

NATIVE RIGHTS
AND THE BOUNDARIES OF RUPERT'S LAND
AND THE NORTH-WESTERN TERRITORY

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PREFACE

This paper originated out of an attempt to analyze the terms and conditions under which Rupert's Land and the North-Western Territory were admitted into Canada in 1870, and the relevance of those terms and conditions to native rights. It quickly became obvious that such an analysis would have little value unless the boundaries of those two territories were defined. My research uncovered a large amount of material on this subject, but no definitive answer as to the location of the boundaries. The purpose of the present work is therefore to suggest a solution to this unresolved issue. The effect of the terms and conditions governing the transfer of the two territories to Canada is dealt with in a separate paper, entitled *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (to be published in 1982 by the University of Saskatchewan Native Law Centre).

I would like to express my appreciation to all those who have assisted me in the preparation of this work, and in particular to Dr. Brian Slattery, former Research Director of the Native Law Centre and currently an Associate Professor of Law at Osgoode Hall Law School. His comments and suggestions were invaluable. I would also like to thank Professor Alison Maingon of the Department of Greek and Roman Studies, University of Saskatchewan, for her assistance in interpreting the Latin text of the Treaty of Ryswick. Needless to say, any errors or deficiencies in this paper are my own.

I. INTRODUCTION

By a Royal Charter dated May 2, 1670, Charles II of England granted a vast tract of North American territory, called Rupert's Land, to the Governor and Company of Adventurers of England trading into Hudson's Bay, otherwise known as the Hudson's Bay Company. The Charter was a fertile source of controversy during the entire two-hundred-year life of the Rupert's Land grant. The validity of the Charter was questioned and the extent of the territory disputed. These issues have remained unresolved to this day. This paper examines the question of the extent of Rupert's Land and suggests an approach whereby the boundaries of that territory and the adjacent North-Western Territory may be determined. No attempt is made to resolve the issue of the Charter's validity or to consider the effect of the Charter on the rights of the aboriginal peoples inhabiting Rupert's Land.

When the provinces of Canada, Nova Scotia and New Brunswick were united to form the Dominion of Canada in 1867, provision was made in section 146 of *The British North America Act, 1867*¹ for the admission of Rupert's Land and the North-Western Territory at some later date. On December 16 and 17, 1867, the House of Commons and Senate of Canada adopted an Address to Her Majesty requesting the admission of the two territories into Canada pursuant to section 146.² Doubts were raised, however, as to whether Rupert's Land could legally be transferred to Canada without an Act of Parliament while the Hudson's Bay Company Charter remained in existence.³ To deal with this problem, the British Parliament passed the *Rupert's Land Act, 1868*,⁴ which empowered the Company to make, and Her Majesty to accept, a surrender of all the rights and privileges of the Company in Rupert's Land. Such a surrender was made on November 19, 1869,⁵ and accepted the following June.⁶

¹ 30 & 31 Vic., c.3 (U.K.); R.S.C. 1970, App.II, No.5

² The Address forms Schedule (A) to the Imperial Order in Council admitting Rupert's Land and the North-Western Territory into the Union, dated June 23, 1870: R.S.C. 1970, App.II, No.9.

³ See a despatch from the Colonial Secretary to the Governor General of Canada, dated Apr. 23, 1868: *Journals, House of Commons* (Can.), vol.I, 1867-8, p.367.

⁴ 31 & 32 Vic., c.105 (U.K.); R.S.C. 1970, App. II, No. 6.

⁵ The Deed of Surrender forms Schedule (C) to the June 23, 1870, Order in Council, *supra*, n.2.

⁶ Her Majesty's acceptance is indicated in the preamble to the 1870 Order in Council, *supra*, n.2, at p.4.

A second Address, which incorporated the terms and conditions on which the Hudson's Bay Company agreed to surrender Rupert's Land, and again requested the transfer of the two territories to Canada, was adopted by the Canadian Parliament on May 29 and 31, 1869.⁷ As a result, Rupert's Land and the North-Western Territory were admitted into Canada on July 15, 1870, by an Imperial Order in Council dated June 23 of that year.⁸ Upon their admission the Province of Manitoba was created out of a small portion of the combined territories.⁹ The remaining territory was united under one jurisdiction which was entitled "The North-West Territories".¹⁰

One would think that the admission of Rupert's Land and the North-Western Territory into Canada and the formation of two new political units would have eliminated the need to locate the boundary between the two former territories. Unfortunately, this is not the case. Since the terms and conditions for the surrender of Rupert's Land had to be negotiated with the Hudson's Bay Company, the provisions under which that territory was admitted into Canada differ from those governing the admission of the North-Western Territory. Most of the terms relating to Rupert's Land involved the compensation to be received by the Company in return for the surrender, and hence have long since been met. Condition 14, however, relates directly to native people and is of continuing significance. It provides:

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.¹¹

The North-Western Territory, on the other hand, was admitted on condition that,

... upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.¹²

Since Canada's obligations to native peoples inhabiting each of the two territories are apparently not the same, it is necessary to establish not only the external limits of the combined territories but also their common boundary.

⁷ Contained in Schedule (B) of the 1870 Order in Council, *supra*, n.2, at p.13.

⁸ *Supra*, n.2.

⁹ By the *Manitoba Act*, S.C. 1870, c.3 (R.S.C. 1970, App. II, No.8), affirmed by the *B.N.A. Act, 1871*, 34 & 35 Vic., c.28 (U.K.) (R.S.C. 1970, App. II, No.11). It should be noted that the boundaries of the original province of Manitoba were much less extensive than the present boundaries: see Map 5, inside back cover.

¹⁰ By *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, S.C. 1869, c.3 (R.S.C. 1970, App. II, No.7), as continued by s.36 of the *Manitoba Act*, *supra*, n.9.

¹¹ Order in Council of June 23, 1870, *supra*, n.2, pp.6-7.

¹² Schedule (A) to the 1870 Order in Council, *supra*, n.2, p.8.

There is a further reason for determining the extent of Rupert's Land. The Royal Proclamation of 1763,¹³ which established governments for the colonies in America, including Quebec, that were ceded to Britain by the Treaty of Paris, made special provision for the protection of Indian lands. However, the second paragraph of the part relating to Indians, which reserved certain lands for their use, expressly excluded "the Territory granted to the Hudson's Bay Company". For this reason the Supreme Court of Canada in *Sigeareak El-53 v. The Queen*¹⁴ held that the Royal Proclamation does not apply to Rupert's Land. This sweeping conclusion is open to question. While it is clear that Rupert's Land is excluded from the operation of the second paragraph, an argument can be made that the other paragraphs dealing with Indian lands nonetheless apply to that territory.¹⁵ Be that as it may, the *Sigeareak* case cannot be ignored. The result of the decision is that in Rupert's Land native claims which are not based on treaty must rely on the concept of aboriginal title rather than on the Royal Proclamation.

¹³ Issued by George III on October 7, 1763; R.S.C. 1970, App. II, No.1.

¹⁴ [1966] S.C.R. 645. This decision was followed by Mahoney, J., of the Federal Court in *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518; [1979] 3 C.N.L.R. 17.

¹⁵ See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), pp.204-12, 221-7, 233-46, 258-60, 295-302, 309-10; Kenneth M. Narvey, "The Royal Proclamation of 7 October, 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1973-74), 38 *Sask. Law Review*, 123; *idem*, "[The Supreme Court, the Federal Court of Canada, and the Royal Proclamation of 1763 in Rupert's Land]", [1980] 2 C.N.L.R. 109.

