meridian and observed that William Ogilvie had already been dispatched to continue the survey he had begun in 1887–88, when he had fixed the intersections of the 141st meridian with the Yukon River and Forty-mile Creek. The order also recommended seeking the co-operation of the United States, preferably in joint action on the survey or, failing that, in temporary recognition of Ogilvie's work without prejudice to the rights of either country when a joint survey should be made at a later date.[111] The British government proposed this to the United States on 20 August 1895,[112] and after consideration the American government replied favourably on 11 March 1896, proposing a more limited joint survey that would concentrate initially on fixing principal points along the 141st meridian. An order in council issued by the new Laurier administration on 28 September 1896 recommended acceptance of the American proposal, observing that the preceding Conservative government had taken the same view.[113] On 30 January 1897, a convention was signed in Washington for "the demarcation of so much of the 141st meridian of west longitude as may be necessary for the determination

of the boundary,"[114] but the convention was not ratified by the American Senate, and joint action on this part of the boundary did not take place until after the dispute over the Panhandle had been settled.

Dyea and Skagway, the principal ports of entry at the head of the Lynn Canal for miners and goods bound for the Yukon, quickly took on boom town characteristics. The refusal of American officials to allow Canadian vessels to land at these ports caused a chorus of Canadian complaints, and Canadian Commissioner of Customs John McDougald wired the Treasury Department in Washington on 22 July 1897, asking permission for Canadian goods to pass through to the Yukon without payment of customs duties, on condition that the parties concerned pay for American officers to accompany the goods.[115] Assistant Secretary of the Treasury W. B. Howell wired back promptly suggesting that Dyea be made a sub-port of entry under these conditions,[116] and a day later he sent another wire saying that this had been done.[117] About a month later, another Canadian request was made for the same privilege at Skagway,[118] eliciting the response that this had already been done.[119] Needless to say, these requests were afterwards used by the United States to buttress her case for ownership of all the land on the shores of the Lynn Canal.[120]

On 23 February 1898, the British government proposed to the American government that the determination of the boundary south of Mount St. Elias "should at once be referred to three Commissioners (who should be jurists of high standing), one to be appointed by each Government, and a third by an independent Power," the commissioners to begin immediately by fixing the frontier at the heads of inlets used for traffic to the Yukon. The proposal added that, pending this settlement of the boundary, Great Britain would view a *modus vivendi* with satisfaction.[121] On 18 April 1898, Ambassador Pauncefote presented to the American Secretary of State a memorandum noting the Canadian government's fear that divergent views on the boundary would prevent any accomplishment under the 1892 convention, but he also expressed its willingness to accept a provisional line "at the Watershed at the first summit north of Dyea" without prejudice to the claims of either party.[122] The American government consented to this suggestion in a note dated 9 May.[123] Later in May, a series of meetings were held in Washington, at which arrangements were made for the establishment of a joint high commission to settle the principal outstanding problems between Canada and the United States, the Alaska boundary being one of them. A protocol of proceedings and conclusions was signed on 30 May, both parties appointed high commissioners, and each sent the other a memorandum of its views.[124]

Under the terms of the protocol, the joint high commission of six American and six British appointees held meetings in Quebec City between 23 August and 10 October 1898, and in Washington between 9 November 1898 and 20 February 1899. Attempts were made to deal comprehensively with the dozen or so subjects listed for discussion on the lengthy agenda, including Bering Sea fur seals and Atlantic fisheries. It proved impossible to reach agreement on the Alaska boundary question, however, and on this stumbling block the entire conference foundered. Lord Farrer Herschell, head of the British-Canadian delegation, had been persuaded (evidently against his better judgment)[125] to put forward a combination of the British Columbia government's and Major General Cameron's claims in extreme form. These claims had been adopted and given authoritative expression by Canadian Minister of the Interior Clifford Sifton and would have

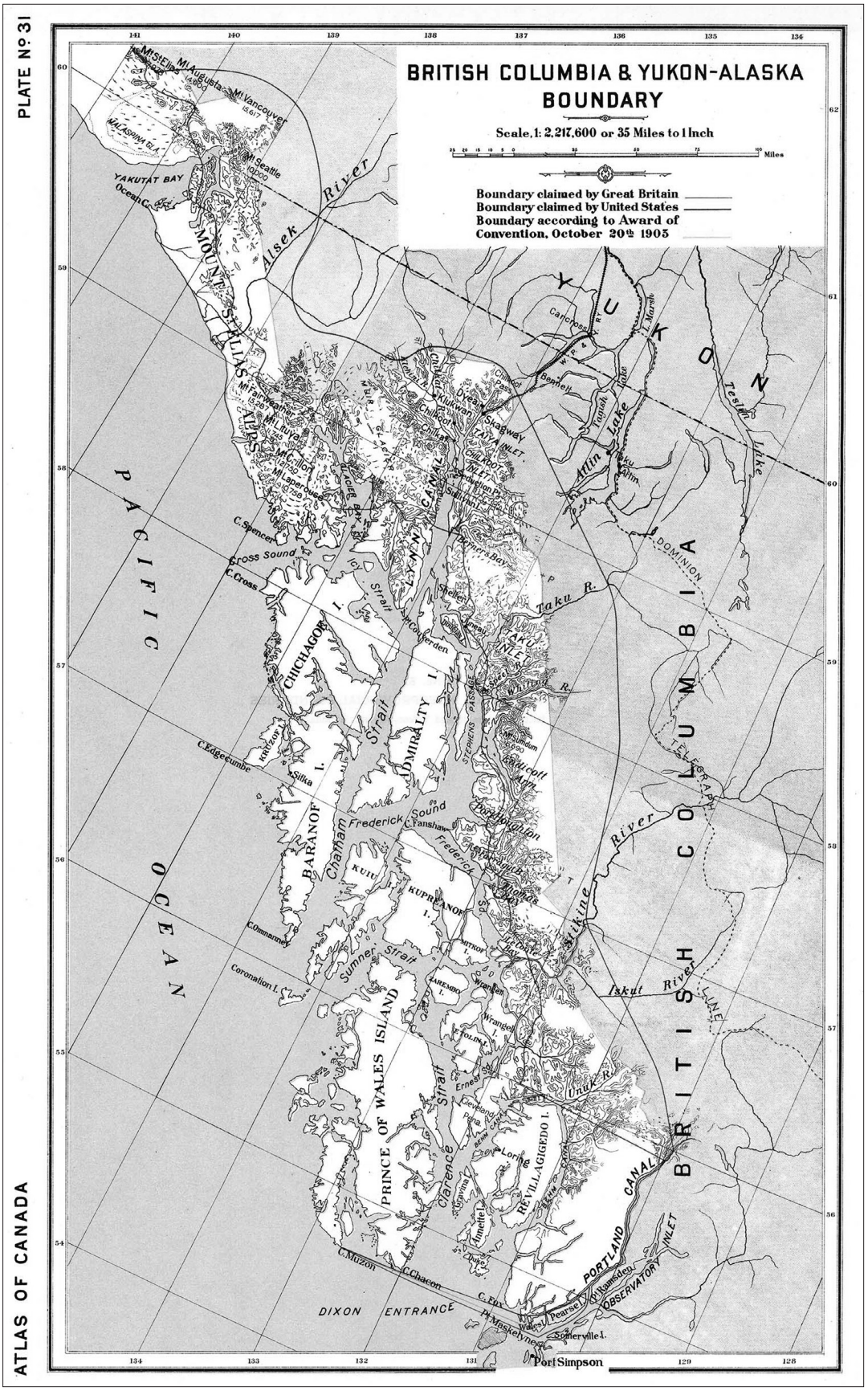

Figure 5-2: Map of U.S. and Canadian claims and the accepted boundary. *National Atlas of Canada, 1906.*

made the boundary run through Clarence Strait east of Prince of Wales Island instead of up Portland Channel, and then across the promontories of the coast so as to leave all the major inlets in British (Canadian) possession.[126] Not surprisingly, the Americans firmly rejected this proposition. The Canadians were particularly anxious to have direct access to salt water from the Yukon, and Herschell proposed that the United States should cede to Canada Pyramid Harbour on Chilkat Inlet at the upper end of the Lynn Canal, with a strip of land along the Chilkat River and Pass to connect the port with the Yukon. The Americans countered with offers of free use of all ports on the Lynn Canal and a fifty-year lease of Pyramid Harbor and the desired strip.[127]

As the impossibility of compromise became increasingly evident, the British delegation proposed on 16 December (and repeatedly afterwards) that the entire Panhandle boundary should be submitted to arbitration by legal experts.[128] Much haggling ensued over the terms of the proposed arbitration, with the Americans insisting that the headwaters and shore of Lynn Canal should not be subject to determination. The British wanted to associate an Alaska boundary compromise with the proposed abrogation of the Clayton-Bulwer Treaty of 1850 relating to a Panama Canal, but the Americans wanted to keep the issues separate. The United States had its way, as Great Britain signed a new treaty on 18 November 1901, providing for American construction of the canal, before the Alaska boundary dispute had been settled.[129] The Americans had hoped that Lord Herschell would be more reasonable to deal with than the Canadian delegates, whom they expected to be difficult, but as events turned out they found Herschell "more cantankerous than any of the Canadians."[130] Since there appeared to be good prospects for progress on the other matters before the commission, the Americans wanted to proceed with these even if the Alaska boundary remained unsettled, but the British-Canadians insisted that only a package deal could be accepted. The deadlock on the Alaska boundary being insurmountable, the meetings broke off on 20 February 1899 without achievement.[131]

On 20 March 1899, Secretary of State John Hay wrote a note to Pauncefote suggesting a provisional boundary line around the head of Lynn Canal "at the water shed on the summit of White and Chilkoot Passes, and at a point thirty marine miles from Pyramid Harbour on the Chilkat Pass and otherwise known as the Dalton Trail."[132] Pauncefote referred this suggestion to the Canadian government, which was willing to accept the watershed for White and Chilkoot Passes as a provisional line, but contended that for Chilkat Pass the boundary should be placed provisionally "at the crest of the mountains nearest to the coast." The entire boundary line from Prince of Wales Island to Mount St. Elias, however, should be determined by arbitration.[133] On 13 May, Francis Hyde Villiers, the Assistant Under Secretary at the Foreign Office writing on behalf of Lord Salisbury, sent a note to US Ambassador Joseph Hodges Choate informing him that the Canadian government had agreed that the Alaska boundary dispute could be referred to arbitration at once along the lines of the Venezuela-British Guiana boundary arbitration treaty (thus separating it from the other points at issue) and that the Canadians were willing to proceed with these other matters as soon as an arbitration agreement had been reached.[134]

Lord Salisbury wrote a further note on 1 July, emphasizing that settlement of the Alaska boundary problem seemed impossible except through arbitration and proposing formally that the Venezuela treaty should be applied.[135]

