

On August 20, 2009, the Ontario Heritage Trust and the McDonalds Corners-Elphin Recreation & Arts unveiled a provincial plaque to commemorate the Rivers and Streams Act of 1884 in McDonalds Corners, Ontario.

The bilingual plaque reads as follows:

RIVERS AND STREAMS ACT OF 1884

In the 1870s, Boyd Caldwell and Peter McLaren both owned timber rights on the upper Mississippi River. McLaren built a dam and timber slide at High Falls and refused to let Caldwell use the slide. Caldwell appealed to the Liberal provincial government of Oliver Mowat, which passed the Rivers and Streams Act in 1881. This made it legal to use private improvements on a watercourse if compensation was paid to the owner. McLaren appealed to the courts and to the Conservative federal government of John A. Macdonald. Macdonald disallowed the act three times, to protect the rights of property holders. Mowat and Macdonald disagreed over provincial authority to legislate in matters of property rights, as granted at Confederation. The Judicial Committee of the Privy Council ultimately sided with Caldwell, and Mowat's government passed the Rivers and Streams Act again in 1884. This legal decision recognized that use of Canadian waterways could not be blocked by private interests and helped establish a fundamental principle in federal-provincial relations.

LOI DE 1884 SUR LES RIVIÈRES ET RUISSEAUX

Dans les années 1870, Boyd Caldwell et Peter McLaren possédaient tous deux des droits de coupe sur la partie supérieure de la rivière Mississippi. M. McLaren construisit un barrage et un chemin de schlitte à High Falls et refusa à M. Caldwell l'utilisation de ce chemin. M. Caldwell fit appel au gouvernement provincial libéral d'Oliver Mowat, lequel fit adopter la *Loi sur les rivières et ruisseaux* en 1881. Il était désormais légal d'utiliser les améliorations réalisées par un propriétaire privé sur un cours d'eau en contrepartie d'une rémunération versée audit propriétaire. M. McLaren porta l'affaire devant les tribunaux et devant le gouvernement fédéral conservateur de John A. Macdonald. M. Macdonald abrogea la Loi à trois reprises, afin de protéger les titulaires de droits de propriété. M. Mowat et M. Macdonald étaient en désaccord à propos de la compétence de la province à légiférer en matière de droits de propriété, droit pourtant prévu par le pacte confédératif. Le

Comité judiciaire du Conseil privé finit par se ranger du côté de M. Caldwell et le gouvernement de M. Mowat fit de nouveau adopter la *Loi sur les rivières et ruisseaux* en 1884. Cette décision judiciaire établit que l'utilisation des voies navigables canadiennes ne pourrait être entravée par des intérêts privés et contribua à l'établissement d'un principe fondamental dans les relations entre les gouvernements fédéral et provinciaux.

Historical background

It began as a dispute between two businessmen and ended with a legal decision that not only recognized the principle in Canada that use of waterways cannot be blocked by private interests, but also helped establish a fundamental principle in federal-provincial relations. Some of the details of the struggle between Peter McLaren and Boyd Caldwell come from accounts written years after the fact, but the political and legal struggle that followed the confrontation over the use of the Mississippi River is well documented.

The McLaren family arrived in the Lanark area shortly after the War of 1812, probably as part of a group of settlers from Glasgow who were supported in their move by the British government, and the Caldwell family arrived in 1821. The early settlers in the region were mostly Scots, and many were among a large group of weavers and spinners that had been displaced by mechanization in the British cloth industry. Often these settlers knew each other before emigrating. The lumber industry, which dominated the economy of the Ottawa River from the early 19th century until the early 20th century, was one of the few ways to make a living until farms were cleared from the virgin forest of large, mostly pine, trees. Boyd Caldwell and his brother Alexander went into the business as partners when Boyd was age 16 (1834 or 1835), cutting timber for export. Both did well, and in 1857, they dissolved the partnership, with Boyd keeping the timber rights that they held on the Mississippi River and Alexander those on the Clyde River.¹

John Gilles, another of the early Scottish settlers, built a lumber mill on the Clyde River near Lanark in 1840 and, probably in the mid-1850s, hired Peter McLaren as his foreman. He later made McLaren a partner in the business, which grew to include grist, oatmeal and carding mills. In the 1860s, the partners bought a small lumber mill in Carleton Place and constructed a very large mill in its place, which employed about 100 men. In 1874, McLaren bought out Gilles, and gained control of timber rights on the upper Mississippi.²