II. THE NORTH-WESTERN TERRITORY

The origin of the term "North-Western Territory", which appears in section 146 of *The British North America Act*, is uncertain. However, a pluralized form of the term was used by the Imperial Parliament in 1859 in *An Act to make further Provision for the Regulation of the Trade with the Indians, and for the Administration of Justice in the North-Western Territories of America*.¹⁶ Prior to 1859 the territory to which that Act extended had been loosely administered under the Jurisdiction Acts of 1803¹⁷ and 1821.¹⁸ The Act of 1821 contained a provision for the grant of exclusive trading rights, under which the Hudson's Bay Company and the principal figures of the North-West Company were issued a license, on December 5, 1821, to trade with the Indian inhabitants of the territory.¹⁹ In 1838 a new 21-year license was issued to the Hudson's Bay Company,²⁰ which in the meantime had acquired the rights of the North-West Company. It was upon the expiry of this license that the Act of 1859 was passed.²¹

The preamble of the 1859 Act refers to the Acts of 1803 and 1821 and declares that it is expedient to make further provision for the administration of justice and regulation of trade in

... any of the *Indian Territories* or Parts of *America* not within the Limits of either of the Provinces of *Lower* or *Upper Canada*, or of any Civil Government of the United States of *America*. . . .²²

¹⁶ 22 & 23 Vic., c.26 (U.K.).

¹⁷ 43 Geo. III, c.138 (U.K.).

¹⁸ 1 & 2 Geo. IV, c.66 (U.K.).

¹⁹ *Parliamentary Papers, House of Commons* (U.K.), No.547 of 1842, p.21.

²⁰ *Ibid.*, p.9.

²¹ The administration of the North-Western Territory prior to its admission into Canada in 1870 is examined in C.C. McCaul, "The Constitutional Status of the North-West Territories of Canada" (1884), 4 *Canadian Law Times*, No.1, pp.1-15, and No.2, pp.49-61; "The Rise of Law in Rupert's Land" (1890), 1 *Western Law Times*, No.3, pp.49-59, and No.4, pp.73-100; D.C. Williams, "The Dawn of Law on the Prairies" (1962-63), 27 and 28 *Sask. Bar Review*, pp.126-33 and 17-26, 63-9 respectively.

²² *Supra*, n.16. This was the description of the territorial application of the 1803 Act: *supra*, n.17, s.1. In this regard, it should be observed that s.5 of the 1821 Act provided that the 1803 Act "shall be deemed and construed . . . to extend to and over . . . all the Territories heretofore granted to the Company of Adventurers of *England* trading to *Hudson's Bay*": *supra*, n.18. S.5 was enacted to remove doubts with respect to the application of the 1803 Act to Rupert's Land.

Section IV, however, contains the following limitation:

IV. Nothing herein contained shall extend to the Territories heretofore granted to the Company of Adventurers trading to *Hudson's Bay*; and nothing herein contained shall extend to the Colony of *British Columbia*, save as herein expressly provided, or to the Colony of *Vancouver's Island*.²³

The territorial application of the Act of 1859, and hence the extent of the North-Western Territories, were thus defined by exclusion to include all of British North America to the north and west of Canada and the United States that was not part of Rupert's Land, British Columbia or "Vancouver's Island".

It is suggested that the term "North-Western Territory", as used in section 146 of *The British North America Act*, includes the same territory over which the Act of 1859 extended, with the exception of that portion of the latter territory that was annexed to British Columbia in 1863 by the Imperial Parliament.²⁴ This interpretation is supported by the fact that section 146 provides for the admission of Newfoundland, Prince Edward Island and British Columbia,²⁵ as well as Rupert's Land and the North-Western Territory, into Canada. The obvious intention was eventually to bring all of British North America into the Dominion. The term "North-Western Territory" must therefore have been used to apply to any British territory not contained in the other provinces or colonies. This definition conforms with the implied definition of the "North-Western Territories" revealed by our examination of the 1859 Act. The discrepancy in number between the words "Territory" and "Territories" in the two Acts was probably due either to careless drafting or to the confusion which apparently existed with regard to the correct name to be assigned to the region.²⁶

²³ *Supra*, n.16. The Act only applied to British Columbia to the extent that the courts of that colony were empowered to try offences allegedly committed in the North-Western Territories.

²⁴ 26 & 27 Vic., c.83 (U.K.): see part VII.A of this paper.

²⁵ Vancouver Island was united with British Columbia in 1866 by 29 & 30 Vic., c.67 (U.K.).

²⁶ For example, Resolution 10 of the 1864 Quebec Resolutions employed the term "North-West Territory": Sir Joseph Pope, ed., *Confederation: Being a Series of Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Co. Ltd., 1895), p.40.

III. RUPERT'S LAND: THE ROYAL CHARTER OF 1670

The starting point for an examination of the question of the extent of Rupert's Land is the Royal Charter itself, which made the following grant to the Hudson's Bay Company:

And by these presentes for us our heires and successors doe give grant and confirme unto the said Governor and Company and their successors the sole Trade and Commerce of all those Seas Streights Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the entrance of the Streights commonly called Hudsons Streights together with all the Landes and Territoryes upon the Countryes Coastes and confynes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State. . . . And that the said Land bee from henceforth reckoned and reputed as one of our Plantacions or Colonyes in America called *Ruperts Land*.²⁷

The Charter therefore not only granted the territory to the Company but also confirmed or asserted British sovereignty over it.

The terms of the grant are remarkably vague, no doubt because in 1670 European knowledge of North American geography was extremely limited. Hudson and James bays had been explored by English expeditions under Hudson (1610), Button (1612-3), Bylot and Baffin (1615), Foxe (1631), and James (1631), and various claims to the region had been made by some of these explorers in the name of Great Britain.²⁸ No Englishman had yet visited the interior of the continent from Hudson Bay. Nor was it known whether or not the coveted passage to the East lay through Hudson Strait. Luke Foxe's map of Hudson Bay, based on his expedition of 1631 and drawn in 1635, indicated the possibility of a northern outlet from the Bay.²⁹

No attempt was made to establish a permanent post on the Bay until 1668-9 when Médard Chouart Des Groseilliers and Pierre-Esprit Radisson,

two renegade Frenchmen, escorted the English to James Bay after their proposal to open a northern fur-trading route was rebuffed in Canada and in France.³⁰ Groseilliers arrived with Captain Guillam on September 25, 1668, at the mouth of Rupert River where Charles Fort was built (see Map 5, inside back cover). A treaty was made with the Indians inhabiting the region and the land was claimed in the name of the King. The expedition returned to England the following summer. In 1669 the *Wivenhoe*, commanded by Captain Stannard and guided by Radisson, visited Rupert River and then sailed west and north along the coast as far as the mouth of the Nelson River, where British possession of the land was formally proclaimed.

The success of these two voyages prompted the organizers to petition Charles II for a Charter to the region. It is significant that Groseilliers and Radisson had not only told the English of the rich fur-trading potential of the Bay but had also represented that a navigable waterway connected the Bay with the Great Lakes and from there with the South Sea (the Pacific).³¹ The discovery of this passage was one objective of the two voyages, and the Charter mentions it as a reason for the grant. It is in the light of these voyages and the representations made by the two Frenchmen that the Charter must be read.

A. The Extent of the Grant

The broadest possible interpretation of the grant is that it covered all the territory from Hudson Strait west to the Pacific, north to the Pole, and south to the lands already possessed by or granted to other British subjects or possessed by the subjects of other Christian princes or states.³² Had the hoped-for passage from the Bay to the South Sea been discovered such an interpretation might have had some merit. However, failing such discovery, the terms of the Charter itself indicate that the grant was not intended to extend indefinitely by land. In addition to the territorial grant, the Company was also given exclusive trading rights

. . . to and from all Havens Bayes Creekes Rivers Lakes and Seas into which they shall find entrance or passage by water or Land out of the Territoryes Lymittes or places aforesaid and to and with all the Natives and People Inhabiteing or which shall inhabit within the Territoryes Lymittes and places aforesaid and to and with all other Nations Inhabiteing any the Coastes adjacent to the said Territoryes Lymittes and places which are not already possessed as aforesaid or whereof the sole liberty or privilege of Trade and Trafficke is not granted to any other of our Subjectes.³³

²⁷ Quoted from Slattery, *supra*, n.15, at p.379 (the entire Charter is reproduced pp.371-88 from E.E. Rich, ed., *Minutes of the Hudson's Bay Company 1671-1674* [Toronto: The Champlain Society, 1942], pp.131-48).