The American government was not inclined to accept the Venezuela treaty as a definitive guide, however, on grounds that – unlike the British-Venezuelan territorial dispute – the dispute over the Panhandle strip was new and no protest over occupied settlements therein had been made until recently.[136] On 17 August, Sir Wilfrid Laurier, in explaining his Cabinet's rejection of a British proposal that Canada should have a perpetual lease of half a square mile on the Lynn Canal and a railway right-of-way to the Yukon, reiterated the Canadian contention that "the only solution is a reference of the whole matter to arbitration."[137]

After much bargaining over Hay's proposal of 20 March 1899, the parties agreed to a *modus vivendi* on 20 October of the same year, setting a provisional boundary line around the head of Lynn Canal. On the Dyea and Skagway Trails, the line was placed at the summits of the Chilkoot and White Passes, respectively, as Hay had suggested, while in the Dalton Pass–Chilkat River region it was to run along the right (south) bank of the little Klehini River to its junction with the Chilkat and from there eastward to the summit of a specified prominent peak. The document stated clearly that the arrangement was without prejudice to the claims of either party in the permanent fixing of the boundary.[138]

For over three years, however, little progress towards a permanent settlement was made. Negotiations continued in desultory fashion, one of the principal points at issue being the composition of the proposed arbitration tribunal. Early British proposals for such a tribunal had taken a variety of forms:

(a) "three Commissioners (who should be jurists of high standing), one to be appointed by each Government, and a third by an independent Power";[139]

(b) "legal experts" or "legal and scientific experts" without specification as to number;[140] and

(c) three "eminent" jurists or jurists "of repute," one to be appointed by the United States, one by Great Britain, and the third by the other two.[141]

Proposals (b) and (c) had been put forward by the British-Canadian representatives on the joint high commission suggesting "four members – two to be named by each Government, one to be a legal expert and one an expert of established reputation in the science of geography and geodesy"[142] and then an arbitral tribunal of "six impartial jurists of repute," three to be nominated by Great Britain and three by the United States.[143]

The basic British-Canadian and American concepts of the tribunal were radically different, and each side held to its own point of view with tenacity. The British, and more particularly the Canadians, wanted an odd-numbered tribunal with a neutral member, believing that there would be a better chance that such a body would reach a decision and also that in case of a division there would be a better chance that an impartial vote would determine the majority. The Americans, feeling at heart that reference of the matter to a tribunal would in reality constitute an unwarranted concession on their part, held out for an even-numbered tribunal without a neutral member so that their appointees could not be outvoted.[144]

The Spanish-American War had tended to draw American attention away from other issues in 1898; the Boer War similarly attracted

British attention between 1899 and 1902. The stubborn but futile British and Canadian attempt to relate the abrogation of the Clayton-Bulwer Treaty to the Alaska boundary dispute was another reason for loss of time. There were distracting elections in all three countries in 1900: in Great Britain in October and in the United States and Canada in November. The assassination of President William McKinley in September 1901 threw American affairs into momentary disarray, but the succession of Vice President Theodore Roosevelt to the presidency brought to office a much more belligerent defender of American interests than McKinley had been. Roosevelt soon made it evident that he felt there was nothing of importance to arbitrate in the Alaska boundary dispute, and if there was to be a settlement, it must be on American terms.

The uncompromising attitude of President Roosevelt caused concern in both Canada and Great Britain. In March 1902, he gave orders for the dispatch of additional troops to Alaska,[145] and from time to time he made aggressive statements, the general tenor of which was to the effect that the Canadians "did not have a leg to stand on" in their contentions.[146] Prime Minister Laurier went to London in 1902 to attend the colonial conference which was meeting that year, and while there, evidently under British pressure, he agreed to accept the American demand that the proposed boundary commission should have an even number of members, all of whom would be appointed by the parties to the dispute.[147] This concession removed one of the major points of disagreement, and henceforth events moved more rapidly.

On 17 October 1902, Secretary of State Hay reiterated an earlier American proposal that, instead of rendering a decision, the members of the tribunal "should merely place their reasoned opinions on record."[148] The Canadian government replied that it "would be disposed to consider it favourably, provided the reference to the Tribunal should include all aspects of the question."[149] On receiving word of this from the British government, Hay indicated his own concurrence, although he would have to consult the president about it. He also gave British Ambassador Sir Michael Herbert the impression that he would now accept a decision of the judicial tribunal as final.[150] Negotiations now focused mainly on a draft treaty, which would specify precisely the terms of reference under which the tribunal would function, and the points of dispute about the boundary, which it would undertake to resolve. On 23 January 1903, Foreign Secretary Lansdowne cabled instructions to Herbert to sign the treaty as it had been framed,[151] and this was done the following day.[152]

The Case

The treaty provided for the immediate appointment of "six impartial jurists of repute," three by His Britannic Majesty and three by the President of the United States, who were to "consider judicially the questions submitted to them," and who would decide all questions by majority vote. Each of the two high contracting parties was to appoint an agent and whatever counsel it wished, and each was to pay for their services as well as for the services of its appointees to the tribunal. The written or printed case of each party, accompanied by all documentary evidence, was to be presented within two months of the date of ratification of the treaty; within two months of this date of presentation, although with provision for a time extension, each party was entitled to present a counter case with additional documentary evidence.

Within two months from the expiration of the time allowed for delivery of the counter cases, each party was obligated to present a written or printed argument which it could support before the tribunal by oral argument of counsel. The tribunal was to assemble in London as soon as possible and, subject to a provision for extension of time by agreement of the two parties, render its decision within three months of the conclusion of the arguments. The decision was to be final and binding, and upon receiving it both parties immediately were to appoint scientific experts to lay down the boundary line in conformity with its terms. Article III of the treaty specified that the tribunal should consider, in settling the questions submitted to it, the treaties of 1825 and 1867, and particularly the third, fourth, and fifth articles of the 1825 treaty, which were reproduced word for word in French from the original text. The specific questions which the tribunal was to decide were set down in precise terms in a key article of the convention:

> Article IV. Referring to Articles III, IV, and V of the said Treaty of 1825, the said Tribunal shall answer and decide the following questions: –
>
> 1. What is intended as the point of commencement of the line?
> 2. What channel is the Portland Channel?
> 3. What course should the line take from the point of commencement to the entrance to Portland Channel?
> 4. To what point on the 56th parallel is the line to be drawn from the head of the Portland Channel, and what course should it follow between these points?
> 5. In extending the line of demarcation northward from said point on the parallel of the 56th degree of north latitude, following the crest of the mountains situated parallel to the coast until its intersection with the 141st degree of longitude west of Greenwich, subject to the condition that if such line should anywhere exceed the distance of 10 marine leagues from the ocean, then the boundary between the British and the Russian territory should be formed by a line parallel to the sinuosities of the coast and distant therefrom not more than 10 marine leagues, was it the intention and meaning of said Convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe, or strip, of coast on the mainland, not exceeding 10 marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the ocean, and extending from the said point on the 56th degree of latitude north to a point where such line of demarcation should intersect the 141st degree of longitude west of the meridian of Greenwich?
> 6. If the foregoing question should be answered in the negative, and in the event of the summit of such mountains proving to be

in places more than 10 marine leagues from the coast, should the width of the *lisière* which was to belong to Russia be measured (1) from the mainland coast of the ocean, strictly so-called, along a line perpendicular thereto, or (2) was it the intention and meaning of the said Convention that where the mainland coast is indented by deep inlets forming part of the territorial waters of Russia, the width of the *lisière* was to be measured (a) from the line of the general direction of the mainland coast or (b) from the line separating the waters of the ocean from the territorial waters of Russia, or (c) from the heads of the aforesaid inlets?

7. What, if any exist, are the mountains referred to as situated parallel to the coast, [and] which mountains, when within 10 marine leagues from the coast, are declared to form the eastern boundary?[153]

The selection of the "six impartial jurists of repute" became a matter of bitter controversy and recrimination. For Canada, it left the most lasting scars of dissatisfaction and ill feeling. On 14 February, Ambassador Herbert sent a cable to the Marquis of Lansdowne saying that he had learned that day from Secretary Hay that President Roosevelt would probably appoint as American members of the tribunal Senator Henry Cabot Lodge of Massachusetts, Senator George Turner of Washington, and Secretary of War Elihu Root.[154] Four days later, the news was relayed to the Canadian government,[155] which protested strongly on the reasonable grounds that it had agreed to the tribunal on the understanding that the appointees would be "impartial jurists."[156] As a matter of fact, all three were eminent lawyers, but they could hardly be considered impartial, since all three were currently political rather than legal in their primary responsibilities. Root, although highly esteemed abroad as well as at home, was circumscribed through being a member of Roosevelt's Cabinet. Both Lodge and Turner had already publicly committed themselves to the American side of the case. Furthermore, Lodge was well known to be an aggressive Anglophobe, and Turner represented the state which had the most direct interest in Alaskan affairs. The British government, although "as much surprised" as the Canadians at the disheartening turn of events, stressed the "difficulty" of the situation and their earnest desire "to have the concurrence" of the Canadian government in dealing with it.[157] They had already foreshadowed their ratification of the treaty in the Speech from the Throne on 17 February, before communicating the news of Roosevelt's selections to Ottawa; the ratifications were duly exchanged in Washington on 3 March, while the situation was still under the consideration of the Canadian government.[158]

Partial explanations for Roosevelt's appointments have been offered by suggestions that he first asked at least two[159] (and perhaps all[160]) of the members of the Supreme Court to serve and met with refusal in each case. Whether he was merely going through the motions is a valid question. At any rate, he was undoubtedly concerned about the problem of securing the Senate's approval of the treaty, and Lodge recounted afterwards that he had impressed upon the president the virtual impossibility of getting this approval unless the appointments were satisfactory from that body's point of

view. Lodge recalled that the treaty had been put in his charge, and when several senators, especially from the Northwest, informed him that they would have to have assurance about American representation on the tribunal, he obtained permission from the president to tell them in confidence whom the appointees would be. This information quieted their objections, and the Senate ratified the treaty on 11 February. One American who was not pleased with the appointments was Secretary Hay who, according to Lodge, "was extremely displeased and protested in the strongest way to the President against Mr. Root, and even more strongly against me, taking the ground that our opinions were already well known, which was also true of Senator Turner."[161]

Typical of angry Canadian comment was the following, which John W. Dafoe of the *Winnipeg Free Press* received in a letter written to him "about this time" by Minister of the Interior Clifford Sifton:

> As you have no doubt already sized the matter up, the British Government deliberately decided about a year ago to sacrifice our interests at any cost, for the sake of pleasing the United States. All their proceedings since that time were for the sake of inveigling us into a position from which we could not retire.…
>
> It is, however, the most cold-blooded case of absolutely giving away our interest, without even giving us the excuse of saying we have had a fight for it, which I know of, and I do not see any reason why the Canadian press should not make itself extremely plain upon the subject. My view, in watching the diplomacy of Great Britain as affecting Canada for six years, is that it may just as well be decided in advance that practically whatever the United States demands from England will be conceded in the long run, and the Canadian people might as well make up their minds to the now.[162]

