

Rhapsody in pink: Jurisdictional boundaries of Henvey Inlet Indian Reserve

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Abstract:

Henvey Inlet Indian Reserve does not include Henvey Inlet. The ambiguous pink line on CLSR Plan T-781B should be discounted in light of other documentary (e.g. instruction, field note, plan and description) evidence.

Context:

As a First Nation (“FN”) assumes responsibility for managing lands within its Indian Reserve (“IR”) through the *First Nation Lands Management Act*, it needs to know the spatial extent of its IR. Such is the case for Henvey Inlet FN on the east shore of Georgian Bay. In rendering an opinion as to the jurisdictional boundaries of its IR, we were confronted with CLSR Plan T-781B which appears to show the IR as including Henvey Inlet, by virtue of a pink line that crosses the inlet in a SE-NW direction (Figure 1). The east and south-east rectilinear boundaries, the north riparian boundary (along The Key) and the west riparian boundary (along Lake Huron) are all highlighted in pink; everything within those bounds is IR. Using that principle – and accepting the pink line across the inlet (through some islands) as valid – the inlet is also part of the IR.

This was my first conclusion, bolstered by the Supreme

Court of Canada injunction to minimally impair IR lands in the context of ambiguous descriptions.² However, this conclusion was based on superficial research.³

Further research:

We know that the surveyors, in establishing IR pursuant to the 1850 Robinson-Huron treaty, were specifically instructed not to survey the shore of Lake Huron. This



Figure 2 - Extract of Bayfield's Admiralty Chart of Lake Huron (1828). LAC (MIKAN 3783322)

prohibition was issued, despite most IR fronting on Lake Huron, for two reasons:

- to save the time and thus the financial cost of a shore traverse for all riparian IR; and
- Bayfield's 1828 survey of the shore of Lake Huron was considered accurate enough to be relied upon in establishing the IR.⁴

Given this prohibition, it struck me as odd that the inlet would be included as part of the IR. That is, Bayfield showed the inlet as part of Lake Huron (Figure 2). If surveyor Dennis was instructed to rely on Bayfield's work, then the pink line was inexplicable. The pink line was made more troubling because – to my knowledge – no IR along Lake Huron included such inlets.

The pink line was made even more troubling because it was inconsistently applied along the inlet. It is shown running along the north shore of the inlet, but is absent along the south shore east of the “Indian Village” (Figure 3).

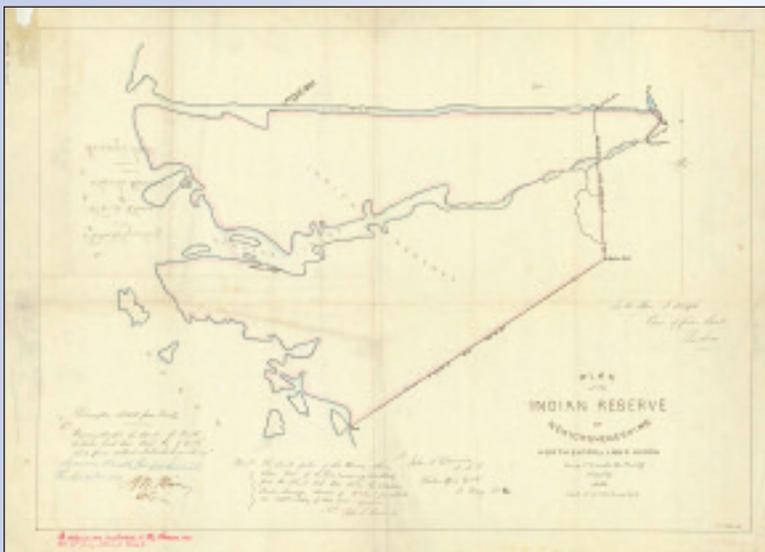


Figure 1 – CLSR Plan T-781B

¹ This article does not necessarily reflect the view of NRCAN, nor of the Government of Canada.

² *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85.

³ In conjunction with a draft Land Description Report.

⁴ Other research for Garden River IR corroborates the accuracy of Bayfield's survey.

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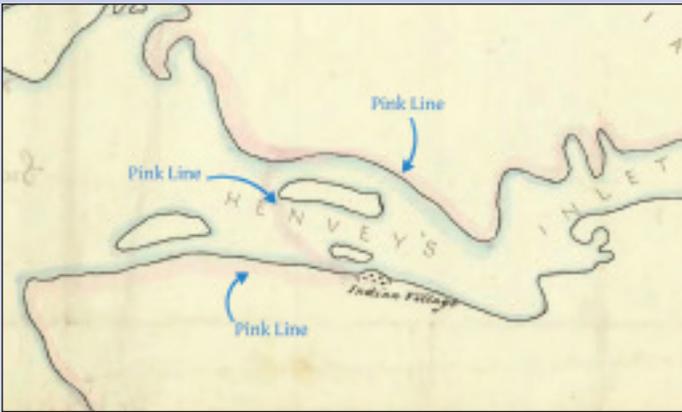


Figure 3 – CLSR Plan T-781B (annotated excerpt)

Field notes:

The first stop was Dennis' field notes, more particularly his diary of his 1851 survey of Henvey Inlet IR.⁵ The diary reveals that Dennis and his crew were on-site from November 1 to 12, and had much discussion with Chief Wagamake about the size and shape of the IR. Rather than an IR with dimensions of three by six miles "as mentioned in the Treaty", the Chief wanted the IR to have dimensions of twelve by six miles. Indeed, "the Chief made a diagram which enabled him clearly to illustrate how he wished the Tract as to size and position." Negotiations ensued between Dennis and the Chief, and a compromise was reached "which differed but little from the treaty."