²⁸ For maps of these early voyages, see Norman L. Nicholson, *The Boundaries of the Canadian Federation* (Toronto: Macmillan of Canada, 1979), p.13; D.G.G. Kerr, *A Historical Atlas of Canada*, 3rd ed. (Toronto: Nelson and Sons, 1975), p.15.

²⁹ Foxe's map is reproduced in Kerr, *supra*, n.28, p.15.

³⁰ A.S. Morton, *A History of the Canadian West to 1870-71*, 2nd ed. (Toronto: University of Toronto Press, 1973), pp.50-2.

³¹ *Ibid.*, pp.58-9.

³² The Hudson's Bay Company did in fact make such extravagant claims on occasion. See a "Memorial from the Hudson's Bay Company to the Board of Trade", Oct. 3, 1750, quoted in part in Slattery, *supra*, n.15, p.188.

³³ Quoted from Slattery, *supra*, n.15, pp.381-2.

If the grant itself extended to the limits of the land in all directions (excepting previous grants and lands possessed by other Christian states), no such "passage by . . . Land" could exist. Furthermore, the broad interpretation is in direct conflict with section 146 of *The British North America Act, 1867* and the Order in Council of 1870 since it negates entirely the existence of the North-Western Territory to which the Act and Order refer.

The more commonly-accepted construction of the Charter is that the grant was limited to the *watershed* of the "Seas Streights Bayes Rivers Lakes Creekes and Soundes . . . that lye within the entrance of the Streights commonly called Hudsons Streights." Such an approach, however, is also open to different interpretations. The territory included might be restricted to the Hudson watershed, including that portion of Baffin Island which drains south into Hudson Bay and Strait, or it might also encompass the lands draining into the Arctic Ocean, both from mainland North America and the Arctic Archipelago. It is suggested that the latter interpretation can be rejected. It would be stretching the words of the grant to an unreasonable extent to regard these Arctic waters as lying "within the entrance" of Hudson Strait simply because they can be reached from Hudson Bay by the narrow Fury and Hecla Strait. On the other hand, these waters would appear to fall comfortably within the area covered by the additional grant of exclusive trading rights, referred to above. Furthermore, the courts have generally viewed the Arctic watershed as falling outside Rupert's Land.³⁴ By the nineteenth century the Hudson's Bay Company itself had limited its territorial claims to the Hudson drainage basin (see Map 1, after Appendix D).³⁵

B. Lands Excluded from the Grant

A determination of the boundaries of Rupert's Land is further complicated by the exclusion from the grant of lands "already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of

any other Christian Prince or State". The Virginia Charter of 1609 granted to the London Company all the territory within two hundred miles north and south of Cape Comfort on the Atlantic coast and inland "from Sea to Sea, West and Northwest".³⁶ On the basis of these words it has been suggested that the northern boundary of the Virginia grant ran north-west from a coastal point two hundred miles north of Cape Comfort to the limits of the continent.³⁷ Such a line would meet the Arctic Ocean somewhere in the vicinity of the mouth of the Coppermine River and would include a portion of present-day Ontario and most of what is now western and north-western Canada (see Map 2). If we interpret the Charter of 1670 as covering the Hudson watershed, it is evident that the suggested construction of the prior Virginia grant would significantly reduce the territory received by the Hudson's Bay Company. Although the United States relinquished any claims it may have had to western Canada when it accepted the 49th parallel as the international boundary,³⁸ that settlement can have no effect on the question of whether the Virginia grant covered lands which would otherwise have been included in Rupert's Land.³⁹

The issue of the extent of Rupert's Land was before the Privy Council in 1884 in the *Ontario Boundaries Case*,⁴⁰ which we shall examine in detail later in this paper. At present it is sufficient to point out that the Privy Council decision in that case does not provide support for the contention that the boundaries of Rupert's Land were affected by the Virginia grant. However, although the Virginia Charter was included in the documents submitted to their Lordships,⁴¹ the issue of the effect of that Charter on the Rupert's Land grant does not appear to have been argued.

Another grant of territory falling within the Hudson watershed was made to Sir William Alexander by a Royal Charter of 1628. This grant included, among other things, all lands within fifty leagues of the St.

³⁶ Quoted from Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of . . . the United States of America* (Washington D.C.: Government Printing Office, 1909), vol.VII, p.3795.

³⁷ See Slattery, *supra*, n.15, pp.103, 183-4.

³⁸ By the Treaty of Paris, 1783, the Convention of Commerce between Britain and the United States, 1818, and the Oregon Treaty, 1846 (Virginia's claims in the north-west had been transferred to the United States in 1784: Slattery, *supra*, n.15, p.184). It should also be noted that the settlement of the international boundary line effectively terminated any claims that the Hudson's Bay Company may have had south of that line.

³⁹ Slattery, *supra*, n.15, p.184.

⁴⁰ The decision is unreported as such. It was, however, embodied in an Imperial Order in Council made August 11, 1884: see Appendix B of this paper, where the Order in Council is reproduced from *The Proceedings before the . . . Privy Council . . . Respecting the Westerly Boundary of Ontario* (Toronto: Warwick & Sons, 1889), p.416 (hereinafter cited as *The Proceedings*).

⁴¹ The Virginia Charter appears at p.697 of the Joint Appendix of Documents submitted to the Privy Council, printed in *Ontario Boundaries Before Privy Council, 1884* (n.p., 1884) (hereinafter cited as *Ontario Boundaries*).

³⁴ *Connolly v. Woolrich* (1867), 11 L.C.T. 197, 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que.S.C.) at pp.212-3 of 11 L.C.T., affirmed by *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, 1 R.L.O.S. 253, 1 C.N.L.C. 151 (Que.C.A.) at pp.269-70, 352 and 376 of 1 R.L.O.S.; *Lee Shek Yew v. A.G. for B.C.*, [1924] 1 W.W.R. 753 (B.C.C.A.) per Martin, J.A., at p.769; *R. v. Kogogolak* (1959), 28 W.W.R. 376 (N.W.T.T.C.), which was overruled by the Supreme Court of Canada in *Sigareak El-53 v. The Queen*, [1966] S.C.R. 645, but on another issue. For a contrary view, see *In the Case of James Calder* (1848), 2 *Western Law Times* (1891), p.1 (decision of Mr. Adam Thom, Recorder of Rupert's Land). See also n.180.

³⁵ Slattery, *supra*, n.15, p.188. It is noteworthy that several areas in southern Saskatchewan and Alberta, totalling approximately 50,000 square miles (130,000 sq. kms.), drain internally: see *National Atlas of Canada*, 4th ed. (Ottawa: Macmillan Company of Canada and the Department of Energy, Mines and Resources, 1974), pp.14-5; *Atlas of Saskatchewan* (Saskatoon: University of Saskatchewan, 1969), pp.62-3. It would appear that those areas, two of which border on the Missouri drainage basin, are not part of the Hudson watershed.

Lawrence drainage basin.⁴² In 1632, however, Britain signed the Treaty of Saint-Germain-en-Laye, thereby restoring all places occupied by its subjects in "la Nouvelle France, la Cadie, et Canada" to France.⁴³ It is likely that this recognition of French claims over territory included in the Alexander Charter effectively terminated the grant in the regions covered by the Treaty.⁴⁴ For this reason, the Charter can probably be ignored when considering the extent of Rupert's Land.