The British government was convinced that it would be useless to press the United States to change the American representatives on the tribunal and extremely unwise to break off negotiations altogether, but it dropped a broad hint to the Canadians that retaliation might be made by appointing "representatives appropriate to the altered circumstances of the case."[163] The Canadian government declined to accept the suggestion, however, and held to the view that if the case were to proceed, "only Judges of the higher Courts, who in the best sense of the words would be impartial jurists of repute, should be chosen."[164] In accord with Canadian wishes, the three men appointed were Lord Alverstone, Lord Chief Justice of England; Sir Louis Jetté, former judge of the Superior Court of Quebec and currently Lieutenant-Governor of that province; and John Douglas Armour, justice of the Supreme Court of Canada.[165] On the death of Justice Armour in July 1903, Allen B. Aylesworth, KC, of the Ontario bar, was appointed to replace him.[166] Clifford Sifton was named agent for the British-Canadian side, with Under Secretary of State Joseph Pope and Chief Astronomer W. F. King to assist him. Senior members of counsel were Attorney General of England Sir Robert Finlay, Solicitor General of England Sir Edward Carson (replacing former Canadian Liberal leader Edward Blake, who was forced to retire because of illness), and Christopher Robinson of Toronto. The junior members, several of whom were destined to achieve distinction in their own rights,

were Lyman P. Duff, Aimé Geoffrion, and F. C. Wade of the Canadian bar and John A. Simon and S. A. Rowlatt of the English bar. General John W. Foster acted as agent for the United States, with several experts to assist him; the American counsel were Jacob M. Dickinson, David T. Watson, Hannis Taylor, and Chandler P. Anderson.[167]

Preparation of the cases, counter cases, and printed arguments occupied approximately six months after the exchange of ratifications on 3 March. The British-Canadian side tried repeatedly for extensions of time and for postponements of the date when the oral arguments would begin, but the Americans refused to accommodate them. Secretary Hay was personally inclined to grant the requested additional time,[168] but others, including Lodge and the president himself, took the hard line that none should be allowed.[169] Hay's position became so uncomfortable that he offered his resignation, but the president declined to accept it.[170] Evidently the main reason for the American refusal was that the members of its tribunal wanted to leave England in October so as to be back in the United States for the approaching sessions of Congress – a revealing indication, no doubt, of the "judiciality" of Roosevelt's appointments.[171]

While the preparation of the cases was in progress, Roosevelt issued a barrage of letters, statements, and instructions which left no doubt about his own stand. On 25 March 1903, for example, he sent "personal and confidential" instructions to the three American commissioners on the tribunal, in which he described the Canadian claims as untenable and the Canadian position as far from judicial. He also insisted that the question of Canadian ownership of salt water harbours should not be open for discussion. In rather contradictory fashion, however, he said:

> You will of course impartially judge the questions that come before you for decision.…There is entire room for discussion and judicial and impartial agreement as to the exact boundary in any given locality.… In the principle involved there will of course be no compromise.[172]

On 25 July, Roosevelt wrote a letter to Justice Oliver Wendell Holmes of the US Supreme Court, who was in England at the time, saying that although he wished to make one last effort to reach a settlement through the tribunal, he wanted it distinctly understood that if there was disagreement, he would get Congress to give him authority "to run the line as we claim it, by our own people, without any further regard to the attitude of England and Canada." Since he also made clear that Holmes was "entirely at liberty" to pass the information on to Colonial Secretary Joseph Chamberlain, the judge took this extraordinary step.[173] On 26 September, he wrote in similar vein to Henry White, Secretary of the American embassy in London, and suggested that White impart its contents to Prime Minister Balfour.[174] The president also asserted his willingness to resort to force of arms, and in a letter to Senator George Turner, he remarked that in case of disagreement he was ready to "send a brigade of American regulars up to Skagway and take possession of the disputed territory and hold it by all the power and force of the United States."[175] There can be little doubt, as Philip Jessup remarks, that the British government was made thoroughly aware of the Rooseveltian viewpoint.[176]

In this general atmosphere of anxiety, suspicion, and antagonism, which fortunately did not seem to affect the proceedings themselves, the tribunal met for the first time at the Foreign

Office in London on 3 September 1903. On the motion of Elihu Root, Lord Alverstone was unanimously elected president of the tribunal, and it was agreed that oral arguments would begin on 15 September and continue thereafter on weekdays, Monday through Friday, until finished. Finlay, Robinson, and Carson spoke for the British-Canadian side and Watson, Taylor, and Dickinson for the American side, in each case in the order just given, with the first group having the first, third, and fifth places and the other the second, fourth, and sixth. The printed cases, counter cases, and arguments had been prepared with great care and in great detail, considering the limited amount of time available, and the oral arguments, although unequal as to length and also as to merit, developed the main issues of the controversy thoroughly. The oral argument ended on 8 October, and the decision of the tribunal was handed down on 20 October.

The printed materials and the oral arguments all devoted considerable attention to the historical background of the case and other relevant or supporting information, but necessarily the major concentration was placed upon the seven specific questions which the tribunal was called upon to answer. It may be convenient here also to concentrate upon these seven questions, which in summary were handled as follows.

On the first question, regarding the beginning point of the line, there was virtual argument and consequently little discussion. Article 3 of the 1825 treaty had identified "the southernmost point of the island called Prince of Wales Island" as the spot where the line should begin. As the British case observed, the United States had once attempted to apply this description to Wales Island at the outlet of Portland Channel but had abandoned the attempt, and both sides now accepted the much larger Prince of Wales Island north of Dixon Entrance. A further point of confusion, regarding the choice of the beginning point from two promontories, was eliminated without much difficulty. The southern extremity of Prince of Wales Island was actually Cape Chacon, while Cape Muzon (although a short distance further south) was the southern tip of nearby Dall Island. The British, however, were willing to admit that neither Captain George Vancouver, who surveyed the island in 1793, nor the negotiations in 1825, realized that Dall Island was separated from Prince of Wales Island, and thus they conceded that the more southerly Cape Muzon was the legitimate beginning point according to the intent of the treaty.[177]

The second question, regarding the identity of Portland Canal, caused more disagreement within the tribunal than any other – to such an extent that in the end the Canadian members refused to sign the award. The British-Canadian side argued that the true Portland Canal was the one that had been surveyed and given this name by Captain Vancouver in 1793 and that his identification of it had been known and used by the negotiators who made the treaty of 1825. They claimed that Vancouver himself had identified it as the long passage that extended all the way from its upper end close to 56° N latitude to open water, passing north of Pearse, Wales, Sitklan, and Kannaghunut Islands. Thus these islands were British territory. In making this claim, they relied heavily upon a statement in Vancouver's own narrative, where he referred to this passage as "that arm of the sea, whose examination had occupied our time from the 27th of the preceding to the 2d. of this month … which, in honor of the noble family of Bentinck, I named Portland's Canal."[178] Their contention was strongly supported by this and other evidence, and the other side did not question that Vancouver's route down the passage

had taken him north of all four islands. They also held that Vancouver's Observatory Inlet, just south of Portland Canal, extended all the way from its inner extremity to the main outlet south of Point Wales on Wales Island, and they cited as their main evidence another statement in Vancouver's narrative ("The west point of Observatory inlet I distinguished by calling it Point Wales").[179] They discounted the importance of post-1825 maps and interpretations, saying that these could not have had any bearing upon the negotiations leading up to the treaty in that year. They also maintained that the expressions "Portland Canal" and "Portland Channel," both of which had been used, had the same meaning.[180]

The American counsel agreed with the British so far as the upper part of Portland Canal was concerned, but they maintained that in its lower reaches it turned south between Pearse Island and Point Ramsden, and from there to open water was actually what the British called the lower part of Observatory Inlet. Thus a line drawn through the American "Portland Canal" would give the four islands in question to the United States. To the Americans, Observatory Inlet was only that part of the British Observatory Inlet which extended northeast of Point Ramsden. What was important, they said, was the Portland Canal of the negotiators in 1825, maintaining that these men must have seen Portland Canal either as the entire estuary from the mainland (including the four islands and also the upper part of the British Portland Canal) or simply as the upper part alone, with the large estuary being left unnamed. In either case, the boundary line should follow the main passage south of the four islands.[181] Senator Turner raised the further question as to whether Vancouver, in naming Portland Canal, considered its opening to be the narrow, island-filled passage north of Kannaghunut and Sitklan Islands, through which he sailed, or the shorter, broader, clearer, more navigable Tongass Passage between Sitklan and Wales Island, which he saw but did not sail through on his way out of Portland Canal.[182]

The answer to the third question, regarding the course the line should take from its beginning point to the entrance of Portland Canal, depended largely on the answer to the second. The British-Canadian counsel argued that the words "54 degrees 40 minutes" in Article 3 of the 1825 treaty were only intended to aid in identifying the beginning point at the southern extremity of Prince of Wales Island and were not intended to describe the course to be followed. The line between the two points in question should be the shortest and most direct possible, and since a straight line from Cape Muzon to the entrance of Portland Canal (as interpreted by the British) would cut off Cape Chacon and some small islands nearby, it would be necessary to draw two straight lines, one from Cape Muzon to Cape Chacon and another from Cape Chacon to the channel entrance.[183] The Americans at first simply asked that the line should run "in an easterly direction" to the middle of the entrance of what they conceived to be Portland Channel, but later they advanced the argument that the line was intended to run along the parallel of 54° 40', which would in fact take it very close to the point they wanted it to reach.[184]

The fourth question, regarding the point on the 56th parallel to which the line should be drawn from the head of Portland Channel, and the course this line should follow, resulted from the false assumption in the negotiations leading up to the treaty of 1825 that Portland Channel extended up to 65°. Actually only a few miles intervened, in a direct line, but the opposing views as to how the discrepancy in the treaty should be resolved differed radically.

The British argued "that the point in the 56th parallel to which the line should be drawn is the point from which it is possible to continue the line along the crest of the mountains situated parallel to the coast, and, accordingly, that the point at which the 56th parallel and the crest of the coast mountains coincide is the point in question."[185] Since they were contending for a very narrow, broken coastal strip, governed by a line of mountain crests very close to water's edge, they located the point in question far to the west of the head of Portland Canal, actually on Cleveland Peninsula to the northwest of Revillagigedo Island. The intervening distance was about seventy miles, and they proposed to bridge it by a straight line which would run only slightly north of due west. The Americans maintained that the logical interpretation of the treaty was that the line should be continued in the direction it was following along Portland Channel until it struck the 56th parallel, without immediate regard to mountains, and that it should then be taken directly to the appropriate mountain top in the coastal chain, which they, of course, located much farther inland than the British did. They held that the British line was not only illogical but in violation of the treaty, since it would cross salt water and also a small island north of Revillagigedo Island.[186]

The fifth question was long and involved, but in essence it amounted to whether it was the intention and meaning of the 1825 convention that Russia should have a continuous strip of coast on the mainland, not more than ten marine leagues in width, separating the British possessions from salt water. This was clearly the most important question put to the tribunal, and the outcome of the entire controversy depended to a large extent on its answer. (The sixth and seventh questions were obviously closely related to it and largely dependent upon it; hence most of the arguments treated the three together, with most emphasis falling upon the fifth.)