⁵ CLSR FB 30723.

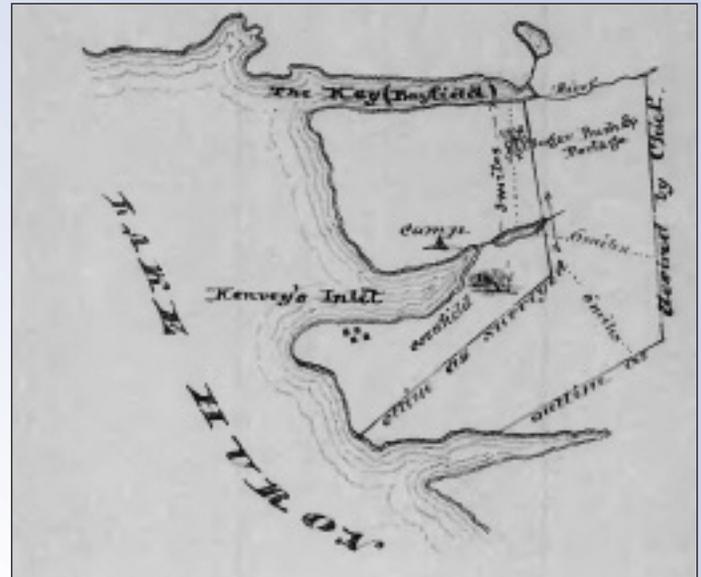


Figure 4 - FB 30723 CLSR (excerpt)

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It is up to us to instruct the public on the misuse of coordinates and GPS equipment. Just because we now have geo-referenced surveys showing coordinates of reference points it doesn't mean this is a new issue. For years people having been extracting coordinates from OBM sheets or other maps and uploading the coordinates into their GPS units in order to locate their corners. We must be able to properly, coherently and clearly explain to our clients why we are a necessary asset in defining the extent of title.

The public's use of GPS is not the only issue when discussing or contemplating coordinate surveys. Do we envision moving to a solely coordinate-based survey system? If coordinates of a corner become the primary piece of evidence, anyone who is proficient in mathematics and is able to operate the appropriate equipment can establish property corners. But does this serve and protect the public? How will clients really know where their property limits are if they are only numbers on a plan? It is we, the professional surveyors, who are properly trained in statute and case law and understand the priority of evidence that can perform proper legal surveys that both serve and protect the public.

Perhaps eventually we will move to a coordinate-based survey system but won't our clients still want to see the physical evidence of their property limits? Won't surveys still be

required to mark out limits and to retrace limits already established and lived up to? I would suggest that we as land surveyors will always be necessary to keep peace between neighbours.

Neil Edwards, past president of the Association of Newfoundland Surveyors summarized it very well when he said;

"This, my fellow land surveyors, is what sets us apart from other geomatics professionals, from those who operate in a perfect geometric world were each and every polygon has a perfect closure. We as land surveyors have to use all our training in mathematics and real property law to transition the spatial inaccuracies of a historic profession into the modern era, while at the same time respecting the rights of a trusting society impacted by our decisions."

Is our profession in a crisis? No, not right now, but we have to be ever diligent in promoting the value and importance of surveying. We have to protect not only a new coordinate-based cadastre but also the long established extent of title. We need to encourage new, young professionals to see what a great career surveying is now and will continue to be in the future. We just need to do a little first aid within our profession to eliminate a potential "crisis". We may be injured but we are definitely not close to death.



Dennis returned to the IR the following year, on October 31, 1852 “for the purpose of making a small addition to the Reserve ... to satisfy the band.”⁶ The addition was at the NE angle of the IR, between the easterly rectilinear boundary and the river running into The Key. His diary contains much discussion about this terrestrial addition, as reflected in Dennis’ sketch. There is no mention made of the inlet – neither dissatisfaction by the Chief that it was excluded nor intention by Dennis to include it (by amending the plan).

Plans:

The second step was other plans of the survey of the IR. Sadly, Dennis’ original plan - that he created and signed on May 12, 1852 and that he amended in 1853 – is not available.⁷ There is no extant plan with his original signature, a signature similar to that in his field notes. Certainly, the pink-line plan is not an original plan, given that it was not signed by Dennis. Rather, “John S Dennis” is prefaced twice by “(Sd).” It was the convention at the time when Person X affixed the name of Person Y to a copy of a plan to preface the name with “Sd” or “Signed.” That is, had Dennis created Plan T781A, then:

- his signature would be present; and
- the (Signed) preface would be absent.

