

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 *Sigaeareak 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 *Sigaeareak* 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 "wc" 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 pretentions 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

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

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.

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. . . . Porro 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

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

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.

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.

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

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

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.

one accepts, as the arbitrators may have done,¹⁰⁶ that it gave title to the territory up to the Albany River to France, there is no justification for extending that line west from the headwaters of the Albany to the English River, a region which neither the French nor the English had explored when the Treaty was signed in 1697. The only logical explanation left for the adoption of the English River as the southern boundary of Rupert's Land is that the French had acquired undisputed possession of the territory south of that river between 1713 and 1763.

B. The Ontario Boundaries Case, 1884

The *Ontario Boundaries Case*¹⁰⁷ arose out of the continuing controversy over the location of the northern and western boundaries of the province following the Arbitration Award.¹⁰⁸ Canada regarded the Award as unacceptable and declined to implement it. Resolution of the dispute became essential in 1881 after both Canada and Manitoba enacted statutes extending the limits of that province east to the "westerly boundary of the Province of Ontario" (see Map 5).¹⁰⁹ In 1884 Canada referred the matter of the location of the boundary between Manitoba and Ontario to the Privy Council on the request of the two provinces.¹¹⁰

The historical evidence and the legal arguments were very thoroughly presented before the Privy Council.¹¹¹ The final decision (see Appendix B) upheld the Arbitration Award with two minor variations, to be examined below. However, since the question referred to their Lordships involved only the common boundary between Manitoba and Ontario, the decision was limited to a definition of the boundary from the Lake of the Woods north and eastward to the point where the Albany River meets a line drawn due north from the confluence of the Mississippi and Ohio rivers (approximately 89° west longitude: see Map 5). Since that due north line was held to form

the eastern boundary of Manitoba north of the Albany River,¹¹² it was unnecessary for their Lordships to go any further.

Regrettably, the Privy Council provided no reasons for its decision. Although their Lordships substantially upheld as much of the Award as related to the boundary between the two provinces, it is uncertain whether they did so for the reasons expressed by Sir Francis Hincks.¹¹³ Nonetheless, some indication of their thinking can be obtained from an examination of the transcript of the proceedings.

In the first place, their Lordships appear to have been heavily influenced by the Imperial commissions which described the boundary between Upper and Lower Canada originally as a line drawn due north from Lake Temiscaming to "the boundary line of Hudson's Bay", and later to "the shore of Hudson's Bay".¹¹⁴ Near the end of the proceedings the Lord Chancellor commented:

The Commissions were Acts of State, and of great authority and importance, beginning contemporaneously almost with the Conquest of Quebec, and coming down to the years 1838 and 1839, and probably the case depends upon them more than upon anything else.¹¹⁵

If their Lordships relied on the commissions, that would explain their rejection of the height of land as the northern boundary of Ontario in the north-east.

It is clear that the Privy Council determined the location of the western boundary on the basis of the *Quebec Act* of 1774. After consultation with the other members of the Privy Council, the Lord Chancellor stated: "They [their Lordships] consider the true question to be the present identification of the boundaries laid down in the Quebec Act".¹¹⁶ Shortly before the close of the proceedings their Lordships expressly accepted the western boundary

¹⁰⁶ With respect to his rejection of the height of land as the southern boundary of Rupert's Land, Sir Francis referred his listeners to the memorandum of Joseph Cauchon, cited *supra*, n.66: see "Lecture", *supra*, n.92, p.116. It will be remembered that Mr. Cauchon interpreted the Treaty of Ryswick as recognizing French title to the Hudson's Bay Company posts on James Bay.

¹⁰⁷ *Supra*, n.40.

¹⁰⁸ See Biggar, *supra*, n.85, pp.377-414.

¹⁰⁹ S.C. 1881, c.14; S.M. 1881, c.1.