With respect to these charters it is noteworthy that territorial grants in North America frequently overlapped. This was due to the inadequacy of the geographical information available at the time and the consequent tendency to define the extent of the grants in broad language rather than on the basis of known geographical features. For practical reasons it is therefore necessary to consider factors other than the bare words of the charters themselves in order to determine the territorial limits of these grants. A reasonable approach of this kind was suggested in 1761 by Charles Pratt, the British Attorney General, in an opinion relating to conflicting claims under the Connecticut and Pennsylvania charters. Pratt wrote:

If all the Colonies in North America were to remain at this Day bounded in point of Right as they are described in the Original Grants of each I do not believe there is one Settlement in that part of the Globe that has not in some measure either been encroached upon, or else usurped upon its Neighbour So that if the Grants were of themselves the only rule between the Contending Plantations there never could be an End of their Disputes without unsettling large Tracts of Land where the Inhabitants have no better Title to Produce than either Possession or posterior Grants which in Point of Law would be superseded by Prior Charters. Hence I conceive that many other Circumstances must be taken into Consideration besides the Parchment Boundary, For that may at this Day be Extended or Narrowed by Possession Acquiescence or Agreement; by the Situation & Condition of the Territory at the time of the Grant, as well as by various other Matters with respect to the present dispute. . . .⁴⁵

⁴² Slattery, *supra* n.15, pp.106-7.

⁴³ *Ibid.*, p.126. Text in Frances G. Davenport, ed., *European Treaties Bearing on the History of the United States* . . . (Washington, D.C.: Carnegie Institution of Washington, 1913-37), vol.I, p.319.

⁴⁴ Alexander's Charter was subsequently confirmed by an Act of the Scottish Parliament in 1633: Slattery, *supra*, n.15, p.126. The legal effect of that Act is debatable. In any case, Britain made no attempt to assert sovereignty over the Hudson watershed portion of the Alexander grant from 1633 to the time of the voyages (1668-9) leading to the grant of the Hudson's Bay Company Charter.

⁴⁵ Mar. 7, 1761. Julian P. Boyd and Robert J. Taylor, eds., *Susquehanna Company Papers* (Ithaca, N.Y.: Cornell University Press, 1962-71), vol.II, pp.64-5 (quoted from Slattery, *supra*, n.15, p.301). The words "which" and "would" in the 12th line, which were abbreviated as "w^c" and "wod" in the original text, and "Agreement" in the 17th line, which was abbreviated "Agreem^t", have been spelled out in full by the writer.

The exclusion of lands possessed by the subjects of other Christian princes or states from the Hudson's Bay Company grant is of greater practical significance than the exclusion of lands possessed by or granted to British subjects. It is clear that France had made claims to the Hudson Bay region prior to 1670. French maps drawn before that date, for example, include the region in La Nouvelle France.⁴⁶ Furthermore, by the Treaty of Saint-Germain-en-Laye Britain restored places in La Nouvelle France and Canada to France without mentioning any northern limit to those colonies, in spite of the fact that Britain was probably aware of the extent of French claims.

The Charter, however, excluded only lands which were "already *actually* . . . possessed" (emphasis added).⁴⁷ This suggests the necessity of something more than a bare assertion of sovereignty over unexplored territory. Some degree of physical occupation, whether in the form of settlements, forts, trading posts, or, at the very least, expeditions of exploration, must have been envisaged.

Historical evidence does not indicate that the French were in actual possession of the Hudson Bay region prior to 1670. Father Gabriel Druillettes and the Sieur de la Vallière had travelled overland in 1662 from Canada to the height of land near Lake Mistassini from which point they claimed possession of the Baie du Nord (Hudson Bay) for France (see Map 5).⁴⁸ In the same year Groseilliers and Radisson made their way from Lake Superior to James Bay, probably visiting the mouth of Rupert River;⁴⁹ however, since they set out on their fur-trading mission against the wishes of the Governor of La Nouvelle France (in fact they were fined heavily for their disobedience on their return), their explorations probably cannot be used to support French claims to sovereignty over the Bay.⁵⁰ Nonetheless, the French fur-trade did extend beyond the height of land towards James Bay through the intermediacy of Indian traders, and as a result the French

⁴⁶ See John Warkentin and Richard I. Ruggles, *Historical Atlas of Manitoba* (Winnipeg: Historical and Scientific Society of Manitoba, 1970), pp.28-35.

⁴⁷ Although grammatically the term "actually" may or may not refer to "possessed by the subjects of any other Christian Prince or State" as well as referring to "possessed by or granted to any of our Subjects", it is suggested that it refers to both phrases. It is unlikely that His Majesty intended to impose a stricter measure of possession on British subjects than on foreigners.

⁴⁸ Morton, *supra*, n.30, pp.42-3.

⁴⁹ *Ibid.*, pp.43-5. This of course was before their defection to the English.

⁵⁰ See the *Anglo-Norwegian Fisheries Case*, I.C.J. Rep., 1951, 116 at p.184, where Judge McNair stated that "the independent activity of private individuals is of little value [for establishing sovereignty] unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them". See also D.P. O'Connell, *International Law*, 2nd ed. (London: Stevens & Sons, 1970), pp.417-9.

viewed "the establishment of English posts on James Bay . . . in the light of an encroachment."⁵¹

Whatever claims to sovereignty France may have had to the region, it must be pointed out that, for the purposes of municipal law, English courts are bound to recognize authoritative assertions of sovereignty by the British Crown regardless of competing claims.⁵² Since Britain asserted sovereignty over Hudson Bay by the Charter of 1670, if not before, the only issue to be determined at this point, therefore, is the extent of actual French possession in 1670, since that is the criterion laid down by the Charter itself.

As for the portion of the Hudson watershed located to the north and west of Lake Superior, there does not appear to be any historical evidence of French penetration into this region before 1670,⁵³ with the possible exception of the unauthorized journey of Groseilliers and Radisson in 1661-3, the itinerary of which is unknown.⁵⁴ Some French maps drawn prior to that date show both Hudson Bay and Lake Superior, and the territory between them.⁵⁵ A 1660 map drawn by Father Franciscus Creuxius introduces a river entitled the Assinipoualacus Fl(uvius), flowing out of a western lake into James Bay.⁵⁶ Professor Ruggles suggests that these waterways may represent the Nelson River and Lake Winnipeg.⁵⁷ If his suggestion is correct, it is nonetheless uncertain whether this information was obtained from the Indians or from unrecorded explorations undertaken by *coureurs de bois*.

It therefore appears doubtful that France had sufficient possession in 1670 to defeat the Hudson's Bay Company title to any portion of the Hudson watershed, with the possible exception of the territory to the south-east of James Bay which had been visited in 1662 by Father Gabriel Druillettes and the Sieur de la Vallière and from which the French drew some of their fur-trade.

⁵¹ Morton, *supra*, n.30, p.53.

⁵² See Slattery, *supra*, n.15, p.63; *Halsbury's Laws of England*, 4th ed., vol.VI, para.803 at p.322; and the cases cited in those sources, esp. *R. v. Kent Justices*, [1967] 1 All E.R. 560 (Q.B.) at p.564 and *Post Office v. Estuary Radio Ltd.*, [1967] 3 All E.R. 663 (C.A.) at p.680.

⁵³ See Warkentin and Ruggles, *supra*, n.46, pp.9 and 13. Monk, J., would appear to have been mistaken when he stated in *Connolly v. Woolrich* (*supra*, n.34, at pp.203-4, 212, of 11 L.C.T.) that the Athabasca country of what is now Saskatchewan and Alberta was already in the actual possession of France in 1670.

⁵⁴ See Morton, *supra*, n.30, pp.43-5.

⁵⁵ Samuel Champlain's "Carte de la Nouvelle France", 1632; Nicholas Sanson's "Amerique Septentrionale", 1650; Pierre du Val's "Le Canada", 1653. Reproduced by Warkentin and Ruggles, *supra*, n.46, pp.28-9, 30-1, 32-3, respectively.

⁵⁶ Reproduced *ibid.*, pp.34-5.

⁵⁷ *Ibid.*, p.12.