McLaren made improvements on the Mississippi and on tributaries of its upper reaches, Louse Creek and Buckshot Creek. These included dams to raise water levels, slides to send logs around the dams, booms to contain logs and the clearing of channels. He then indicated that he

would not allow others to use his improvements without his permission. The details of what followed vary between sources, but the basic story is the same. Apparently, in 1875, the firm of Buck and Stewart destroyed the boom at Rugged Chutes in getting their logs past Palmerston and cut a 20-foot gap in the dam that McLaren had built at High Falls. McLaren was not able to stop them since they had the help of 100 volunteers from nearby townships. The farmers and others who transported timber over the Mississippi River were very unhappy with McLaren's policy.³

The firm of Boyd Caldwell and Company (also given as Messrs. Caldwell and Son or Boyd Caldwell & Son) also had a large mill at Carleton Place and wanted to get their logs to market. Just how many confrontations occurred between employees of the two men is not clear. According to McLaren, Caldwell agreed to pay for the use of the slide at High Falls in 1878, but did not fulfill the bargain. In 1879, his men sent logs through on a Sunday, when no one was there to stop them. In 1880, when Caldwell again agreed to pay for the right to send logs down the slide at the High Falls dam, McLaren refused to grant him access. Caldwell indicated he would send his logs down anyway and McLaren applied to the Court of Chancery for an injunction to prevent Caldwell from using his improvements, which was granted. Caldwell then appealed to the Ontario Court of Appeals, which cancelled the injunction, and Caldwell sued for damages because he had been unable to get his logs by the dam. He was forced to close his mill temporarily because of a lack of logs.⁴

Following this confrontation, the two men used the courts and their political connections in an attempt to prevail. Later in 1880, the Court of Chancery⁵ heard the case, brought by McLaren, and ruled in his favour. The issue was based on a simple question: were rivers and other natural waterways open to unrestricted use by anyone, regardless of improvements made in the private interest? The Court of Chancery ruled that existing law – passed in Upper Canada in 1859⁶ – meant that watercourses had to be navigable in their natural state in order to be public thoroughfares. If they could only be used because of private improvements, they could not be used without compensation to whoever had made the improvements. The Caldwells, Boyd and his son William, immediately appealed to the next level, the Ontario Court of Appeals.⁷

Meanwhile, in 1881, the Government of Ontario passed an “Act for Protecting the Public Interest in Rivers, Streams, and Creeks,” which made it legal to transport logs down improved rivers, subject to a levy paid to the owner of any improvements, said levy to be set by the provincial cabinet. There is little doubt that William C. Caldwell, the Liberal member of provincial parliament for Lanark South Riding and son of Boyd's brother, had a hand in obtaining the legislation, just as it is certain that William Lees, member for North Lanark and McLaren's father-in-law, was not a disinterested party when he claimed in the legislature that the bill was rebellion against the national government. However, this was the kind of issue that Premier Oliver Mowat welcomed in the early 1880s. He was becoming engaged in a struggle

with Prime Minister John A. Macdonald over the issue of whether the provincial governments had the freedom to legislate in what they deemed to be areas of provincial jurisdiction.⁸

As one of the principal architects of confederation, Macdonald, a social conservative, sought to severely limit provincial power. He believed that unchecked popular will led to social unrest and that a weak federal state invited the local levels of government to grasp for more power. In the British North America Act of 1867, the provinces were given a short list of strictly local issues for which they were responsible, with only a partial listing provided in the act. To ensure that the provinces adhered to this allocation, the federal government was given three ways to regulate provincial legislation. The federal cabinet, through the governor general, could order the lieutenant governor of a province to refuse to sign a bill which might be outside provincial jurisdiction, and to reserve it for judgment by the federal cabinet. If bills were signed by the lieutenant governor and became law, the federal government was given the power of disallowance, that is, the power to cancel a provincial act. A less certain, but more politically acceptable means to keep the provinces in line was to challenge provincial laws in the courts, which could rule if a law was “*ultra vires*,” beyond the powers of the provinces.

Because Oliver Mowat was serving in a legal capacity at the time of the confederation discussions, we do not know his opinion of this division of powers. We do know that he became a champion of provincial rights and an opponent of the federal controls, which he attempted to cripple, except for review by the courts, where the province had a chance of a favourable verdict. Prime Minister Macdonald’s attempts to restrain the Ontario government, that represented the largest and wealthiest province, served to encourage Mowat in these endeavours. While he was in power, for example, Macdonald attempted to give what is now northwestern Ontario to Manitoba, and to retain mineral and lumber in the control of the federal government.