¹¹⁰ By an Order in Council dated May 6, 1884. Reproduced in *Ontario Boundaries*, *supra*, n.41, Joint Appendix, p.6. Canada agreed to be bound by the decision, and was represented by counsel at the proceedings.

¹¹¹ See *Ontario Boundaries*, *supra*, n.41, for the documentary evidence, and *The Proceedings*, *supra*, n.40, for the arguments of counsel.

¹¹² The portion of their Lordships' decision relating to the eastern boundary of Manitoba north of the Albany River was not implemented. A northern continuation of the line that was held to form the western boundary of Ontario appears to have been accepted as the eastern boundary of Manitoba: see Nicholson, *supra*, n.28, pp.188-20, 138-46. The territory east of that line which the Privy Council had included in the province of Manitoba became part of Ontario when that province's boundaries were extended in 1912 by *The Ontario Boundaries Extension Act*, S.C. 1912, c.40.

¹¹³ It is noteworthy that a copy of Sir Francis' lecture was included in the documents submitted to the Privy Council: *Ontario Boundaries*, *supra*, n.41, Joint Appendix, p.109. See *The Proceedings*, *supra*, n.40, pp.334-7, where D. McCarthy, counsel for Manitoba, and their Lordships comment on the lecture. See also the Lord Chancellor's observations at p.398.

¹¹⁴ See text accompanying nn.97-100.

¹¹⁵ *The Proceedings*, *supra*, n.40, pp.366-7. See also pp.308-9, 364-7, 387-95, 400. At p.400 Sir Montague Smith stated: "[T]hese commissions are much stronger than the popular view to shew where the boundary of Upper Canada was".

¹¹⁶ *Ibid.*, p.163

as laid down by the Arbitration Award.¹¹⁷ They must therefore have interpreted the Act as establishing a due north line from the source of the Mississippi as the western boundary.¹¹⁸ They then went on to conclude that the western boundary extended north of the Lake of the Woods to some undetermined point, and asked counsel for Ontario to address them on the question of the northern boundary.¹¹⁹ Mr. Oliver Mowat replied that, although there were grounds for extending the western boundary north to the Bay, Ontario was satisfied with the Award, and favoured the natural water boundary.¹²⁰

The difficulty which the Privy Council had in establishing the true location of the northern boundary is revealed in an interesting exchange which took place between their Lordships and Mr. C. Robinson, counsel for the government of Canada, at the close of the latter's argument.¹²¹ The Lord Chancellor, in effect, directed this hypothetical question at Mr. Robinson: Suppose the north-eastern and south-western points on the boundary can be determined with certainty, but the evidence relating to the northern boundary is inconclusive — how then are we to establish the location of that boundary? Mr. Robinson replied that it was not for him to say what their Lordships should do in such a situation, but he went on to point out that the Reference was to ascertain the "true boundaries".¹²² The dilemma their Lordships were presented with may be stated simply: How does one determine true boundaries on inconclusive evidence? Sir Montague Smith provided an answer:

It must be done on presumptions. If evidence fails, it must be the best presumptions we can make upon facts before us.¹²³

He went on to explain that by presumptions he meant presumptions of fact as well as of law, since "[i]t is a mixed question of law and fact".¹²⁴ This is a telling statement. If the location of the boundary depended solely on the interpretation of the Charter of 1670, Acts of Parliament, orders in council, commissions, international treaties, and the like,¹²⁵ the question would have been one of law alone. What questions of fact presented themselves? It is suggested that the major factual issue before their Lordships was the extent of French possession prior to 1763 in the territory claimed by the Hudson's

Bay Company.