The British-Canadian side argued that the answer to the fifth question should be in the negative. They held that the words "ocean" and "coast" as used in the treaty of 1825 in reference to the boundary must refer to the same line, since where one ends the other begins. These words could not have been intended to apply to the water and land of the deep inlets, however, so the boundary line must cut across these inlets, making everything on the inner side British. It would be impossible to draw a ten-marine-league line parallel to all the windings and indentions at the edge of tide water or salt water; on the other hand, it would be quite possible to draw it parallel to the "general coast," and since the possible rather than the impossible was contemplated, the line should be drawn in this fashion, cutting across both deep inlets and long promontories. This would admittedly have left Russia with a narrow, broken strip, while Britain would

> have access to salt water in a number of places. However, the only difficulty in accepting this lay in reading into the treaty a controlling principle that British territory should at no point touch salt water, and this principle was nowhere stated in the treaty. The establishment of the *lisière* had nothing to do with British access to and use of the sea; what Russia wanted was to stop Britain from having liberty to settle and trade near her own establishments on the islands. Russia herself had no settlements on the mainland in this region and was not in possession of it, and in fact had only Sitka as a genuine possession on the adjacent

> islands. Maps and documents had no value insofar as they misrepresented or contradicted the treaty; neither had later American acts of possession and administration insofar as they were done in the face of Canadian protests or while the countries were at issue on the question. Canada had protested certain American action, but could not be held responsible for not protesting others of which she had known nothing. Canadian admissions of American possession could not be taken also as admissions that mere possession precluded questions of right.[187]

The American side argued that the fifth question should be answered in the affirmative: that the 1825 convention was intended to give, and that it had given, a continuous strip of coast on the mainland to Russia which shut off the British territories from salt water. They maintained that Russia's primary object in the negotiations leading up to the treaty had been to secure such a strip, that Britain in the end had agreed that she should have it, and that the agreement had been written into the treaty and clearly understood on both sides. In purchasing Alaska in 1867 and acquiring all Russian rights therein, the United States had relied upon this interpretation of the treaty; both Russia before 1867, and the United States for fully thirty years afterwards, had acted under the assumption that they had full sovereignty over an unbroken coastal strip, without any formal protest of objection from Great Britain. On the contrary, British and Canadian official acts, declarations, and publications after 1825 consistently demonstrated their acceptance and recognition of first Russian and then American title, and the American case and counsel pointed to the implications in this direction of episodes such as the *Dryad* affair, the lease of the *lisière* by the HBC, the Peter Martin affair, and the Hunter survey. Governments, geographers, cartographers, and historians, including British and Canadian, had all given either implicit or explicit endorsement to the American contention, which was fortified by substantial and continuous measures of occupation and administration. Although American officials had become aware of the Canadian challenge, notably as a result of the Dall-Dawson discussions in 1888, the American government had received no distinct, official announcement of any British claim at variance with the concept of an unbroken *lisière* until 3 August 1898, on the eve of the meeting of the joint high commission. On the subject of the coastline,

> there are but two possible coast lines known to international law. One is the physical coast line traced by the hand of nature, where the salt water touches the land, which exists for the purpose of boundary: the second is the political coast line – that invisible thing superimposed upon the physical coast by the operation of law, which exists for the purpose of jurisdiction.[188]

In this case, there was already a political coastline, which lay outside the archipelago, so there could not possibly be a second political coast lying behind it. In any event, the coastline of relevance here was the physical coastline, where land and salt water met, and there could be no such thing as a general trend of the physical coastline. "Ocean" is to be considered as analogous to "man" in that each word comprehends not only the main body but also the arms or limbs.[189]

The British-Canadian side pointed out that the sixth question had to be answered only if two conditions were fulfilled: (a) that the fifth question had been answered in the negative and (b) that the summit of the mountains in question proved to be in some places more than ten marine leagues from the coast. Since they requested the first and anticipated the second, they took the view that the sixth question required an answer. It had been badly framed, and its wording gave everyone concerned a certain amount of difficulty, but according to their interpretation the alternatives it posed in Parts 1 and 2(a) were essentially the same, and thus there were really three alternatives: 1 and 2(a) together, or 2(b), or 2(c). That is to say, if the above two conditions were fulfilled, the width of the *lisière* could be measure from the line of the general direction of the mainland coast (1 and 2[a]), or from the line separating the waters of the ocean from the territorial waters of Russia (2[b]), or from the heads of the inlets (2[c]). They held, of course, that the measurement should be taken from the line of the general direction of the mainland coast according to the first alternative, and thus the upper part of the deeper inlets would be British. In cases where the line of mountains cut across the inlets, the waters inside this mark would also be British.[190]

Since the Americans argued that the fifth question should be answered in the affirmative, it follows that according to their view the sixth question did not require an answer. But if the tribunal should decide against them on the fifth question, the sixth had to be answered, and they held that the width of the *lisière* should be measured from the heads of the inlets – in which case the result would be approximately the same as if they had won the answer to the fifth. They maintained that a boundary line placed according to the British contention would be in direct conflict with the plain intent and meaning of the treaty of 1825 and that it would be utterly unreasonable to suppose that the Russians had conceded such a line to the British, since it would have deprived them of practically every safe harbour and anchorage on the mainland coast.[191]

On the seventh question, of the existence and identity of mountains forming the eastern boundary, the British-Canadian side contended that there were such mountains which fulfilled the requirements of the treaty and that they lay parallel to the general coast all the way along the *lisière* north of 56°. These mountains were to constitute the boundary within the ten-marine-league distance from the coast, and this distance was to be invoked only as a limit to mark the maximum possible breadth of the strip when the mountain chain went beyond it or ceased altogether. It was not necessary that this mountain chain should be completely continuous and unbroken; on the contrary, the line it made could continue across rivers, valleys, and inlets. The expression "la crête des montagnes" or "the summit of the mountains" in the 1825 treaty meant the tops of the mountains adjacent to the sea; the best evidence of this was that although Britain had suggested a line along "the base of the mountains nearest the sea," at Russian insistence the line was moved to the summit of these same mountains. Thus the strip would be very narrow throughout most of its length. The line would connect the summits of appropriate mountains next to the coast, and although it could not be argued that there was anything definite about the choice of such mountains, nevertheless the treaty clearly meant that this was the way the line should be drawn.[192]

The Americans argued that the contracting parties in 1825 intended that the width of the *lisière* should be consistently ten marine

leagues measured from tide water, unless within that distance there was wholly or in part a continuous range of mountains extending the full length of the strip. The negotiators had believed that such a range existed, but in fact it did not, and nothing could be distinguished beyond a veritable sea of mountains. Thus ten marine leagues, rather than an imaginary range of mountains, became the controlling feature and should be applied throughout. They maintained that the British-Canadian side was mistaken in translating "la crête des montagnes" to signify the tips of individual mountains; rather it signified a continuous mountain ridge, which also was non-existent. Therefore the proposal to form the boundary line by connecting arbitrarily selected mountain tops was invalid. The other side was also mistaken in assuming that the mountain range nearest the sea, if one existed, should be taken. What was contemplated in 1825 was a principal range farther from the coast, as depicted on the maps of the time.[193]

Running through the case, and recurring continually, was the question as to whether Britain (and then Canada) had understood and accepted the concept of the unbroken *lisière* during the approximately sixty years before it began to emerge clearly as a major issue – and, more specifically, the precise point in time when they gave definite and formal notice that they disputed it. As noted above in my comments on the fifth question, the British-Canadian side attempted to establish that they had made clear their own point of view about the *lisière* and had protested against what they regarded as unwarranted American occupation of it. They referred particularly to such matters as Joseph Hunter's survey of the boundary at the Stikine River in 1877, working from "the general direction of the coast";[194] the British government's protest in 1887 regarding Schwatka's unauthorized fixing of the boundary during his 1883 reconnaissance;[195] Dawson's firm expression of opinion about the coastal strip during his discussions with Dall in 1888;[196] the British protest over the projected construction by Americans of a trail from Lynn Canal over the White Pass in 1888;[197] the convention of 1892 which dealt with an "existing boundary" that required only "permanent delimitation";[198] and Lord Salisbury's dispatch of 19 July 1898, which stated clearly the British view that the provisional boundary which had been agreed upon at the head of the Lynn Canal was more than one hundred miles from the ocean.[199] As evidence that the Canadian contention had come to the notice of official circles in the United States, they pointed out that the American president had laid the report of the 1887–88 conference (with some of the Dawson-Dall documents) before Congress[200] and that the Canadian claims had been referred to in Congress on at least two occasions. On 3 January 1896, Senator Watson C. Squire read a report to the Senate about the "pretensions of Canada" to canals, bays, and inlets, and the Canadian claim that the boundary line should "follow an alleged range of mountains arbitrarily crossing and cutting off the heads of bays and inlets, the ownership of which by the United States had hitherto been unquestionable."[201] On 12 February of the same year, Mahlon Pitney, a New Jersey representative, spoke in the House of Representatives regarding the Canadian claim that "there is a range of mountains very near to the coast of the mainland, and … a line should be run there near the coast, which would leave in British territory a large part of Taku Inlet, and a large part of Lynn Canal."[202]

The Americans contended that the evidence presented by their adversaries was of little or no validity. The point fixed by Hunter on the Stikine had clearly been accepted by the United

States as a temporary boundary only; the alleged "protest" over Schwatka's reconnaissance evidently had nothing to do with the coast and coastal waters, and if it had such purpose, this was "so artfully veiled as to make it entirely indiscernible"; the Dall-Dawson discussions were entirely unofficial and were clearly understood to be so by both sides; the "protest" over the projected White Pass trail was finally presented only as dealing with a rumour which the American government found so "vague and indefinite" that it did not take the matter seriously; the British had not put forward their new interpretation of the "existing boundary" at the 1892 conference, and there had been no real divergence of opinion on the subject. On the available evidence it was fair to conclude that the British and Canadians, like everyone else, had accepted the concept of the unbroken *lisière* for fully sixty years after the convention of 1825, and even when contrary theories were formulated following Cameron's 1886 report, they were put forward in such vague, variable, and unofficial fashion that the United States paid little heed to them. In fact, the first official notification the American government had that the continuous coastal strip was disputed came via Lord Salisbury's note of 19 July 1898, which was evidently communicated to them on 1 August following.[203]

The Americans were able to cite an impressive array of documents and statements by British and Canadian officials, some of them quite recent, which indicated not only their acceptance of the unbroken *lisière* and their failure to protest it but also their doubts and uncertainties about their own stand. For example, the Americans cited a remark by former Canadian Minister of the Interior David Mills in the House of Commons on 10 March 1879:

> Ultimately the points in dispute between the two Governments were disposed of in the Treaty of 1825, which gave to Russia a narrow strip of territory upon the coast south of Mount St. Elias, extending as far south as Portland Channel, upon the express condition that all the rivers flowing through this Russian territory should be open to navigation by Great Britain, for all purposes whatsoever.[204]

They interpreted this, of course, as an admission that there was a continuous strip of Russian territory through which the rivers flowed and which would make almost impossible the existence of British bays and inlets sandwiched between this strip and the Russian islands.