In 1881, the Caldwells appealed to the Court of Chancery, the Ontario Court of Appeals, which had ruled in their favour, arguing that a river was a public highway and could not be blocked by a private individual.⁹ In the interim, McLaren appealed to the Supreme Court of Canada, but before the Supreme Court could make a ruling, Boyd Caldwell had his logs – which had been sitting on the upper Mississippi River since they were cut some years before – brought down to the firm’s mill. The details are somewhat uncertain, but it appears that the logs were once again brought down on a Sunday, when McLaren’s men were not working. Caldwell maintained that the dam at High Falls was breached in order to get the logs beyond the falls, but McLaren insisted that the slide on his property was used to move the timber. Apparently there were numerous confrontations during the early 1880s between employees of the two firms, some peaceful and some violent.¹⁰

Subsequently, in 1881, the federal government disallowed the Ontario act. John A. Macdonald, in the House of Commons, explained why cabinet felt impelled to interfere in provincial jurisdiction:

[Previously] I laid down the sound principle, that the autonomy of every province, the independence of every province, the independence of every Legislature, should be protected unless there is a constitutional reason against it. The Government here are not to set up their opinion against the opinion of the Local Government or the Local Legislature...We are protecting a man from a great wrong, from a great loss and injury, from a course which, if pursued, would destroy the confidence of the whole world in the law of the land. What property would be safe? What man would make an investment in this country? Would capitalists come to Canada if the rights of property were taken away, as was attempted under this bill?...I declared that, in my opinion, all Bills should be disallowed if they affected general interests. Sir, we are not half a dozen Provinces. We are one great Dominion...There may be differences in laws in detail, but the great grand principle, that every man should have the right to occupy his own house and property, sit under his own fig-tree, cultivate his own vine, and be protected in all this, is the common law of all civilized countries and must prevail throughout the Dominion.¹¹

Macdonald was advocating the principle that the federal government had the right to maintain national standards, which the provinces might otherwise override for narrow, self-serving reasons.

Peter McLaren, a loyal Conservative, appealed to the federal government and Macdonald immediately disallowed the act, without the courtesy of consulting the Ontario premier. James McDonald, federal minister of justice, commented on the reasons for disallowance:

The effect of the Act, as it now stands, seems to be to take away the use of his property from one person and give it to another, forcing the owner, practically, to become a toll-keeper against his will, if he wishes to get any compensation for being thus deprived of his rights.

I think the power of the local legislatures to take away the rights of one man and vest them in another, as is done by this act, is exceedingly doubtful, but assuming that such a right does, in strictness exist, I think it devolves upon this government to see that such power is not exercised, in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the Act overrides a decision

of a court of competent jurisdiction, by declaring retrospectively that the law was, and is, different from that laid down by the court.¹²

Ontario's Acting Attorney General, Adam Crooks, responded with his own legal interpretation. The issue, he explained angrily, was one that fell completely within provincial jurisdiction. "The Confederation Act was intended to give practical effect to the exercise of the fullest freedom in the administration and control in local matters within each province, which was the main object of Quebec and Ontario, especially in seeking such a union." This freedom was being compromised, "on the private statement of a private individual."¹³ Since provincial powers included control of natural resources and matters pertaining to property and civil rights, the federal government was clearly not using disallowance to prevent a province from overstepping its jurisdiction. The Ontario government felt that this was inappropriate, and passed the Rivers and Streams Act again in 1882.

During the 1882 struggle over the Rivers and Streams Act, Macdonald redistributed the federal seats in Ontario, reducing the number of Liberal ridings and increasing the Conservative ones. These actions further encouraged Mowat to take a strong stand against the federal government.¹⁴

In the interim, the Supreme Court of Canada had ruled on Peter McLaren's appeal, in his favour, in 1882. The justices rejected the idea that a river was like a highway, since there were no natural obstacles on a highway that had to be overcome by private improvements on private property. They went back to the original law of 1859, that stated:

All persons may float saw logs and other timber rafts and craft down all streams in Upper Canada during the spring, summer, and autumn freshets, and no person shall, by felling trees or placing any obstacles in or across such streams prevent the passage thereof.

From this they deduced that the intent of the law was to allow passage on *unimproved* waterways. Should improvements be required on private property to make a watercourse navigable, the law did not apply, and owners of such improvements had to be compensated at a rate decided by them or, better still, the local government could expropriate the property. This line of reasoning asserted that it was the natural topography and surrounding environmental features of rivers or streams that impeded use rather than the improvements or alterations made by an individual.¹⁵

Following this decision, at the end of November of 1882, the Caldwells appealed to the highest court, the Judicial Committee of the Privy Council in England. With both the federal

government and the Supreme Court against them, they were unable to move their timber down the Mississippi in 1883.