A great deal of evidence and argument was presented to the Privy Council on the question of French possession.¹²⁶ During the course of the proceedings, the Lord Chancellor commented:

I do not think one would be disposed to dispute the proposition that, *so far as the Crown of England could give it*, it [the Charter of 1670] gave to the Hudson's Bay Company a right, *if they were able to make themselves masters of the country*, to the territory up to the sources of the rivers; but they did not make themselves masters of the whole of that country, for some other nation had come in in the meantime.¹²⁷ (emphasis added)

The following exchange on this issue is worth quoting at length:

LORD ABERDARE. — You argue that even although the evidence shewed, for instance — just as an example — that a portion of this territory awarded by the arbitrators within the watershed towards Hudson's Bay, had been occupied by the French, that occupation for fifty, eighty or a hundred years, would not avail against the claim of the Hudson's Bay Company?

Mr. McCARTHY [counsel for Manitoba]. — Yes, my Lord, that is my proposition.

The LORD CHANCELLOR. — It is really a proposition which, if it is anything, is the most extraordinary imaginable. The French got access to this country, which is drained at a certain point by the St. Lawrence, they push their settlements into the interior, and do not meet there with any other settlements of any other nation whatever. According to your argument, they might organize these settlements in the most civilized way, and build towns and villages, and cultivate the land, but because King Charles II. had granted, a hundred or fifty years before, a charter to some of his subjects, which in the terms of it, as you say, construed upon certain principles, would include part of the territory which the French had so settled, therefore, internationally, the adventurers, the grantees of Charles II., have a right to turn out the French settlers?

Mr. McCARTHY. — Yes.

The LORD CHANCELLOR. — It is perfectly absurd.¹²⁸

These observations show clearly that their Lordships considered evidence of French possession up to 1763 relevant to the issue of the extent of Rupert's Land.

Prior to the cession of French Canada to Britain, the Hudson's Bay Company generally relied upon the Indians to bring their furs down to the Company posts on or near the Bay. With a few exceptions,¹²⁹ the Company made no attempt to penetrate the interior of the continent. By comparison, French exploration and trade in the north-west were extensive. Between

¹¹⁷ *Ibid.*, p.403, *per* the Lord Chancellor.

¹¹⁸ The due north line from the confluence of the Mississippi and Ohio rivers was expressly rejected: *ibid.*, p.404.

¹¹⁹ *Ibid.*, p.403, *per* the Lord Chancellor.

¹²⁰ *Ibid.*, p.404.

¹²¹ *Ibid.*, pp.401-2.

¹²² Their Lordships *did* determine the *true* boundaries: see paragraph 2 of their report to Her Majesty, contained in the Imperial Order in Council of Aug. 11, 1884 (Appendix B).

¹²³ *The Proceedings, supra*, n.40, p.402.

¹²⁴ *Ibid.*

¹²⁵ It will be remembered that Sir Francis Hincks made this kind of assertion: see the quotation cited by n.104.

¹²⁶ See *The Proceedings, supra*, n.40, esp. pp.35, 55-8, 81-97, 255-67, 287-90, 357-66, 388.

¹²⁷ *Ibid.*, p.362.

¹²⁸ *Ibid.*, pp.255-6.

¹²⁹ Henry Kelsey, for example, probably reached the prairies in 1690-2, and Anthony Henday's 1754-5 journey took him as far west as present-day Alberta.

1731 and 1763 France established a series of forts stretching west from Lake Superior at least to a point near the junction of the North and South Saskatchewan rivers (see Map 5). Early access to this vast region was by way of the Lake of the Woods and the Winnipeg River, which river, along with the English River, was found by the Privy Council to form part of the northern boundary of Ontario. One of the variations in the Arbitration Award made by the Privy Council involved this portion of the boundary.¹³⁰ Their Lordships decided to continue the northern boundary along the Winnipeg River from the confluence of that river and the English River to the western boundary (should that boundary be found to be located west of the confluence, as in fact it is: see Map 5). The arbitrators, it will be remembered, had opted for a due west line from the confluence to the western boundary. Why this minor variation? It is possible that the Privy Council simply favoured the convenience of a natural boundary. One might speculate, however, that their Lordships took into account the French fur-trading route down the Winnipeg River, a point which may have been overlooked by the arbitrators. In any case, a glance at Map 5 will show that, if one accepts the Hudson's Bay Company's own proposal in 1700-1 of the Albany River as the boundary in the north-east, and takes into account the undisputed French possession around the Lake of the Woods and south of the Winnipeg River prior to 1763, then the English River and Lac Seul form a convenient natural division for most of the remaining portion of the northern boundary.

