

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

Kent McNeil

Studies in Aboriginal Rights No. 4
University of Saskatchewan Native Law Centre
1982

CONTENTS

PREFACE

I	INTRODUCTION	1
II	THE NORTH-WESTERN TERRITORY	4
III	RUPERT'S LAND: THE ROYAL CHARTER OF 1670	6
	A. The Extent of the Grant	7
	B. Lands Excluded from the Grant	8
IV	RIVAL CLAIMS BY BRITAIN AND FRANCE TO HUDSON BAY, 1670-1713	13
	A. The Treaty of Ryswick, 1697	13
	B. The Treaty of Utrecht, 1713	17
V	THE ONTARIO BOUNDARIES DISPUTE	20
	A. The Arbitration Award of 1878	21
	B. The Ontario Boundaries Case, 1884	26
	C. The Canada (Ontario Boundary) Act, 1889	33
VI	MANITOBA AND THE RED RIVER SETTLEMENT	35
VII	DETERMINING THE BOUNDARIES OF RUPERT'S LAND AND THE NORTH-WESTERN TERRITORY	43
	A. West of Ontario	43
	B. In the North	44
	C. East of Hudson Bay	45
VIII	THE RUPERT'S LAND ACT, 1868	48
IX	CONCLUSION	50
APPENDICES		
	A. Award of the Arbitrators, August 3, 1878	52
	B. Imperial Order in Council of August 11, 1884	54
	C. Imperial Order in Council of August 24, 1791	58
	D. Canada (Ontario Boundary) Act, 1889	61
MAPS		
	1. Rupert's Land based on the Hudson drainage basin	64
	2. Boundaries of Virginia on a literal interpretation of the Royal Charter of 1609	65
	3. Boundaries between British and French territory proposed in 1719	66
	4. Boundaries of Quebec in 1898 and 1927	67
	5. Portion of map used in the Ontario Boundaries Case, 1884	Inside Back Cover

Canadian Cataloguing in Publication Data

McNeil, Kent, 1945-
Native rights and the boundaries of Rupert's
Land and the North-Western Territory

(Studies in aboriginal rights, ISSN 0226-3491 ; 4)
ISBN 0-88880-111-4

1. Rupert's Land - Boundaries. 2. Northwest,
Canadian - Boundaries. 3. Indians of North
America - Northwest, Canadian - Claims.
I. University of Saskatchewan. Native Law Centre.
II. Title. III. Series.
FC209.M3 971.9 C81-091389-5
F1027.5.M3

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.