Mowat's government passed another measure in 1883. On one level this was an attempt to embarrass the federal government by, in effect, saying that the people of Ontario wanted this legislation and the federal government was denying them their wishes.¹⁶

At the end of that year, the Judicial Committee ruled that the Rivers and Streams Act merely confirmed practices that had been in effect prior to Confederation. In so doing, they ignored any interpretation of the law of 1859, and made their decision based on existing practice. Faced with this legal dilemma, Macdonald's government wisely decided *not* to disallow the Rivers and Streams Act when Ontario passed it again in 1884. Through his persistence, Premier Mowat had won his struggle for provincial control of what he believed to be a purely local matter. In this final version of the act he did, however, alter one portion that could be seen as objectionable from a political perspective. The provincial cabinet could no longer set the rates that private property owners could charge users of their improvements. Instead, a county judge, or local official, would determine compensation.¹⁷

Mowat's triumph had two major consequences. It established the principle in Canadian law that waterways are open to all, and that while private interests can charge a reasonable amount for the use of any improvements they have made, they cannot refuse passage to anyone. His refusal to back down in the face of Macdonald's intransigence made it more difficult for the federal government to disallow legislation that clearly fell under provincial jurisdiction, and led Macdonald increasingly to send matters to the courts. The Judicial Committee of the Privy Council, in turn, increasingly ruled in favour of the provinces, with a broad interpretation of what constituted local matters. There is no doubt that both sides seized on the rivers and streams issue to further their specific interpretation of the Canadian Constitution, and in this instance, Macdonald and the federal interpretation were defeated.

With the right of unimpeded passage guaranteed, Boyd Caldwell could freely send his logs down the Mississippi River, but the resolution of the issue had only short-term consequences for McLaren and Caldwell. Peter McLaren sold his interests in the area in 1887,¹⁸ and Caldwell died in 1888, ending one of the most influential disagreements in Canadian legal history.



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¹Perth Courier, Perth, Ontario, August 17, 1888; C. M. Forbes, *History of Lanark Village Covers an 85 Year Period*, from articles published in the *Perth Courier*, December 15, 1905 to February 9, 1906, transcribed by Charles Dobie for the Lanark County Genealogical Society, accessed on April 26, 2009 at <http://globalgenealogy.com/LCGS/articles/A-LANARK.HTM>.

²Perth Courier, August 17, 1888; Howard Morton Brown, *Lanark Legacy; Nineteenth Century Glimpses of an Ontario County* (General Store Publishing House: Renfrew, Ontario, 2007), p.228.

³Brown, op. cit., p.236, 240.

⁴P. B. Waite, *Canada 1874-1896 Arduous Destiny* (Toronto and Montreal, 1971), p. 116, citing McLaren to Caldwell, April 12, 1880; Supreme Court of Canada, v. VIII, 435, Peter McLaren Appellent, 1882, accessed on April 27, 2009 at <http://csc.lexum.umontreal.ca/en/1882/Orcs8-435/Orcs-435.pdf>; Brown, op. cit., p. 236.

⁵The Upper Canada Court of Chancery is dated from 1837. Originating in 15th-century England, the Courts of Chancery were established to offer civil cases equitable resolutions unobtainable from the common law courts. The two systems of law operated parallel to one another; while the rulings of the common law system were based on written law, the Courts of Chancery were based on equity and fairness.

⁶Consolidated Statutes of Upper Canada Ch. 48 Sec. 15 or C.S.U.C. refers to a very large compilation where in 1859, all the statutes applying to Upper Canada were 'revised, classified and consolidated' into one document.

⁷Supreme Court of Canada, v. VIII, 435.

⁸Brown, op. cit., pp. 239-40.

⁹Supreme Court of Canada, v. VIII, 435.

¹⁰Brown, op. cit., pp. 26-38; a slightly different story appears in Howard Noyes, *Old District Lumber Days*, an undated article (likely from the 1920s) from *The Ottawa Journal*, Ottawa, accessed on April 23, 2009, at http://david.mclaren.name/lumber_days.htm, but this probably refers to an earlier incident.

¹¹Quoted in Beck, op. cit., p. 166.

¹²Quoted in J. M. Beck (ed.), *The Shaping of Canadian Federalism: Central Authority or Provincial Right?* (Toronto, 1971), p. 163.

¹³Quoted in Armstrong, op. cit., p. 26.

¹⁴For a discussion of Mowat's views see Waite, op. cit., pp. 113-19 and Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto, Buffalo and London, 1981), pp. 1-30.

¹⁵Supreme Court of Canada, v. VII, 435.

¹⁶In a similar fight that Mowat was carrying on with the federal government over the right of the lieutenant governor to reserve bills, Mowat hoped to force the federal government to resort to the courts, where Ontario had a chance of winning. Once again Macdonald's government disallowed the act.

¹⁷Waite, op. cit., p. 116.

¹⁸In 1890, McLaren, who had extensive business interests in Canada and the United States, was made a senator by John A. Macdonald, his earlier protector, a position that he enjoyed until his death in 1919 at age 85 or 86.