The principles of international law relating to the acquisition of territorial sovereignty support the necessity of taking French possession into account. Although some writers maintain that discovery and a formal declaration of sovereignty were sufficient to establish a right to territory during the period of European colonial expansion in America,¹³¹ such activity at most created what has been referred to as an "inchoate title".¹³² M. F. Lindley describes it as

... a right to occupy the territory discovered. But that title is evanescent, and if the occupation is not carried out within a reasonable time, it will lapse, and other nations will be free to annex and occupy the territory.¹³³

On the issue of the degree of occupation necessary to maintain sovereignty Lindley writes:

There is now a general agreement that the essential point to look to is not whether there is present sufficient force to repel foreign intrusion, or whether the land is in fact being efficiently exploited, but whether there has been established over it a sufficient governmental control to afford security to life and property there.¹³⁴

We have seen that France disputed Britain's claim to Rupert's Land from the outset. Although defeat in the War of the Spanish Succession forced France to recognize British sovereignty over Hudson Bay by the Treaty of Utrecht, the French interpreted that recognition as extending to no more than a coastal strip of territory (see Map 3). The Hudson's Bay Company's subsequent failure to consolidate its claims to the entire drainage basin by effective occupation left the field open to the more energetic French. There can be little doubt that in international law France's claim to the territory in her actual possession prior to 1763 was much stronger than that of Britain and the Company.

Although English courts are obliged to recognize authoritative assertions of sovereignty by the British Crown, judges can hardly be expected to ignore entirely the reality of the situation when confronted with an ambiguous Charter surrounded by two centuries of controversy. Furthermore, the Crown is presumed to act in accordance with international law. Where the territorial extent of the Crown's claims are uncertain, it is therefore open to the courts to interpret those claims so as to avoid a conflict with the principles of international law.¹³⁵

It is further suggested that the rule that British courts must recognize the Crown's territorial claims only applies where the issue to be resolved is

¹³⁰ The other variation was a change of the eastern terminus of the line connecting Lac Seul and Lake St. Joseph from the head of the latter to the nearest point on its middle line.

¹³¹ See, for example, Keller, Lissitzyn, and Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800* (New York: Columbia University Press, 1938), esp. pp. 148-9.

¹³² See M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York: Negro Universities Press, 1926), pp. 136-8; F.A. Von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935), 29 *A.J.I.L.* 448, esp. pp. 457-62; Julius Goebel, *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927), pp. 47-119, esp. pp. 94-5; McDougal, Lasswell and Vlasic, *Law and Public Order in Space* (New Haven: Yale University Press, 1963), pp. 830-44, esp. pp. 832-3; Ian Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979), pp. 149-50; O'Connell, *supra*, n. 50, pp. 408-9, 416-7; Brain Slattery, "French Claims in North America, 1500-1559" (1978), 59 *Canadian Historical Review* 139, esp. pp. 153, 163-4.

¹³³ *Supra*, n. 132, p. 137. See also *The Island of Palmas Case*, 2 R.I.A.A. 829, where arbitrator Huber states at p. 869: "The title of discovery . . . would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty."

¹³⁴ *Supra*, n. 132, p. 141. See also Brownlie, *supra*, n. 132, pp. 141-8, 153-4; O'Connell, *supra*, n. 50, pp. 409-16; *The Island of Palmas Case*, *supra*, n. 133; *The Eastern Greenland Case* (1933), P.C.I.J. Rep., Series A/B, No. 53; *The Minquiers and Ecrehos Case*, I.C.J. Rep. 1953, 47. In *The Clipperton Island Case* (1931), 26 *A.J.I.L.* 390, the arbitrator, King Victor Emmanuel III of Italy, stated at p. 393: "It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there."