IV. RIVAL CLAIMS BY BRITAIN AND FRANCE TO HUDSON BAY, 1670-1713

Events after 1670 added further complications to the boundary question. France refused to recognize British sovereignty over Hudson Bay, and as a result a series of encounters between the two nations took place in the region between 1670 and 1713. In 1686 an official French force under the Chevalier de Troyes marched overland from Canada in time of peace and captured Moose Fort, Charles Fort, and Albany Fort, the three Hudson's Bay Company posts on James Bay (see Map 5). The Treaty of Whitehall, signed in November of that year, apparently divided the disputed territory on the basis of actual possession, which would have left the posts on James Bay in the hands of the French and York Fort and Fort Severn, on the west coast of Hudson Bay, under British sovereignty (see Map 5).⁵⁸ However, it appears that the English were unaware that three forts on James Bay had fallen to the French at the time the Treaty was signed.⁵⁹

A. The Treaty of Ryswick, 1697

The boundary question remained unsettled when England declared war on France on May 17, 1689. Peace was restored by the Treaty of Ryswick, 1697,⁶⁰ which provided in article 7 that each king should restore "tous les pays, isles, forteresses, et colonies", wherever situated, which were possessed by the other when war was declared.⁶¹ Article 7 meant that Britain

⁵⁸ The relevant terms provide: "4. It is agreed that each king shall have and retain for himself all dominions, rights, and prerogatives in the seas, straits, or other waters of America, with the same amplitude which belongs to each by right and in the same manner in which he now enjoys them. 5. And moreover the subjects . . . of both kings respectively, shall abstain and keep away from trade and fishing in all places which are occupied or shall be occupied by one or the other party in America . . ." (English translation taken from Davenport, *supra*, n.43, vol.II, p.320). As pointed out by Slattery, *supra*, n.15, pp.150-1, the Treaty appears to leave the question of title, as opposed to possession, undecided.

⁵⁹ Morton, *supra*, n.30, p.103; Davenport, *supra*, n.43, vol.II, p.317.

⁶⁰ The French text, from which the following quotations are taken, appears in Davenport, *supra*, n.43, vol.II, pp.360-5. Davenport took the text from the Ratification by France preserved in the London P.R.O. St. Pap. For., Treaties, no.66.

⁶¹ *Ibid.*, p.362.

would have to restore the three posts on James Bay which had been retaken by the English after the declaration of war. Similarly, France would have to restore Fort Bourbon (York Fort) which, unknown to either party, had been taken by the French a short time before the Treaty was signed. Restoration of the James Bay posts to the French, however, was not intended to settle the question of title to those posts, for article 8 provided (in part):

8. On est convenu qu'il sera nommé de part et d'autre des commissaires pour l'examen et jugement des droits et pretensions reciproques que chacun desdits seigneurs roys peut avoir, sur les places et lieux de la Baye d'Hudson, que les François ont pris pendant la derniere paix, et qui ont esté repris par les Anglois depuis la presente guerre et doivent estre remis au pouvoir de sa Majesté Tres Chrestienne, en vertu del'article precedent . . . [et] lesdits commissaires . . . auront pareillement pouvoir de traiter pour le reglement des limites et confins des pays cedez ou restituez de part et d'autre par ledit article precedent. . . .⁶²

The role of the commissioners, among other things, was therefore not only to set the boundaries between the French and English possessions in the Hudson Bay region, but also to examine and judge the rights and pretensions of each king to the places in Hudson Bay which had been taken by the French in peacetime, retaken by the English during the war, and which were to be restored to France by virtue of article 7. At least that is how the French version of the Treaty reads. Turning to an English version contained in Charles Jenkinson's *Treaties*, we find the following translation of the relevant parts of article 8:

Commissioners shall be appointed on both sides, to examine and determine the rights and pretensions which either of the said kings hath to the places situated in Hudson's Bay; but the possession of those places which were taken by the French, during the peace that preceded the present war, and were retaken by the English during this war, shall be left to the French, by virtue of the foregoing article. . . . [T]he said commissioners . . . shall be invested with sufficient authority for settling the limits and confines of the lands to be restored on either side, by virtue of the foregoing article. . . .⁶³

Although the English version is not without ambiguity,⁶⁴ the use of the

⁶² *Ibid.*, p.363

⁶³ *A Collection of all the Treaties of Peace, Alliance, and Commerce between Great Britain and other Powers; from the Treaty signed at Munster in 1648, to the Treaties signed at Paris in 1783* (London: Printed for J. Debrett, 1785), vol.I, p.299. Reproduced in Clive Parry, ed., *Consolidated Treaty Series* (Dobbs Ferry, N.Y.: Oceana Publications, 1969-), vol.23, p.445, from which the quotation is taken (p.447).

⁶⁴ It is possible to interpret the phrase beginning with "but" as simply confirming expressly that possession of the three James Bay posts to which this phrase refers is to be yielded up to the French, for the time being at least, until the commissioners determine the respective rights of each king to the places in the Bay, including the James Bay posts. Such a construction would be in conformity with the original Latin text of the Treaty, to be examined below.

word "but" after "Hudson's Bay" points to the conclusion that the James Bay posts were excluded from the commissioners' mandate "to examine and determine the rights and pretensions" of each king to the places situated in Hudson Bay.

Such an interpretation, in any case, has been adopted by at least some writers on the subject. E.E. Rich, historian for the Hudson's Bay Company, concludes:

. . . Clause VIII gave the French a *de jure* right to Albany and the posts at the Bottom of the Bay, which had been captured by the French in times of peace in 1686 and which, being in French hands, however illegally, at the outbreak of the war, were covered by the clause.⁶⁵

The Honourable Joseph Cauchon, Canadian Commissioner of Crown Lands, in an admittedly one-sided memorandum attacking the Hudson's Bay Company claims, wrote in 1857 that the commissioners

. . . would have been compelled to make over to France all the places she took during the peace which preceded the war, for in that the treaty left them no discretion. The following are the words of the treaty: "But the possession of those places which were taken by the French, during the peace that preceded this present war, and were retaken by the English during the war, shall be left to the French by virtue of the foregoing article." Thus the Treaty of Ryswick recognized and confirmed the right of France to certain places in Hudson's Bay, distinctly and definitely. . . .⁶⁶

In *Connolly v. Woolrich*, Mr. Justice Monk quoted from what appears to be the same version of article 8 and emphasized the words "shall be left to the French" and "foregoing article".⁶⁷

It is suggested, however, that an interpretation of article 8 which would have given France indisputable title to the three James Bay posts, while possibly consistent with the English version of the Treaty, is incompatible with the French version. Which text is authoritative? According to both Frances Davenport⁶⁸ and Clive Parry,⁶⁹ the English version is a translation. The text of the French version, on the other hand, was taken by Davenport from the Ratification by France. Davenport states that while the English Ratification was in Latin, the original Treaty was in French.⁷⁰ Parry implies that the original was in Latin and that the French version is a translation.⁷¹

⁶⁵ E.E. Rich, "The Hudson's Bay Company and the Treaty of Utrecht" (1953-4), XI *Cambridge Historical Journal* 183, at p.188. See also *idem*, *The History of the Hudson's Bay Company, 1670-1870* (London: Hudson's Bay Record Society, 1958-9), vol.I, pp.346-7, 416.

⁶⁶ *Journals of the Legislative Assembly* (Can.), 1857, vol.15, Appendix No.17. Reproduced in *Ontario Boundaries, supra*, n.41, Joint Appendix, pp.168-93, at p.176.

⁶⁷ *Supra*, n.34, at p.213 of 11 L.C.T.

⁶⁸ *Supra*, n.43, vol.II, p.359.

⁶⁹ *Supra*, n.63, vol.23, p.445

⁷⁰ *Supra*, n.43, vol.II, p.358.

⁷¹ *Supra*, n.63, vol.23, p.409.

On this point, Parry appears to be correct. A 1699 collection of the documents relating to the Treaty of Ryswick contains both a Latin and a French text of the Treaty (but no English text).⁷² The French version is headed "Traduction". Since it would have been unnecessary to translate the Treaty into French if the original had been in that language, the Latin text must be the original.

Regrettably, it does not follow from that conclusion that the French version has no legal authority. The French Ratification, which follows the French text,⁷³ is not a translation. It is therefore possible that France ratified the French and not the Latin text, and thereby (arguably) made the French version authoritative.⁷⁴ Fortunately, as a comparison of the French and Latin texts will indicate, it is probably not necessary for our purposes to resolve this issue.