On 29 February 1892, Liberal Senator Richard William Scott, Leader of the Opposition in the Senate, spoke as follows in reference to the conference which had just been held in Washington:

> There was no dispute as to the boundary of Alaska…. It was settled in the treaty of 1825. The line was defined, but not marked out …. It is purely a question of survey. The terms of the treaty are not disputed…. I have never heard of any dispute as to the interpretation to be given to the treaty, because the treaty is plain and speaks for itself.[205]

On 11 February 1898, the following exchange took place in the House of Commons:

> *The Minister of the Interior (Mr. Sifton)*: I believe our contention is that Skagway and Dyea are really in

> Canadian territory, but as the United States have had undisputed possession of them for some time past, we are precluded from attempting to take possession of that territory.
>
> *Sir Charles Hibbert Tupper*: May I be excused for saying that I do not think the hon. Minister meant to say "undisputed possession."
>
> *The Minister of the Interior*: There have been no protests made. It must be taken as undisputed when there has been no protest made against the occupation of that territory by the United States.
>
> *Sir Charles Hibbert Tupper*: A claim, I suppose, was made and adhered to?
>
> *The Minister of the Interior*: There is nothing in the records to show that any protest has been made – an unfortunate thing for us, but it's a fact….[206]

A few days later, replying to a query about the reported intention of the American government to send two companies of troops to Dyea and Skagway, Prime Minister Laurier remarked:

> My hon. Friend is aware that, although this is disputed territory, it has been in the possession of the United States ever since they acquired this country from the Russian Government in 1867, and, so far as my information goes, I am not aware that any protest has ever been raised by any Government against the occupation of Dyea and Skagway by the United States….[207]

On 7 March of the same year, replying to Tupper's question about the choice of the Stikine River over Lynn Canal for a Yukon railway and anticipated American frustration of the plan, Laurier answered in rather confused, or confusing, fashion:

> But if we had adopted the route by the Lynn Canal, that is to say, had chosen to build a railway from Dyea by the Chilkat Pass up the waters of the Yukon, we would have to place the ocean terminus of the railway upon what is now American territory. I agree with the statement which has been made on the floor of this House, on more than one occasion, that Dyea, if the treaty is correctly interpreted, is in Canadian territory….
>
> Now I will not recriminate here; this is not the time nor the occasion for doing so; but so far as I am aware no protest has ever been entered against the occupation of Dyea by the American authorities; and when the American authorities are in possession of that strip of territory on the sea which has Dyea as its harbour, succeeding the possession of the Russians from time immemorial, it becomes manifest to everybody that at this moment we cannot dispute their possession, and that before their possession can be disputed, the question must be determined by a settlement of the question involved in the treaty. Under such circumstances, Dyea was practically in American territory – at all events, in possession of the Americans.[208]

These and other such statements resurrected by the Americans had a decidedly weakening effect on the Canadian case.

A reasonable summary of the issue would appear to be that the British and Canadians were right, at least for the period after about 1886, in maintaining that they had raised questions about the *lisière* and advanced views regarding it contrary to the American view. They were also right in insisting that they had made known these views to American officialdom. On the other hand, the Americans were right in maintaining that all evidence pointed to general and official British and Canadian acceptance of the unbroken *lisière* for about sixty years after the 1825 treaty and that although they had been made aware of contrary views in recent years, they had not received them in formal and official fashion until 1898. On this particular matter, the Americans had the better argument.

As the oral arguments proceeded, the irreconcilable differences of opinion within the tribunal itself became increasingly apparent. It was widely assumed that in all probability the three American members would vote solidly in favour of the United States' claims. This would mean that the questions would be decided by a four to two majority in favour of the United States, or left unsettled by a three to three tie, depending upon the decisions made by Lord Alverstone. He was not only the president of the tribunal but also the central figure in the manoeuvrings and negotiations behind the scenes which were directed mainly towards winning his vote.

President Roosevelt's crude efforts to dictate the course of action the American members of the tribunal should follow, and to browbeat the British government, have already been noted.[209] He continued in this vein during the oral arguments. On 3 and 5 October, he wrote letters to Root and Lodge, respectively, remarking in the one to Lodge: "The plain fact is that the British have no case whatsoever…. Rather than give up any essential, we should accept a disagreement…. We must not weaken on the points that are of serious importance."[210] Secretary Hay, although trying hard to keep the president within bounds,[211] also sent communiqués to Henry White and Ambassador Choate at the embassy in London to firm up their resolution on the major issue and to instruct them regarding American procedure. On 20 September, Hay wrote a letter to White, hoping that its contents "might indiscreetly percolate through to Balfour."[212] He stated in categorical terms that the disputed territory in the coastal strip was American and that if the tribunal failed to decide the question, the United States would not submit it to adjudication again but would simply continue to hold the land.[213] On 16 October, he sent word to Choate, in response to the ambassador's request for instructions, that if the tribunal granted the unbroken coastal strip to the United States, the president would accept a decision favourable to the other side on the Portland Canal.[214]

The three American commissioners kept in close contact with one another and also maintained a close liaison with Choate and White at the embassy so that they all presented a united American front. Lodge in particular sent frequent communiqués to Roosevelt to keep him informed about how the case was developing.[215] Henry White observed afterwards that on the occasions when it was necessary to convey some delicate intimations to Lord Alverstone about the stand he should take, "it was always Cabot who was deputed to do it. He has shown great tact and considerable diplomacy throughout."[216] Other accounts, including Lodge's own, do little to dispel the impression that he had an active and influential role in behind-the-scenes

proceedings.[217] On 2 October, having become very worried about the way the oral arguments were proceeding, he wrote anxiously to White, asking him to let Prime Minister Balfour know how serious the situation had become and suggesting that he try to get Balfour to speak or write to Alverstone in the following vein: "We know you are going to decide this question impartially on the law and facts. We, of course, should not think of seeking to influence your opinions on any point. But it seems right that you should know that a failure to reach a decision would be most unfortunate."[218] On the same day, Root also wrote to White suggesting that he see Balfour. Although he should avoid saying anything to the prime minister that "might be misconstrued as being in the nature of a threat," Root instructed that "the Foreign Office should know how serious the consequences of disagreement must necessarily be."[219] White spent the following weekend at Balfour's country estate, and in a long conversation on 4 October, the prime minister said that he attached far more importance to the agreement of the tribunal than to any other current problem. Two days afterwards, his confidential secretary told White that he had seen Alverstone twice.[220]

On 9 October, the day after the tribunal heard the last of the oral arguments, Lodge and Balfour had a meeting at White's home in which both spoke of their extreme anxiety over the consequences of failure to reach a settlement.[221] Five days later, when it appeared that the six commissioners were deadlocked, Choate had an interview with Lord Lansdowne and strongly pressed Roosevelt's views upon the foreign secretary. He left satisfied that Lansdowne and Balfour would emphasize to Alverstone the need for a settlement. According to Choate's account, he and Lansdowne reached the amazing agreement that if the commissioners failed to settle the question of the boundary line, they would undertake to do it themselves.[222]

The foregoing shows the nature and extent of American pressure with sufficient clarity. What about Canadian? From the start it seemed apparent, at least in the American view, that the Canadians would adhere united and stubbornly to their own contention and would use all possible means to avoid defeat. Lodge wrote to Roosevelt that the Canadians were so "perfectly stupid" that they could not see that "a disagreement deprives them of their only chance to get out of the matter creditably";[223] in his later recollections, he remarked that "the two Canadian representatives would yield absolutely nothing on any point" and "there was no possibility of any agreement whatever between the Canadians, who would assent to nothing, and the American commissioners."[224] The Canadians were "filling the newspapers with articles of the most violent kind, threatening England with all sorts of things if the decision should go against Canada," and England was "so afraid of Canada" that the pressure might be effective.[225] In a letter to White, Secretary Hay remarked, "I see the Canadians are clamoring that he [i.e., Alverstone] shall decide not according to the facts, but 'in view of the imperial interests involved.'"[226] As the case proceeded, the American commissioners reported Alverstone's complaints to them about the Canadian pressure being exerted upon him.[227] According to Lodge, Alverstone admitted "that he was in a very trying and disagreeable position; that the Canadians were putting every sort of pressure and making every kind of appeal to him."[228]

These reports emanated from American sources, of course, and it is conceivable that they could have been distorted, or exaggerated, or inaccurate in some degree. But in the final stages, if not before, Canadian pressure from

high political authorities became as blatant and uninhibited as American. On 7 October, Sifton cabled Laurier from London:

> I think that Chief Justice intends to join Americans deciding in such a way as to defeat us on every point. We all think that Chief Justice's intentions are unjustifiable, and due to predetermination to avoid trouble with United States. Jetté and Aylesworth are much exasperated, and considering withdrawing from Commission.[229]

Laurier replied:

> Our Commissioners must not withdraw. If they cannot get our full rights let them put up a bitter fight for our contention on Portland Canal, which is beyond doubt: that point must be decided in Canada's favor. Shame Chief Justice and carry that point. If we are thrown over by Chief Justice, he will give the last blow to British diplomacy in Canada. He should be plainly told this by our Commissioners.[230]

Any assumption or recognition here of impartiality or judiciality on the part of the Canadian commissioners would be difficult to detect. The same tendency to identify them with the Canadian point of view, and to instruct them, is evident in a later exchange between the same two leaders. On 17 October, after the tribunal had made its decisions but before the award had been made public, Sifton sent another cable to Laurier:

> Chief Justice has agreed with American Commissioners. Their decision will be to give us Wales and Pearse Islands, but give Americans two islands alongside, namely, Kanaghannut [*sic*] and Sitklan which command entrance to canal and destroy strategic value Wales and Pearse. Remainder of line substantially as contended for by Americans, except that it follows watershed at White Pass and Chilkoot. Our Commissioners strongly dissent. Decision likely to be Tuesday next. I regard it as wholly indefensible. What is your view? Course of discussion between Commissioners has greatly exasperated our Commissioners who consider matter as pre-arranged.

Laurier replied by cable the following day:

> Concession to Americans of Kanaghannut [*sic*] and Sitklan cannot be justified on any consideration of treaty. It is one of those concessions which have made British diplomacy odious to Canadian people, and it will have most lamentable effect. Our Commissioners ought to protest in most vigorous terms.[231]

The Canadian commissioners did protest, publicly, "in most vigorous terms," but how much Laurier's message might have had to do with their protest is uncertain.