¹³⁵ See Slattery, *supra*, n. 15, p. 63.

the extent of those claims vis-à-vis a foreign state. When the Treaty of Paris was signed in 1763 France's claims to Canada were transferred to Great Britain. The Hudson's Bay Company's pretensions in regard to the extent of Rupert's Land therefore ceased to correspond with Britain's territorial claims. The conflict over the location of the boundaries of Rupert's Land was no longer an international issue between Britain and France, but rather an internal issue between the Company and other British interests. It is suggested that under these circumstances the rule regarding the conclusive nature of the Crown's territorial claims would no longer apply.¹³⁶ Arguably, it would be open to a court in such a case to ignore the rule and examine the merits of the conflicting claims on the basis of international law criteria. It is therefore not only suggested that their Lordships did consider French possession up to 1763 in determining the extent of Rupert's Land in the *Ontario Boundaries Case*, but also respectfully submitted that they were correct in doing so.¹³⁷

To summarize, the *Ontario Boundaries* decision substantially confirmed the Arbitration Award insofar as it related to the boundary between Manitoba and Ontario. It determined the true boundary on the north to be the Winnipeg and English rivers, Lac Seul, Lake St. Joseph, and the Albany River down to the point where a due north line from the confluence of the Ohio and Mississippi rivers meets that river (see Map 5). Since the northern boundary of Ontario was also the southern limit of the Hudson's Bay Company territory, the decision authoritatively established the portion of the southern boundary of Rupert's Land to which it related.

It is significant that the Privy Council decision included part of the Albany River, since that was the boundary adopted by the arbitrators from Lake St. Joseph to James Bay. It would therefore appear that their Lordships regarded that aspect of the Award as correct as well, even though they declined to determine the boundary down to James Bay because it lay outside the terms of the Reference.¹³⁸ It is possible that their Lordships were misled in regard to the north-eastern boundary by the erroneous English

translation of the Treaty of Ryswick, a copy of which was included in the documentary evidence.¹³⁹ However, an examination of the transcript of the proceedings does not indicate that their Lordships relied on the terms of that Treaty. With respect to the arbitrators' choice of the Albany River, the Lord Chancellor commented near the close of the proceedings as follows:

What we gathered from Sir Francis Hincks' document is this: that the arbitrators having settled certain points on the strictest principle, according to the best of their judgment, then the person who represented the Dominion said it would be convenient that those points should be connected by a good geographical boundary, and the arbitrators thought the Albany River line was proper for that purpose. Then, finding some indications in previous documents that that view of the Albany River line had been at one time entertained by the Hudson's Bay Company, it was adopted. I do not think it is for the Dominion, I must say, to complain of that.¹⁴⁰

Their Lordships do not appear to have regarded the Treaty of Ryswick as laying down the Albany River as the legal boundary. Instead, they seem to have relied on the commissions following the division of the old province of Quebec into Upper and Lower Canada in 1791 as establishing that the boundary lay somewhere to the north of the point where the eastern boundary of Ontario struck James Bay.¹⁴¹ Since the evidence was inconclusive as to the exact location, they, like the arbitrators, chose the Albany River as the "true" boundary, both because it had been proposed by the Hudson's Bay Company in 1700-1, and because it formed a natural division. Once the height of land had been rejected, no other logical boundary suggested itself.

C. The Canada (Ontario Boundary) Act, 1889

As recommended by their Lordships, the Privy Council decision was implemented by the Imperial Parliament in the *Canada (Ontario Boundary) Act, 1889* (Appendix D).¹⁴² The Act went on to define the remaining portion of the northern boundary as the Albany River and the south-west shore of James Bay. Thus the Act not only confirmed the decision but also accorded with the Arbitration Award in the north-east.