The Latin version of the relevant parts of article 8 reads:

Constituentur ab utraque Parte Commissarii qui possint examinare & determinare Jura & Praetensiones, quas affert uterque Dominorum Regum, in Loca in Sinu Hudsoni sita, quorum quidem Locorum à Gallis captorum, durante Pace praecedenti hoc praesens Bellum, ab Anglis vero recuperatorum durante praesenti Bello, Possessio Gallis ceditur vigore Articuli proximè Superioris. . . . Porrò dicti Commissarii immediatè post Ratihabitionem praesentis Tractatus Auctoritate sufficienti munientur definiendi Limites & Confinia Terrarum utrinque restitutarum, vigore Articuli praecedentis. . . .⁷⁵

The Latin text appears to give the commissioners the authority to examine and determine the rights and pretensions of both France and England to all the places situated in Hudson's Bay, including the three James Bay posts which had been taken by the French in 1686 and retaken by the English in 1693. The Latin text therefore conflicts both with the French version, which restricts the commissioners' mandate in this regard to the three James Bay posts, and with the interpretation of the English version which would empower the commissioners to deal with all places in the Bay except those three posts.

Since our interest in the Treaty of Ryswick centres on the issue of whether or not article 8 gave France legal title to the James Bay posts, it is not necessary to consider whether the commissioners' mandate extended to

⁷² Jacques Bernard, ed., *Actes et Mémoires des Negotiations de la Paix de Ryswick* (La Haye: Adrian Moetjens, 1699), vol.III, pp.175 and 193 respectively. The portion of the French text which concerns us is identical to the text in Davenport.

⁷³ *Ibid.*, p.214.

⁷⁴ England, on the other hand, ratified the Latin text in Latin: *ibid.*, p.187.

⁷⁵ Taken from Parry, *supra*, n.63, vol.23, p.415. Parry states at p.409 that this "original Latin text . . . is taken from Dumont, *Corps Universel Diplomatique du Droit des Gens*, vol.VII, Part II, p.399, and by Dumont from the print issued by Léonard under Royal authority in 1697". This portion of Parry's Latin text, at least, is identical to the Latin text reproduced in Bernard, *supra*, n.72.

the whole Bay. Respecting the James Bay posts, there is no conflict between the Latin and French versions. Both empower the commissioners to determine the respective rights to the posts, as opposed to actual possession, which for the time being was to be given to the French by virtue of article 7. It is thus unnecessary to determine whether only the Latin or also the French text is authoritative. Since the English version is undoubtedly a translation, it can be disregarded. With respect to the James Bay posts, we therefore conclude that the Treaty of Ryswick merely gave France present possession. The outstanding question of legal title was left for determination by the commissioners.

The Treaty of Ryswick was never implemented. The French retained possession of Fort Bourbon (York Fort) and the English held on to the James Bay posts. The commissioners met and considered various proposals for settlement. It is significant that the Hudson's Bay Company, while continuing to maintain that it had a legal claim to the entire Bay, in 1700 proposed a compromise boundary between its own territory and French Canada which followed the Albany River on the west side of the Bay and Rupert River on the east. In 1701 it modified its position and expressed its willingness to accept the Canuse River (probably the present-day Eastmain) as the boundary on the east (see Map 5). These proposals, if accepted, would have given all three James Bay posts to France.

B. The Treaty of Utrecht, 1713

No settlement was reached, however, and in 1702 war broke out again, terminating with the Treaty of Utrecht in 1713. Article 10 of that Treaty provided in part:

The said most Christian King shall restore to the Kingdom and Queen of *Great Britain*, to be possessed in full Right for ever, the Bay and Streights, of *Hudson*, together with all Lands, Seas, Sea-Coasts, Rivers, and Places situate in the said Bay and Streights, and which belong thereunto, no Tracts of Land or of Sea being excepted, which are at present possessed by the Subjects of *France*. . . . But it is agreed on both sides, to determine within a Year, by Commissaries to be forthwith named by each Party, the Limits which are to be fixed between the said Bay of *Hudson*, and the Places appertaining to the *French* . . .⁷⁶

Of particular significance is the use of the term "restore". On this point Professor Slattery observes:

The term "restore" was employed at British insistence, in place of the word "cede" found in the original French proposal, and on this point the

⁷⁶ Taken from an English translation of the text contained in *British Sessional Papers, House of Commons*, 1847, vol.LXIX, 391 at p.441. Original French text in Parry, *supra*, n.63, vol.27, p.477, and in Davenport, *supra*, n.43, vol.III, p.208.

terminology differs from that used elsewhere in the Treaty regarding Acadia. Britain's aim was to secure recognition of its asserted original title to the Bay.⁷⁷ (footnotes omitted)

E.E. Rich comments as follows:

In view of this assertion of discovery, first settlement, and trade, the British decided that the French should not be allowed to make an act of cession. To do so would imply that the lands were French possessions, would therefore invalidate the Hudson's Bay Company's claims for damages, and would render the English trespassers on French soil up to the date of the Treaty. The Lords of Trade urged the rejection of an act of cession not only because a "restoration" would implicitly acknowledge the Company's title but because it would also put them "into the immediate Enjoyment of their property without further Trouble".⁷⁸ (footnotes omitted)

The use of the term "restore" in this Treaty signed 16 years after the Treaty of Ryswick is therefore further evidence that England did not intend to relinquish title over the James Bay posts to France in the earlier Treaty. However, the term resulted in continuing disagreement over the location of the boundary between the French and English territories. Its use permitted France to contend that it need surrender only a strip of land around the Bay, since that was the only territory which Britain had previously held.⁷⁹ Britain, on the other hand, claimed everything north of a line running south-west from 58 ½° north latitude at Cape Perdrix on the Atlantic coast through Lake Mistassini to the 49th parallel and then due west (see Map 3). The commissioners who were appointed under the Treaty to settle the boundary question failed to reach an agreement. The matter therefore remained unresolved when it ceased to be an international issue in 1763 on the cession of French Canada to Britain.

It has been argued that, as a result of the Treaty of Ryswick, the Hudson's Bay Company lost any title which it may have had to the southern part of James Bay where its three posts were located and that, although the Treaty of Utrecht restored the territory to Britain, it did not revive the Company's title.⁸⁰ Such a contention probably depends on the erroneous interpretation of article 8 of the Treaty of Ryswick, which has already been

discussed. Nonetheless, even if loss of possession could be said to have jeopardized the Company's title, the intention of Britain at the time the Treaty of Utrecht was signed would appear to have been to "restore" the former rights not only of the King but also of the Company. It is clear from E.E. Rich's article that Britain's insistence at Utrecht on recognition of her sovereignty over the whole of Hudson Bay was due in large measure to pressure from the Company.⁸¹ The whole purpose of the restoration was to re-establish the Company's monopoly over the Bay and to eliminate French competition in the fur-trade. On the effect of the restoration of Fort Bourbon (York Fort), Professor Morton observes:

. . . [W]hen the French in keeping with the Treaty of Utrecht surrendered their posts to England, Governor James Knight and his Deputy Henry Kelsey of the Hudson's Bay Company's overseas service were given a commission by Queen Anne to receive possession of Fort Bourbon from the French, and all parties accepted it that the Company was simply coming back into its own.⁸²

As for James Bay, the Company's monopoly was just as effectively re-established there after 1713. Competition with the French from that date shifted to the interior of the country.

⁷⁷ *Supra*, n.15, pp.152-3.

⁷⁸ "The Hudson's Bay Company and the Treaty of Utrecht", *supra*, n.65, at p.198. The phrase quoted in the last sentence comes from a letter written, on Her Majesty's command, from the Earl of Dartmouth to the Lords of Trade on May 27, 1713: reproduced in *Ontario Boundaries*, *supra*, n.41, Joint Appendix, p.576. The phrase is preceded by the words, "By this Means [i.e. a delivery of possession rather than an act of cession] the title of the Company is acknowledged, and they will come . . .".