Lord Alverstone, the key figure in the proceedings, was under severe and conflicting pressures from literally all sides – from the American and Canadian members of the tribunal itself, from various external American and Canadian influences including politicians and

newspapers, and from his own government. In the circumstances, it would have been almost miraculous if he had not reacted to the stresses and strains in some fashion. Nevertheless, his conduct of the oral arguments appears to have been consistently impartial, open-minded, courteous, and capable; anyone reading the lengthy record of the hearings cannot help but be impressed by the quality of his performance. The charge that has been most frequently levelled against him is that he permitted himself to become wrapped up in the bargaining, manoeuvring, and wheeling and dealing that went on behind the scenes and that he abandoned his assigned role as impartial judge to become a sort of umpire or conciliator between two quarrelling groups, with the purpose of securing a negotiated or compromise agreement rather than rendering his own judicial decision. A leading Canadian commentator has said that he was revealed "not as the inflexible judge but as the adroit and pliable adjuster of difficulties."[232] The evidence certainly gives some support to the accusation, but, giving full consideration to the situation in which he found himself, Lord Alverstone was more sinned against than sinning.

On 13 September, shortly before the oral arguments began, Alverstone asked Joseph Pope confidentially if he "thought Canada would be satisfied if we could get Wales and Pearse Islands and a mountain line. I said that I feared not. He asked which would they prefer that or an absolute draw – 3 and 3 all round. I said I thought the latter. Personally I would greatly prefer the former, which I thought was all we could expect, but I added people were as unreasonable in Canada as elsewhere and that the inlets were the question." This conversation occurred during a weekend visit, and afterwards Pope wrote of it: "The position, at times, was most embarrassing, and Lord Alverstone very improperly took advantage of old personal friendship to put to me questions he should not have asked…. I found when I got back to town that Lord Alverstone had been talking to others besides myself, and that his views as to the ownership of the heads of inlets were more or less known."[233]

Senator Lodge said in his *Memoir* that Alverstone told him on the first day of the oral arguments that "of course the oral arguments may entirely change my views, but on the cases as presented to us by the agents, Canada has no case…. You understand that this is entirely subject to change, which may come from hearing the oral arguments.[234] Henry White wrote to Secretary Hay on September 19 that "Alverstone is getting daily into closer personal touch with Cabot and Root and has already spoken quite freely to them…. There seems to be unanimity in thinking the Canadians have a good case upon the Portland Canal or channel, and Alverstone has intimated that he is with us on the main question."[235] On the same day, he wrote a similar message to President Roosevelt.[236] The frequent communiqués of Lodge suggest Alverstone's willingness to negotiate. On 24 September, Lodge wrote to Roosevelt that Alverstone had told him he felt bound to

> hold that the line goes round the heads of the inlets, which is, if course, the main contention. He takes very decisively the British view on the Portland Canal. He wants to answer question 7, however, by picking out a series of mountains which will reduce the strip running around the heads of all the inlets to as narrow boundaries possible, his idea being, I presume, to try to let the Canadians down as easily as possible in this way, after having decided against them on the main point.[237]

On 2 October, Lodge reported to White that Alverstone had told him he was "nearer than ever to our view of question 7, while he is as firm as ever on his main contention of the line going round the head of the inlets which is involved in the reply to question 5."[238]

It is understandable that the members of the tribunal would exchange opinions among themselves, but one gets the impression of a good deal of loose and uninhibited communication on Alverstone's part. This is difficult to reconcile with his own claim (in a cable to Laurier on October 13) of complete circumspection and silence in the matter. On 12 October, Adam C. Bell of Pictou asked in the House of Commons in Ottawa for information about a report in the press that a majority of the Alaska commission were about to give judgment against the Canadian contention. "It is understood that Great Britain's representative on the commission, Lord Alverstone, has privately intimated to diplomatic and colonial office officials that he is convinced that a stronger case is made out by the United States, and that he intends to give judgment accordingly," Bell noted.[239] A cable was promptly sent to London, and Laurier read Alverstone's reply in the Commons on 13 October: "There is not the slightest foundation for statement attributed to me…. I have made no communication of any kind to any diplomatic or colonial officials, or to any person respecting the case. The report is an absolute fabrication."[240] Robert Laird Borden asked on 12 October about a somewhat similar indiscretion attributed to Aylesworth, but Laurier declined to give any credence to the report and apparently no inquiry was made. Neither, apparently, did Aylesworth issue any denial.[241]

The six members of the tribunal carried on their deliberations after the oral arguments ended on 8 October, in the midst of all this speculation, rumour, pressure, and intrigue, and obviously contributed a good deal themselves to the general atmosphere of anxiety and uncertainty. By 17 October, the main decisions had been made, and as noted Sifton sent word of them to Laurier by cable. On 20 October, the award was formally pronounced, the substantive part of it being as follows:

> In answer to the 1st question –
>
> The Tribunal unanimously agrees that the point of commencement of the line is Cape Muzon.
>
> In answer to the 2nd question –
>
> The Tribunal unanimously agrees that the Portland Channel is the channel which runs from about 55° 56' north latitude, and passes to the north of Pearse and Wales Islands.
>
> A majority of the Tribunal, that is to say, Lord Alverstone, Mr. Root, Mr. Lodge, and Mr. Turner, decides that the Portland Channel, after passing to the north of Wales Island, is the channel between Wales Island and Sitklan Island, called Tongass [Passage]. The Portland Channel above mentioned is marked throughout its length by a dotted red line from the point B to the point marked C on the map signed in duplicate by the Members of the Tribunal at the time of signing their decision.
>
> In answer to the 3rd question –
>
> A majority of the Tribunal, that is to say, Lord Alverstone, Mr. Root, Mr. Lodge, and Mr. Turner, decides that the course of the line from the point of commencement to the entrance to Portland Channel is the

line marked AB in red on the aforesaid map.

In answer to the 4th question –

A majority of the Tribunal, that is to say, Lord Alverstone, Mr. Root, Mr. Lodge, and Mr. Turner, decides that the point on the 56th parallel of latitude marked D on the aforesaid map, and the course which the line should follow is drawn from C to D on the aforesaid map.

In answer to the 5th question –

A majority of the Tribunal, that is to say, Lord Alverstone, Mr. Root, Mr. Lodge, and Mr. Turner, decided that the answer to the above question is in the affirmative.

Question 5 having been answered in the affirmative, question 6 requires no answer.

In answer to the 7th question –

A majority of the Tribunal, that is to say, Lord Alverstone, Mr. Root, Mr. Lodge, and Mr. Turner, decides that the mountains marked S on the aforesaid map are the mountains referred to as situated parallel to the coast on that part of the coast where such mountains marked S are situated, and that between the points marked P (mountain marked S, 8, 000) on the north, and the point marked T (mountain marked S, 7, 7950), in the absence of further survey, the evidence is not sufficient to enable to Tribunal to say which are the mountains parallel to the coast within the meaning of the Treaty.[242]

In essence the award amounted to this. The six commissioners accepted unanimously the point of commencement that both sides had argued for in Question 1, there being no serious controversy here. They also accepted unanimously the British contention for Portland Channel, through most of its length, and of Pearse and Wales Islands, in Question 2, this involving a rejection by the three American commissioners of the American claim. In all other cases, Lord Alverstone joined with the three Americans to outvote the two Canadians. The answers to Questions 3 and 7 did not give decisive victory to either side and might be termed compromises. The answer to what was left of Question 2 (the outlet of Portland Channel and the ownership of Sitklan and Kannaghunut Islands) and to Questions 4, 5, and 6 constituted clear-cut American victories.

Aylesworth and Jetté were so displeased with the outcome of the tribunal, especially with what they regarded as the non-judicial division of the four islands at the entrance of Portland Channel and selection of the mountain line, that they refused to sign the award. They also wrote strongly worded dissenting opinions and issued public statements justifying their stand. Alverstone and the American commissioners also wrote their own opinions: Alverstone individually, the Americans as a group.

Aylesworth was bitterly critical of Lord Alverstone for his abandonment of his earlier view that the British contention regarding Portland Channel was entirely correct and the four disputed islands should thus all be Canadian, and for his acceptance of the American demand that Tongass Passage should be named the entrance of Portland Channel, thus making Sitklan and Kannaghunut Islands American territory. This, Aylesworth said, "is no decision upon judicial

principles; it is a mere compromise dividing the field between two contestants…. nothing less than a grotesque travesty of justice."[243] He disputed also the majority decisions on Questions 5, 6, and 7. In his comments, he adhered rigidly to the Canadian claims that (1) the 1825 convention had not been designed to give Russia a continuous strip of coast on the mainland, (2) the strip should be measured from the general direction of the mainland coast and thus would be broken by the inlets, and (3) the mountain line should run along the tops of the mountains nearest the sea.

Jetté's opinion consisted largely of lengthy and rather pointless repetition of the 1825 treaty, the convention of 24 January 1903, the arguments of the two sides, and the award. In essence, he took essentially the same stand on the specific questions as Aylesworth. Regarding the majority decision to divide the four islands, he found that "it was totally unsupported either by argument or authority, and was, moreover, illogical."[244] On Question 7, he observed correctly that the decision of the majority to choose certain mountains was adverse to the American contention that the treaty called for a continuous chain of mountains and that no such chain was identifiable. He could not accept the arbitrary choice of a mountain line which "although it does not concede all the territory they claimed to the United States, nevertheless deprives Canada of the greater part of that to which she was entitled."[245]

The American commissioners wrote joint opinions on the second and fifth questions. On Question 2, they explained their rejection of both the American contention that Portland Channel lay south of all four disputed islands and the British that it lay north of them and their opting for Tongass Passage as the "true entrance" of Portland Channel so that the islands were divided. Their explanation followed essentially the line of reasoning that Senator Turner had indicated in his remarks before the tribunal.[246] In accounting for their acceptance of the American argument on the fifth question, that is, that the 1825 treaty conceded a continuous Russian mainland strip running around the heads of the inlets, they did little more than reiterate the main points made by the American side during the case, with emphasis upon the factors of original understanding and long, unchallenged possession.[247]

The two opinions written by Lord Alverstone were also concerned with the second and fifth questions. He reached the same conclusions as the American commissioners, but his written comments suggest a different line of thought in each case. His approach to the second question is in fact difficult to detect if one has only his written opinion for guidance. For the fifth question, it is clear that while he concurred with the Americans in his emphasis upon the importance of the original intent of the 1825 treaty, he was much less impressed than they were with the significance of such things as subsequent actions and mapmakers' interpretations.[248]