What is the effect of the *Canada (Ontario Boundary) Act* on our examination of the extent of Rupert's Land? By adopting the boundaries held by the Privy Council to be "the correct boundaries",¹⁴³ the Act implicitly but indisputably established the Winnipeg and English rivers, Lac Seul, Lake St. Joseph, and the headwaters of the Albany River as the southern

¹³⁶ The justification for the rule is suggested in *The Fagernes*, [1927] P.311 (C.A.) where Atkin, L.J., states at p.324: "Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country" (emphasis added). See also: *Duff Development Company Ltd. v. Government of Kelantan*, [1924] A.C. 797 (H.L.) per Viscount Cave at p.808; *The Arantzazu Mendi*, [1939] A.C. 256 (H.L.) per Lord Atkin at p.264.

¹³⁷ Arguments based on the principles of international law relating to the acquisition of territorial sovereignty were heard and commented on by the Privy Council: see *The Proceedings*, *supra*, n.40, pp.55-7, 85, 252-6, 326-31, 357-63. See also nn.126-8 and accompanying text.

¹³⁸ See *The Proceedings*, *supra*, n.40, p.405.

¹³⁹ See *Ontario Boundaries*, *supra*, n.41, Joint Appendix, p.488; and *The Proceedings*, *supra*, n.40, pp.191-2.

¹⁴⁰ *The Proceedings*, *supra*, n.40, p.398.

¹⁴¹ See nn.115-6 and accompanying text.

¹⁴² 52 & 53 Vic., c.28 (U.K.). The events leading up to the enactment of this statute are examined in Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950), at pp.62-71.

¹⁴³ Preamble, *Canada (Ontario Boundary) Act, 1889*, *supra*, n.142.

boundary of Rupert's Land. Beyond that point, the effect of the Act is less certain. While it defined the remainder of the northern boundary of Ontario in the same terms as the arbitrators, it did not expressly confirm the Award. However, it is significant that the Act was the result of a Joint Address sent to Her Majesty by the Parliament of Canada with the consent of Ontario. What prompted Canada to ask the British Parliament, in effect, to implement an Award which Canada regarded as incorrect and which the Privy Council had decided was not binding?¹⁴⁴ We have seen that the Privy Council adopted as much of the Albany River as was necessary for its decision as part of the northern boundary of Ontario. That aspect of the ruling must have convinced the Canadian government that the arbitrators had been correct in adopting the whole of the Albany River. From that viewpoint, the Act may be regarded as an implicit affirmation of the Albany River as part of the true boundary of Ontario, and hence of Rupert's Land.

VI. MANITOBA AND THE RED RIVER SETTLEMENT

The view that any territory occupied by the French prior to 1763 must be excluded from Rupert's Land is supported by an examination of the *Manitoba Act*, 1870,¹⁴⁵ which was enacted by the Parliament of Canada and confirmed by the Imperial Parliament in *The British North America Act*, 1871.¹⁴⁶ Section 1 of the *Manitoba Act* provides in part:

1. On, from and after the day upon which the Queen . . . shall, by Order in Council in that behalf, admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba, and be bounded as follows. . . .¹⁴⁷

The boundaries of the new province are then described as the 49th parallel on the south, the 99th meridian on the west, the parallel of 50 degrees and 30 minutes on the north, and the 96th meridian on the east, which means that the entire province was within the Hudson drainage basin (see Map 5). Nonetheless, the Act assumes that the boundary between Rupert's Land and the North-Western Territory crossed the new province at some point because section 1 provides that Manitoba shall be formed out of the two territories.¹⁴⁸ Furthermore, the section states that the 49th parallel "forms a portion of the boundary line between the United States of America and the

¹⁴⁴ See para.1 of the Privy Council's report, contained in the Order in Council of Aug. 11, 1884 (Appendix B).

¹⁴⁵ *Supra*, n.9.