⁷⁹ Slattery, *supra*, n.15, p.153; Max Savelle, "The Forty-Ninth Degree of North Latitude as an International Boundary, 1719: The Origin of an Idea" (1957), 38 *Canadian Historical Review* 183, at pp.196-8.

⁸⁰ See, for example, Cauchon, *supra*, n.66, at p.177 of *Ontario Boundaries*, Joint Appendix.

⁸¹ "The Hudson's Bay Company and the Treaty of Utrecht", *supra*, n.65.

⁸² *Supra*, n.30, p.109.

the Act of 1774) out of which Upper Canada was formed in 1791.⁹⁰

A. The Arbitration Award of 1878

The dispute that arose between the governments of Canada and Ontario over the location of the western and northern boundaries of the province went to arbitration in 1878. Canada contended that the provision in the *Quebec Act* quoted above laid down a line running due north from the confluence of the Ohio and Mississippi rivers as the western boundary of the old province of Quebec, and hence of Ontario (see Map 5). The arbitrators rejected this contention and adopted the interpretation proposed by Ontario, that is, that the Act established the Mississippi River itself and a line running due north from its source as the western boundary (see Map 5). Since this line corresponded very closely with the international boundary, which, by the Convention of Commerce between Britain and the United States, 1818,⁹¹ jags due north from the 49th parallel to the north-western angle of the Lake of the Woods, the arbitrators decided to use a due north continuation of the international boundary as the western boundary of Ontario (see Map 5). In the words of one of the three arbitrators, Sir Francis Hincks,

[i]t seemed to the Arbitrators that under all circumstances of the case, the true south-westerly boundary of Ontario should be held to be at the international boundary, rather than at a point due north of the source of the Mississippi. The latter would have been in nearly the same meridian, I may observe, and would have entailed much useless expense in surveys, besides disputes as which was really the true source of the Mississippi, which according to Mr. S. J. Dawson, is to be found "in numerous brooks and countless lakelets."⁹²

At this point it must be pointed out that no reasons were included in the Arbitration Award itself. But as a result of the harsh criticism which the arbitrators' findings evoked, Sir Francis Hincks felt compelled to provide an explanation of the Award, which he did in a public lecture delivered in Toronto on May 6, 1881.⁹³ Our analysis of the Award is based on the

V. THE ONTARIO BOUNDARIES DISPUTE

The significance of the historical events of the period from 1670 to 1713 is revealed by an examination of the 1878 Arbitration Award⁸³ (Appendix A to this paper) and the 1884 Privy Council decision⁸⁴ (see Appendix B) relating to the boundaries of Ontario.⁸⁵ While the southern limit of Rupert's Land ceased to be an international question in 1763, the issue resurfaced when it became necessary to determine the northern boundary of Quebec and the northern and western boundaries of Ontario after the admission of Rupert's Land into Canada in 1870.

In the case of Ontario, the matter depended upon the interpretation of a provision of the *Quebec Act* of 1774 which extended the boundaries of the old province of Quebec westward along the Ohio River "to the Banks of the Mississippi, and Northward to the Southern Boundary of the Territory granted to the Merchants Adventurers of England, trading to Hudson's Bay"⁸⁶ (see Map 5). In 1791 an Imperial Order in Council (Appendix C) divided Quebec into Upper and Lower Canada and defined the boundary between them.⁸⁷ The two provinces were re-united as the province of Canada under the *Union Act*, 1840,⁸⁸ and divided once again on the formation of the Dominion of Canada in 1867. Section 6 of *The British North America Act, 1867*,⁸⁹ provided that the parts of the province of Canada which formerly constituted Upper and Lower Canada would henceforth constitute Ontario and Quebec, respectively. The boundaries of Ontario in 1867 therefore corresponded with those of Upper Canada, which were derived in part from the limits of the old province of Quebec (as defined by

⁸³ Aug. 3, 1878. Reproduced in *Ontario Boundaries, supra*, n.41, Joint Appendix, p.107.

⁸⁴ See n.40.

⁸⁵ For a historical account of the dispute, see C.R.W. Biggar, *Sir Oliver Mowat* (Toronto: Warwick Bro's & Rutter, Ltd., 1905), vol.I, pp.369-458.

⁸⁶ 14 Geo. III, c.83 (U.K.); R.S.C. 1970, App.II, No.2.

⁸⁷ Aug. 24, 1791. Reproduced in *Ontario Boundaries, supra*, n.41, Joint Appendix, p.399. The *Constitutional Act*, 1791, 31 Geo. III, c.31 (U.K.) (R.S.C. 1970, App.II, No.3) provided for the government of the new provinces. That Act was proclaimed into force on Dec. 26, 1791, by a Proclamation dated Nov. 18, 1791 (also reproduced in *Ontario Boundaries*, Joint Appendix, p.401).

⁸⁸ 3 & 4 Vic. c.35, s.1 (U.K.); R.S.C. 1970, App.II, No.4.

⁸⁹ *Supra*, n.1.

⁹⁰ See n.99. The present boundaries of Ontario are the result of a 1912 extension of the limits of the province: see *The Ontario Boundaries Extension Act*, S.C. 1912, c.40.

⁹¹ Text in Parry, *supra*, n. 63, vol.69, p.294.

⁹² "Lecture of Sir Francis Hincks . . . on the Northerly and Westerly Boundaries of Ontario, and the Award Relating Thereto, May 6, 1881" (hereinafter referred to as "Lecture"), *Ontario Boundaries, supra*, n.41, Joint Appendix, 109 at p.116.

⁹³ *Ibid.*

reasons given by Sir Francis.⁹⁴

Once the western boundary line had been located, it was necessary to determine how far north that line extended. As we have seen the *Quebec Act* provided that the western boundary of the old province of Quebec ran northward to the southern boundary of the Hudson's Bay Company territory. Canada contended that the height of land between the Hudson and St. Lawrence drainage basins formed the southern boundary of that territory. Once again the arbitrators rejected Canada's contention and settled the matter in favour of Ontario by selecting a line well north of the watershed. More specifically, they held that the western boundary line terminated at the English River or, if that line happened to be located west of the confluence of the English and Winnipeg rivers (as in fact it is), at a point due west of the confluence. The northern boundary then followed the English River upstream to the easterly end of Lac Seul. Similarly in the north-east the arbitrators rejected the height of land in favour of the south shore of James Bay and the middle of the Albany River and Lake St. Joseph. They then completed the boundary by simply connecting the eastern end of Lac Seul and the head of Lake St. Joseph with a straight line (see Appendix A and Map 5).

Sir Francis declined to enumerate all the arguments which led him to reject the height of land as the southern boundary of Rupert's Land.⁹⁵ He did, however, give some indication of his reasoning. In the first place, he stated that he had "been unable to discover any authority for so extensive a claim".⁹⁶ On the contrary, he regarded such a claim as being inconsistent with the Proclamation of 1791 which brought the *Constitutional Act* into force.⁹⁷ The Proclamation referred to the Imperial Order in Council of August 24, 1791 (Appendix C), which defined the boundary between Upper and Lower Canada in part as a line drawn due north from the head of Lake "Tomiscanning" (Temiscaming or Temiscamingue) to "the boundary line of Hudson's Bay". Sir Francis rejected the contention that these words should be interpreted as meaning "to the boundary of the Hudson's Bay

Territory", and concluded that the eastern boundary of Ontario extended north to the shore of James Bay (see Map 5).⁹⁸

If the Order in Council and the Proclamation stood alone, Sir Francis' interpretation would be questionable. The Order in Council did not attempt to redefine the boundaries of the old province of Quebec — it merely divided that province into two new colonies.⁹⁹ Since the old province was bounded on the north by the territory of the Hudson's Bay Company, it would have been logical for the Order in Council to terminate the boundary between Upper and Lower Canada at the southern limit of that territory. However, an Imperial Commission of March 30, 1838, naming Lord Durham Captain-General and Governor-in-Chief of Upper Canada, described the boundary line between the two provinces as running due north from the head of Lake Temiscaming "until it reaches the shore of Hudson's Bay".¹⁰⁰ This Commission shows that Sir Francis' interpretation was probably correct. The British Crown in 1791, or at least in 1838, could not have regarded Rupert's Land as extending south beyond the point where the boundary between the new provinces met James Bay.