Alverstone's reversal on Portland Channel and the four islands, and his questionable behaviour in connection with this change, provoked Canadian resentment more than anything else and precipitated the bitter aftermath that followed. During the course of the oral arguments, he had made no secret of his conviction that the British contention regarding Portland Channel was the correct one and thus the four islands should be Canadian; his memorandum on the subject, which he apparently read to the other commissioners on 12 October,[249] embodied this view. Yet, when the vote was taken, he joined with the three Americans to identify Tongass Passage as the entrance of Portland Channel, thus conceding

the two small, outer islands to the United States. The usual explanation for this odd turnabout is that the American commissioners, finding the American argument on Portland Channel untenable and Alverstone stubbornly determined to deny them as wide a *lisière* as they wanted, demanded the two outer islands as compensation, and Alverstone's surrender on this point gave the resulting compromise arrangement. He wrote a memorandum afterwards in which he said that one of the American commissioners told him that if the islands were not divided, they would not sign the award, and he defended his action on grounds that it was necessary and the two tiny islands were of no value anyway.[250]

Alverstone was subjected to severe public criticism by the two Canadian commissioners and by many senior Canadian officials, including Sifton and Laurier, for his compromises on the four islands and the mountain line. Aylesworth and Jetté took the extraordinary step of issuing a public statement criticizing the award and justifying their refusal to sign it, in which they said:

> We do not consider the finding of the tribunal as to the islands at the entrance of Portland Channel or as to the mountain line a judicial one, and we have therefore declined to be parties to the award…. We have been compelled to witness the sacrifice of the interests of Canada, powerless to prevent it, though satisfied that the course the majority determined to pursue in respect to the matters above specially referred to, ignored the just rights of Canada.[251]

Hurt and angered by the storm of criticism that descended upon him, in which the Canadian press enthusiastically joined, Alverstone wrote letters to Jetté, Aylesworth, Laurier, and Sifton in which he defended the decisions he had made. The replies he received showed their rejection of his attempts at self-justification, and when Laurier expressed frankly his view that the decision on Portland Channel and the two islands could not be supported on judicial grounds, Alverstone wrote back, "I desire to state most emphatically that the decisions, whether they were right or wrong, were judicial and founded on no other considerations. I alone am responsible for them."[252] He also commented publicly on the matter in a speech at a dinner in London. "If when any kind of arbitration is set up, they don't want a decision based on the law and the evidence," he proclaimed, "they must not put a British judge on the commission."[253] In his memoirs, Alverstone commented in a general way upon the case and still defended his impartiality:

> I came to the conclusion that I could not support the main contention of Canada as regarded the boundary, and acting purely in a judicial capacity, I was under the painful necessity of differing from my two Canadian colleagues…. I only came to this decision with the greatest reluctance, and nothing but a sense of my duty to my position influenced me. I mention this because my conduct in giving this decision was the subject of violent and unjust criticism on the part of some Canadians.[254]

In spite of Alverstone's protest, it seems beyond doubt that the decision on Portland Channel and the islands was a last-minute compromise that he made in the face of severe pressure from the American commissioners and perhaps from his own government. A few years afterwards,

Canadian lawyer John Skriving Ewart (a tireless advocate for Canadian independence), in a viciously worded article which according to one leading commentator has been considered "a classic work of legal reconstruction,"[255] put forward a strong argument that Alverstone's opinion espousing a division of the islands was in reality his earlier opinion advocating the award of all four to Canada, but slightly and illogically revised and generally inconsistent with the new conclusion. Ewart's basic argument ran thus: "With the change of one word in one clause; the omission of two words in another clause; and the interjection of one whole clause, *this second judgment of Lord Alverstone is really his first judgment*."[256] In spite of the vitriolic and polemical style of the article, Ewart's argument, which he set forth in minute detail, certainly had a ring of authenticity. It was shown to be essentially sound in 1914 when Frederick Coate Wade, one of the Canadian counsels in the case, published (for the first time according to his own claim) Alverstone's earlier opinion, which conformed essentially to the reconstruction Ewart had made.[257] Recalling a comment in Aylesworth's opinion,[258] Ewart also charged that in identifying Portland Channel in his second judgment, Alverstone had at first written, "The channel which runs to the north of … the islands of Sitklan and Kannaghunut and issues into the Pacific between Wales and Sitklan Islands." Subsequently, he was permitted to eliminate the words "Sitklan and Kannaghunut" so that his award conformed with his second decision and with geographical possibility.[259] To reiterate, the opinion Alverstone finally gave was a hasty last-minute compromise, made in the face of severe pressure. There remains the possibility, of course, that it also represented a genuine change of view on his part, and thus it could have been based upon judicial considerations.

This brings up again the provocative question posed by Senator Turner during the oral argument as to whether Captain Vancouver, when naming Portland Channel, considered its opening to be the passage north of Kannaghunut and Sitklan Islands, out of which he sailed, or Tongass Passage between Sitklan and Wales Islands, which he saw but did not sail through when leaving Portland Channel.[260] The question appeared to embarrass both Sir Robert Finlay and Sir Edward Carson, who had obvious difficulty finding a satisfactory answer. Turner suggested that although it was quite clear Vancouver had gone out through the northern channel, there was no conclusive evidence as to which route he had taken on his return trip, and it was on the return trip that the name was given. He had not chosen the northern channel on his outward trip because it was the better one but simply because it was the direction he wanted to take, and in fact Tongass Passage was broader, clearer, and more navigable than the other one. The element of time might also have favoured his being opposite Tongass Passage when the channel was identified. Turner was thus able to cast at least a measure of doubt upon the British contention for the entrance of Portland Channel, and in the final decision, of course, the majority opted for Tongass Passage.

The matter is important because the choice of Tongass Passage gave Aylesworth his specific reason, according to his own statement, for refusing to sign the award. In his dissenting opinion he wrote, "It is a line of boundary which was never so much as suggested in the written Case of the United States, or by Counsel, during the oral argument before us. No intelligible reason for selecting it has been given in my hearing. No Memorandum in support of it has been presented by any member of the Tribunal." In a technical way he may have been

right, since the suggestion was put forward by a member of the Tribunal rather than of Counsel, and orally rather than on paper. Otherwise, the evidence is against him. Further on, he continued, "The sole question presented to us for decision on this branch of the case was whether the Portland Channel of the Treaty lay north of the four islands or south of the four, and until today it has been uniformly admitted by everybody that all four of these islands belonged, all together, either to Great Britain or to the United States."

Obviously both parts of this statement are incorrect. This was not the question presented to the tribunal, as a glance at the treaty will show. The precise wording of the question was simply, "What channel is the Portland Channel?" Aylesworth's concept of the possible alternative answers had obviously not been "uniformly admitted by everybody." It is difficult to understand how he could have made the above statements, because he was present and made comments on both occasions when Turner raised the issue.[261] Regrettably, Aylesworth's view of this aspect of the case has been widely and uncritically accepted by many Canadian writers. James White, for example, wrote in his *Boundary Disputes and Treaties* that "there was no evidence presented by either nation, nor can any be found, that would indicate that Portland Channel was ever considered as passing between Sitklan and Wales Islands, as decided by the tribunal."[262] Even Sir Joseph Pope, who was at the tribunal, took no note of Turner's suggestion: "At no stage of the proceedings was such a claim ever put forward by the American counsel. Nobody on either side ever suggested such a thing as a division of these four islands."[263] Ewart in his categorical fashion stated that Alverstone agreed to locate the channel entrance "at a place for which there was not a tittle of evidence, which the Americans had never claimed, and in favor of which American counsel had not advanced a single argument…. Division was never thought of or suggested by anybody until the compromise was agreed to."[264] After remarking elsewhere that "until that moment there had not been a suggestion that the line could possibly run anywhere but north or south of all four islands," Ewart adds the footnote that "Mr. Turner's interpolations at pages 77 to 79 do not affect the correctness of this assertion." Thus, having discovered the evidence that destroyed the point he was trying to establish, he blithely chose to ignore it.[265] Why the Canadians at the tribunal, especially Aylesworth, failed to give due consideration to this evidence in their savage criticism of this part of the award is a question. Their failure to do so undoubtedly had an unfortunate effect, because it gave rise to a popular Canadian folk-tradition about the division of the islands which is not entirely warranted by the facts.

In time, it became clear that the importance both sides then ascribed to Sitklan and Kannaghunut Islands was wholly imaginary. The two islands are practically valueless, strategically and otherwise. In his opinion, Aylesworth described them as being "of the utmost consequence, for they lie directly opposite to, and command the entrance to, the very important harbour of Port Simpson, British Columbia,"[266] which was then planned as the western terminus of the Grand Trunk Pacific Railway. Others took a similar view. As events transpired, however, the railway was diverted to Prince Rupert, the United States did not fortify the islands, and practically nothing happened to disturb their customary tranquility, isolation, and insignificance. As a matter of fact, word had been sent from Washington that the British contention as to Portland Channel could be conceded,[267] and it would thus appear that in demanding the two outer islands the

American commissioners were acting on their own. All told, the furor over Sitklan and Kannaghunut constitutes the silliest aspect of the entire case, and it is debatable who behaved the more discreditably in the affair: the American commissioners for insisting upon having them or the Canadian commissioners for raising such an outcry over not getting them.

The objections of the Canadian commissioners to the majority's decision fixing the mountain line were much more solidly grounded, and it is unfortunate that they did not concentrate more exclusively upon this aspect of the award. The selection of particular mountain peaks was necessarily quite arbitrary, and any number of alternatives could easily have been found. If the majority had stated frankly that in the absence of adequate information their aim was simply to make as equitable and just a placing of the line as was possible in the circumstances, their decision might have been less objectionable. Their categorical assertion that the mountains they chose *were* "the mountains referred to as situated parallel to the coast"[268] was sheer effrontery, and the fact that they could not complete their own line suggests strongly that the inadequacy of their knowledge about the part they could not locate extended in reality to the part they did locate. The line they chose made an almost equal division of the disputed territory between the Canadian and the American claims, but there would appear to be strong grounds for holding that a just division would have given Canada considerably more. Granting that the strip was intended to be unbroken, it is also clear that it was intended to be narrow. The best evidence of this is that when the Russians objected to the British proposal for a boundary following the base of the coast mountains because it might go right down to water's edge, they themselves proposed as a corrective a line following the tops of these same mountains.[269] As Sir Robert Finlay said in his argument, "You start from the margin of the sea, you go up to the summit of the mountains, and there you have got your *lisière*."[270]

Considering all the issues disputed during the case, about the most certain thing is that the convention of 1825 was intended to give Russia an unbroken strip of mainland coast and that, consequently, Question 5 as put to the tribunal required a positive answer. It is here, regrettably, that the performance of the two Canadian commissioners became most questionable. Virtually all other matters before the tribunal were genuine issues that required settlement, including the beginning point of the boundary line, the identity of Portland Channel, the course of the line from the beginning point to the entrance of Portland Channel and from the head of Portland Channel to the 56th parallel, the existence and location of the mountain range in the treaty, and the breadth and exact delimitation of the *lisière*. Unfortunately, most of them did not lend themselves to settlement in strictly judicial terms. But the matter of the unbroken coastal strip was not in reality a legitimate issue, and it would probably have been better if it had not been permitted to assume the status of one. The background of the case shows clearly that President Roosevelt was right in his contention that this was a trumped-up claim on Canada's part and if (in line with his view that it was not justiciable) he had refused to let it go before the tribunal, he would have given it no more than the treatment it deserved. This in no way excuses his behaviour after he had agreed to let it become part of the arbitration, but that is another matter.