Rather, the pink-line plan was copied by the Crown Lands Department in Québec in November 1853 by Morin, whose original cursive signature does appear.

CLSR Plan T-781A (Figure 5) is also not an original plan, given that John Stoughton Dennis’ name is in printed (not cursive) font and is prefaced twice by “(Signed).” However, this plan is certainly the most detailed (i.e. accurate) copy of Dennis’ original (lost) plan, because it:

- was certified as “a true copy” by Aubrey White, Assistant Commissioner in March 1888. The certification is original because Whites’ signature is in cursive font and the “signed” (or “sd”) preface is absent; and
- the detail on the plan could only have come from Dennis’ survey and field notes. For example, this plan has an annotation at the head of the inlet – “Rock called Nekickshegeshing or ‘Place for Otters.’” This echoes Dennis’ diary entry for Sunday November 2, 1851: “... the bay is called in Indian ‘Nekickshegeshing’ or ‘place for otters’.”

Having established the reliability of Plan T-781A, one looks in vain on the plan for a pink line across the inlet. Rather, the pink line runs along the north and south shores of the inlet, from Lake Huron proper in the west to the head of the inlet at the Nekickshegeshing rock in the east. The plan clearly excludes the inlet from the IR, consistent with



Figure 5 – CLSR Plan T-781A

surveys of other IR along Lake Huron of that era.

Other plans and maps of Henvey Inlet IR of that era are consistent in excluding the inlet from the IR. To wit, CLSR Plan T-781, albeit a copy of Dennis’ lost plan,⁸ shows detail that reflects Dennis’ field notes and excludes the inlet. CLSR Plan T-764, which is a map of the French River and Lake Nipissing region showing the IR created under the 1850 treaty, excludes the inlet (Figure 6).

Proclamation:

The third stop was the 1854 Proclamation that set aside as



Figure 6 – CLSR Plan T-764 (excerpt)

Indian Reserves the various parcels of land that had been surveyed pursuant to the 1850 Treaty. The Henvey Inlet IR was described using metes and bounds, with references to distances and directions measured and to monuments established in Dennis’ 1851 and 1852 surveys, and as “containing about twenty six thousand acres.”

⁶ CLSR FB 30700.

⁷ The Surveyor General will pay a \$20 cash-money reward to the person who finds such plan

⁸ It appears to have been copied by Samuel Bray, Chief Surveyor of the Department of Indian Affairs.

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The area appears to be inconclusive in including the inlet within the IR. Indeed “about” captures both scenarios (included and excluded). The area of the inlet from the various copies of Dennis’ plans is constant at 1,100 acres. If included, then the area of the IR is 2.9% larger than 26,000 acres; if excluded, the area of the IR is 1.3% smaller than 26,000 acres. More to the point, the Proclamation description does not include the inlet in the IR. The description of the westerly boundary of the IR is rather vague: “Following the said shore of the said Lake Northward crossing said Henry’s inlet to the Channel or deep bay called the Key.”

Conclusion:

A truncated series of events puts the “crossing said Henry’s inlet” clause from the Proclamation in context. In 1850, the Treaty area was ambiguous; the inlet was not included. In late 1851, surveyor Dennis negotiated with the Chief; the inlet was not included. In mid-1852, Dennis drafted a plan of survey; the inlet was not included. In late-1852, Dennis negotiated with the Chief; the inlet was not included. In mid-1853, Dennis amended his plan of survey; the inlet was not included.

So, there is no evidence of intention by either party to

include the inlet, and much evidence of intention to exclude the inlet. Indeed, the Chief argued that the IR should extend six miles east from the head of the inlet. The cat was put amongst the pigeons in November 1853, when some bozo⁹ in the Crown Lands Department drew pink lines on the plan - one crossing the inlet and another running along the north shore of the inlet.

In 1854, the metes and bounds description used in the Proclamation was ambiguous (crossing the inlet where?). Given the ambiguity we are forced to look to all relevant extrinsic evidence to ascertain the intention of the parties. This includes all survey evidence. There is one piece of extrinsic evidence (Plan T-781B) that suggests that part of the inlet is included, and it is - itself - ambiguous (given the inconsistent pink lines along the inlet). There is much extrinsic evidence to suggest that the inlet was not included.¹⁰



Dr. Brian Ballantyne advises on land tenure and boundaries for the Surveyor General Branch of Natural Resources Canada. He can be reached by email at Brian.Ballantyne@NRCan-RNCan.gc.ca for further discussion.

⁹ Bozo is a legal term. See: *Dupuis v. Edmonton Cellular Sales Ltd.*, 2005 ABQB 445; *A.A. v. S.N.A.*, 2007 BCSC 594; *R v. Menard*, 2010 BCSC 1416.

¹⁰ This was also the conclusion of Assistant Commissioner White, who suggested on July 29, 1901 that the pink line on the plan might have crossed the inlet “by rapidity in drawing.”