The Proclamation of 1791 was only one reason for the arbitrators' rejection of the height of land. In reference to their choice of the Albany River as part of the northern boundary of Ontario, they seem to have been heavily influenced by the Hudson's Bay Company's own willingness to accept such a boundary in 1700-1 after the Treaty of Ryswick. In this regard, Sir Francis commented as follows:

. . . [T]he Hudson's Bay Company had at one time agreed to accept the Albany River as the southern boundary of their territory; and although it was never agreed to by the high contracting parties, still the fact that the Hudson's Bay Company at that period made no claim to any country south of the Albany River is confirmatory of the correctness of the award.¹⁰¹

It is unclear from Sir Francis' lecture, however, whether he regarded the territory between the height of land and the Albany River as excluded

⁹⁴ Admittedly the reasons given by one out of three arbitrators are not necessarily the reasons of all or even a majority of the three. However, Chief Justice Harrison, one of the arbitrators, wrote as follows to Sir Francis in Aug., 1878 (in reference to the criticism attracted by the Award): "I feel satisfied that you can give an answer to all and sundry who attack the award" (quoted in Sir Francis' "Lecture", *ibid.*, p.118). This statement indicates a certain unanimity between the two men. The Chief Justice was dead at the time Sir Francis delivered his lecture. Sir Edward Thornton, the third arbitrator, was still alive. The writer has been unable to find any comments made by Sir Edward on the Award or on the reasons given by Sir Francis.

⁹⁵ "Lecture", *supra*, n.92, p.116.

⁹⁶ *Ibid.*, p.117.

⁹⁷ *Ibid.* See n.87.

⁹⁸ *Ibid.*

⁹⁹ This is clear from the Imperial Commission to Lord Dorchester, Sept. 12, 1791, appointing him "Captain-General and Governor-in-Chief" of Upper and Lower Canada, reproduced in *Ontario Boundaries, supra*, n.41, Joint Appendix, p.400: see n.104.

¹⁰⁰ Reproduced in *Ontario Boundaries, supra*, n.41, Joint Appendix, p.406. See also Lord Durham's Commission to Lower Canada, of the same date, which also described the boundary line as drawn to "the shore of Hudson's Bay": *ibid.*, p.405. Similar commissions up to that of Lord Elgin in 1846 contain the same words; after that date commissions contain no boundary descriptions: see *ibid.*, pp.428-9.

¹⁰¹ "Lecture", *supra*, n.92, p.120. Sir Francis is mistaken when he says that the Company made no claim south of the Albany in 1700-1. In fact the Company was claiming the whole Bay at that time but it was willing to compromise in view of the Treaty.

from the Company's original grant, either on a restrictive interpretation of the grant itself or as a result of prior possession by France, or whether he decided that the Company had lost that territory under the Treaty of Ryswick in 1697 and failed to recover it under the Treaty of Utrecht. On balance, however, he appeared to favour the latter approach:

I have already adverted to the Albany River having been proposed by the Hudson's Bay Company as their southern boundary, and it seemed to the Arbitrators that a natural boundary, following the course of that river, left to the representatives of the Hudson's Bay Company quite as much territory as they could justly claim. It would be wholly impossible for me, within the limits to which I am necessarily confined, to refer at any length to the numerous documents which led the Arbitrators to reject the pretension of the Dominion Government, that the height of land was the southern boundary of the Hudson's Bay Company's territory. The original charter limited the territorial grant to territories not in the possession of any other Christian Prince, and although the subsequent Treaties of Ryswick and Utrecht affected the boundaries between France and England, yet there is no evidence of any new grant having been made to the Hudson's Bay Company. In his very able report on the boundaries, the Hon. David Mills has maintained that the effect of the Treaty of Utrecht was not to restore to the Hudson's Bay Company what it had lost by the Treaty of Ryswick.¹⁰²

Sir Francis therefore seemed to view the Treaty of Ryswick as setting a southern limit to Rupert's Land and the Hudson's Bay Company's proposal of 1700-1 as defining that limit, or at least defining the limit that the Company was willing to accept. The Company's proposal was a compromise between its own claims and those of France (see Map 5). By adopting it, the arbitrators settled the matter of the boundary, as established by the Treaty of Ryswick, in favour of the Company, and hence of Canada, the successor to the Company's claims. This interpretation of the Award is confirmed by Sir Francis:

. . . [B]eing aware of the fact that the Albany River had been formerly suggested by the Hudson's Bay Company as a satisfactory southern boundary, they [the arbitrators] adopted it. . . . The only questions of doubt were decided in favour of the Dominion. Both on the west and north the doubts were whether Ontario should not have had more territory.¹⁰³

With respect to the boundary adopted as the northern limit of Ontario from the headwaters of the Albany River to the western boundary, it is not clear what factors influenced the arbitrators in their decision. Critics of the Award charged that this portion of the boundary, in particular, was defined

on the basis of convenience. Sir Francis refuted the charge as follows:

The sole ground for the charge that they adopted a conventional or convenient boundary is, that the line connecting the north-eastern and south-western boundaries was adopted for the sake of convenience. The Arbitrators were guided in their decisions solely by Acts of Parliament, Proclamations authorized by Orders in Council on the authority of Acts of Parliament, and international treaties. They found in the Proclamation of 1791, that after reaching James' Bay, the description proceeded thus: "including all the territory [to the] westward and southward of the said line to the utmost extent of the country commonly called or known by the name of Canada". If the critics of the award believe such language susceptible of the construction that it lays down a precise spot on the north-west as a boundary, then their charge might have some foundation, but the fact is that the language would have justified the Arbitrators in extending the boundaries of Ontario very considerably.¹⁰⁴

It would appear then that the arbitrators relied heavily on the vague wording of the Proclamation of 1791 in determining the northern boundary. Elsewhere, however, Sir Francis rejected the contention that the Proclamation extended the boundaries of Upper Canada, and hence of Ontario, beyond those established for the old province of Quebec by the *Quebec Act*.¹⁰⁵ One is thus led back to the provision in that Act which set the southern boundary of Rupert's Land as the northern boundary of Quebec.

What then led the arbitrators to conclude that the English River and Lac Seul formed part of the southern limit of the Hudson's Bay Company's territory in 1774? There is nothing in the wording of the Royal Charter itself which suggests such a boundary. As discussed previously, there is no reliable evidence of French possession north and west of Lake Superior prior to 1670 other than the unauthorized and uncharted journey of Groseilliers and Radisson in 1661-3. As for the Treaty of Ryswick, even if

¹⁰⁴ *Ibid.* The context of the portion of the Proclamation of Nov. 18, 1791, quoted by Sir Francis (which the Proclamation quotes from the Order in Council of Aug. 24, 1791: Appendix C of this paper) renders it grammatically incomprehensible. The quoted words follow a description of the boundary between Upper and Lower Canada. There is no indication as to what "the territory to the westward and southward of the said line" was meant to be included in. In fact the ambiguity contained in the Order in Council had been cleared up, before the Proclamation was issued, by the Sept. 12, 1791, Commission to Lord Dorchester (*supra*, n.99). After repeating the description of the boundary between the two provinces contained in the Order in Council, the Commission substituted the following words for the quoted portion of the Proclamation: "the Province of Upper Canada to comprehend all such lands, territories and islands, lying to the westward of said line of division, as were part of Our said Province of Quebec, and the Province of Lower Canada to comprehend all such lands, territories and islands lying to the eastward of the said line of division, as were part of Our said Province of Quebec".

¹⁰⁵ *Ibid.*, pp.119, 124.

¹⁰² *Ibid.*, p.117.

¹⁰³ *Ibid.*, p.124.