The genesis of the "Coast Doctrine" upon which Canada relied is in itself surprising. In any such situation, a General Cameron is likely to make his appearance, bring forth an idea

that seems to fit the needs of the moment, and give it the aura of substance and legitimacy. What is truly remarkable, however, is the manner in which this peculiar notion permeated and infected thought, judgment, and policy in the higher echelons of Canadian officialdom and government, from George Mercer Dawson through to Clifford Sifton, until it became official in every sense of the word. Equally remarkable is that, although it was trumpeted loudly in public by leading figures, in private many of them were willing to concede that it lacked validity. There seems to be little doubt that Laurier and Joseph Pope, among others, realized that the Canadian claim to the inlets was invalid in a legal sense and that responsible British officials took the same view.[271] The invalidity of the Canadian contention has also been generally recognized by qualified Canadian authorities who have since written on the subject, although some seem to have made this admission more or less as an afterthought, following the familiar complaints about how badly Canada was treated. It is also worth reiterating, while speaking of aspects of the case which seem incomprehensible today, that the American W. H. Dall had pointed unerringly to some of the major flaws in Cameron's theory in his discussions with Dawson in 1888, and the details of these discussions were well known to the Canadian government. If more attention had been paid to his arguments, a good deal of unnecessary trouble might have been avoided.

H. George Classen, in his study of the Alaska boundary dispute, makes the following penetrating comment on the issue of the coastal strip, and in so doing shows effectively the foolishness of the Canadian claim:

> There is no doubt whatever that the United States was right when it claimed that the treaty had conceded to Russia, and thus to the United States, an unbroken strip of mainland coast from the mouth of Portland Channel to the 141st meridian. When the treaty-makers of 1825 spoke of "sinuosities of the coast" they meant just that; and when they spoke of the "coast" they meant the physical coast and not the abstract, artificial construct of the Canadian claim….
>
> To imply, as the Canadian claim did, that the map-makers had for over sixty years misinterpreted the Treaty of 1825 without being corrected by anyone; that Russia had bargained so tenaciously for the longest possible mainland strip only to leave in the hands of Britain every desirable harbour on that coast and to content itself with the useless promontories; that the Hudson's Bay Company expedition of 1834 was prepared laboriously to work its way up the Stikine in open boats lowered from the *Dryad* when the ship could have sailed freely up any inlet into British territory; that the treaty would make a special point of conceding to Britain the right to navigate the rivers without mentioning the "territorial" inlets – all this deserves only one description: it was absurd.[272]

Yet this is the interpretation of the treaty that the two Canadian commissioners, "sitting judicially, and sworn to so determine and answer the questions submitted,"[273] and with all the ascertainable facts before them, decided should be validated when they refused to join the majority in answering "Yes" to Question 5 – the most important issue before the tribunal. Is it not in order to ask, then, how impartial,

in actual fact, were our "impartial jurists of repute"? Or, if they meant to be impartial, how reputable was their judgment?

The same question may be pursued regarding their overall performance in the case and the award. The popular Canadian tradition has been that the American commissioners, under instructions from President Roosevelt, upheld the American claims with utmost rigidity from beginning to end, that Lord Alverstone thought only of a settlement and thus had no firm principles or views to uphold, and that the Canadian commissioners were the only ones to look at the case with firmly judicial and impartial eyes. The truth of the matter is considerably different. Alverstone was undoubtedly the most willing to compromise, but he also had the soundest and most impartial judicial appreciation of the case, and the final award was not greatly at variance with his frequently expressed opinion as to what it ought to be. Roosevelt had told the American commissioners that there should be no yielding on the principle of the *lisière*, but this was a view they should have taken on purely judicial grounds anyway. Otherwise, even though stubbornly pro-American in their attitude, they seem to have taken the posture that the remaining issues were open for adjudication.

Of all the questions in dispute, only two – the identity of the upper part of Portland Channel and the existence of the unbroken *lisière* – could be answered judicially and at the same time decisively. As the oral arguments clearly demonstrated, information was so imprecise and incomplete that clear-cut judicial answers were impossible to the other questions. That being the case, the only approach the tribunal could take to reach a decision, if it was to make one, was to search for the best answers that could be found in the existing circumstances, paying due heed to all relevant facts and evidence. This, in turn, might make inevitable certain elements of concession and compromise. The only alternative was to hand the dispute back to the respective governments for settlement at a political or diplomatic level. The tribunal could hardly have been blamed if it had done this, and it may well be censurable in some respects for not having done so. Looking at the award as given, however, the American commissioners in the end did concede a good deal, either by conviction or by compromise, on the issues concerning the identity of Portland Channel (Question 2), the line to Portland Channel (Question 3), the existence of a mountain line (Question 7), and the ten marine leagues and the width of the coastal strip (Questions 5 and 7). On the other hand, the Canadian commissioners yielded not one jot or title of the Canadian claims, but rather clung inflexibly to the Canadian case throughout, as if they were impervious to argument, evidence, or reason. Their refusal to compromise on judicial principle does them credit, insofar as this really accounts for their stand, but otherwise their stiff-necked, narrow-minded identification of a fair judgment with Canadian interests says little for their impartiality, or judicial perception, or both.

There was plenty of irresponsible and threatening talk on both sides of the 49th parallel during the affair, in both official and unofficial circles. Here again the Canadian tradition of self-righteousness is somewhat at variance with the facts. American intransigence, greed, belligerence, and bluff, insofar as they made themselves evident, were on the whole pretty well matched by Canadian, the main difference being that the United States was in a position to carry out its threats and Canada was not. This feature, real and dangerous at the time, was often discounted or ignored by angry Canadians. For example, Seymour Eugene Gourley

of Colchester proclaimed in the House of Commons in February 1902:

> What we want now is a full discussion in this House so that this ministry will know that the time has come when if they sacrifice one foot of Canada soil we will hang them as high as Haman. If it is necessary to fight the Yankees we will fight them within twenty-four hours, and after six months we will capture their capital and annex their country to Canada.[274]

When news of the award came, the same speaker lectured the House again in the same vein and had a little help:

> We are not a weak colony. Six millions of free people would beat the United States single-handed in the contest….
>
> *Mr. [Samuel] Hughes (Victoria)*: We beat them in 1812, when they were relatively forty times as populous as they are now.
>
> *Mr. Gourley*: Of course. And we could do it again.[275]

Perhaps, in retrospect, we should thank beneficent providence for the much-maligned Lord Alverstone.

Prime Minister Laurier, although expressing disappointment in the outcome of the case, was more concerned about the root problem of Canada's relationship with the Mother Country and its need for a greater measure of independence in foreign affairs:

> I have often regretted also that we have not in our own hands the treaty-making power, which would enable us to dispose of our own affairs…. But we have no such power, our hands are tied to a large extent owing to the fact of our connection – which has its benefits, but which has also its disadvantages….
>
> It is important that we should ask the British parliament for more extensive power, so that if ever we have to deal with matters of a similar nature again we shall deal with them in our own way, in our own fashion, according to the best light that we have.[276]

It was Henri Bourassa, however, who had been connected with the joint high commission in 1898 and had obviously made himself familiar with the historical background of the dispute, who in an able summary reduced the case to its most basic features and set them before the House:

> I think no other conclusion can be drawn by any unbiased mind than that it was clearly the intention of the parties that the strip of land should be uninterrupted, and that Great Britain would not have any right whatever to the inlets that penetrated the coast….
>
> Much has been said about the importance of these two little islands, Kannaghunut and Sitklan. As far as their intrinsic value is concerned, I think every body will agree that they are of no value whatever. To speak of their strategic value is to my mind going a little beyond the mark.[277]

Regarding the substance of the entire award, Canada might fairly have received somewhat more – perhaps the two tiny islands, certainly a larger share of the disputed *lisière*, possibly (because of what has been called a slip on Lord Alverstone's part) a little more territory in the Chilkat River region. Allegedly, in drawing the boundary here, Alverstone overlooked the *modus vivendi* line of 1899, and the American commissioners conveniently neglected to draw his attention to it.[278] The *modus vivendi* line was clearly understood to be provisional only, however, and since the commissioners were attempting to place the line along mountain tips, it is unlikely that Alverstone's oversight (if it was that) would have made any difference. In any case, all these additions would not have given Canada what she really wanted: an outlet or outlets to salt water. Canada's counsel at the tribunal, especially Sir Robert Finlay and Sir Edward Carson, did a magnificent job of presenting her case for the inlets, untenable as it was, in the most favourable light. It was a hopeless task. The only way she might have gained the desired access to tidal water would have been through a diplomatic arrangement of the sort that failed to materialize in 1899. It might have been much better if she had sought, through negotiation, a reasonable modification of an existing but disadvantageous situation, instead of pinning her hopes stubbornly on a spurious legal case.

As a final comment, it is obvious now, and should have been obvious then, that Canada's real grievance could not justly be laid at the door of the United States for what had happened since 1867, but rather concerned what had happened long before. In other words, the real fly in the ointment was the treaty of 1825. Britain, interested mainly in securing Russia's withdrawal from her extravagant pretensions in North Pacific waters, made the unnecessary concession on the mainland that led to all the trouble. Although the two were not logically related and should not have been associated, it is clear that Britain, anxious to gain the one, was not greatly disturbed about conceding the other, and thus let Russia make off with a large strip on the mainland to which she had no more claim than Britain had. If justice had been done, Russia would have received no compensation whatever for abandoning her extreme maritime claims, and the Alaskan coast would have been a separate issue. Here the pretensions were about equal: Britain had no establishments within about two hundred miles on the mainland; Russia had only one real post on the adjacent islands; and neither had established any permanent presence whatever in what became the disputed *lisière*. So far as the coast was concerned, both were starting practically from nothing. The British concession was particularly deplorable because, in spite of Russian arguments to the contrary, British ownership of the mainland coast would not in itself become ruinous to Russia's position on the islands, even if Russia had been clearly entitled to them. On the other hand, Russia's deliberate purpose in seeking a coastal strip was to bar forever British access to salt water in the region, frustrating British commerce and enterprise. Britain's abandonment of the issue becomes even more incomprehensible given that it was in a favourable strategic position to make larger demands in the region – and to back them up with naval force if the need arose. Ironically, if the HBC had had the initiative and foresight to establish even a single post on the upper Stikine River between 1821 and 1825, the entire outcome might have been changed. No doubt the dispatch of a British ship or two, from the many left idle after the end of the Napoleonic Wars, would have had an even more marked effect. Even without any such devious or threatening

devices (which would not, of course, have been in any way exceptional in the diplomacy of the time), a British diplomatic stance as firm and uncompromising as that of the Russians would in all probability have brought about a result more favourable to Britain – and ultimately to Canada. Here, in truth, was the real nucleus of all the trouble over the Alaska boundary.[279]