¹⁴⁶ *Supra*, n.9.

¹⁴⁷ *Supra*, n.9., s.1.

¹⁴⁸ The French version of the *Manitoba Act* is more explicit than the English version in this regard. It provides that the new province "sera constitué dans ces territoires". Further, s.35 confirms that Manitoba was formed out of portions of each territory. It begins: "And with respect to such portion of Rupert's Land and the North-Western Territory, as is not included in the Province of Manitoba . . .".

said North-Western Territory".¹⁴⁹ The implication is that Rupert's Land does not extend as far south as the international boundary.

The provisions of the *Manitoba Act* were raised before the Privy Council in the *Ontario Boundaries Case*. The Lord Chancellor remarked that that Act, confirmed as it was by an Imperial Act, removed any doubt that Rupert's Land included the province of Manitoba.¹⁵⁰ It is respectfully submitted that, since the Act states that Manitoba shall be formed out of "Rupert's Land and the North-Western Territory" (emphasis added), it would be just as correct to say that the North-Western Territory included the province of Manitoba. In other words, a portion of *each* territory must have been used to create the new province.

Additional support for this proposition is to be found in the Imperial Commission to Sir Guy Carleton, Governor of Quebec, dated April 22, 1786.¹⁵¹ That Commission was issued following the modifications to the boundaries of Quebec¹⁵² which were agreed to by Great Britain and the United States in the Treaty of Paris, 1783. Both the Treaty and the Commission contain the following description of the boundary between Quebec and the United States from Long Lake, near Lake Superior, westward:

. . . [T]hence through the middle of said Long Lake and the water communication between it and the Lake of the Woods to the said Lake of the Woods; thence through the said lake to the most north-western point thereof, and from thence on a due west course to the River Mississippi. . . .¹⁵³

From that point, the Commission continues the boundary of Quebec "northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay". Both documents were of course based on a mistaken perception of the geography of the region since the Mississippi River in fact lies entirely to the south of the

¹⁴⁹ It is noteworthy that the section describes the 49th parallel as a "portion" of the boundary line. Where is the rest of the boundary between the United States and the North-Western Territory located? Three possibilities are suggested: (1) the international boundary from the 49th parallel to the north-west angle of the Lake of the Woods and down to Lake Superior, (2) the eastern boundary of Alaska (purchased by the United States from Russia in 1867), or (3) both of these. Since the Privy Council in the *Ontario Boundaries Case* found that the international boundary from Lake Superior to the north-west angle formed part of the southern boundary of Ontario, that portion of the first possibility can be eliminated. There is no way of knowing which of the remaining choices is correct.

¹⁵⁰ *The Proceedings, supra*, n.40, p.81. See also pp.76-7.

¹⁵¹ Reproduced in *Ontario Boundaries, supra*, n.41, Joint Appendix, pp.387-8. This Commission was pointed out to the Privy Council: see *The Proceedings, supra*, n.40, pp.42-5, 78-9, 318-21.

¹⁵² As described by the *Quebec Act*, 1774, *supra*, n.86: see Map 5.

¹⁵³ Quoted from the Commission, *supra*, n.151. The text of the Treaty of Paris is reproduced in Parry, *supra* n.63, vol.48, p.489.

Lake of the Woods (see Map 5).¹⁵⁴ Be that as it may, the Commission is nonetheless of interest because it shows that the British Crown in 1786 regarded the southern limit of Rupert's Land as lying somewhere to the north of the most north-western point of the Lake of the Woods, that is, to the north of the line which was laid down as the southern boundary of Manitoba in 1870.

Since all of the original province of Manitoba lay within the Hudson watershed, there was no reason other than French possession for the *Manitoba Act* to provide, in effect, that the southern boundary of Rupert's Land crossed the new province. What portion, then, of Manitoba had been occupied by the French prior to 1763? We have already mentioned the French fur-trading route which followed the Winnipeg River from the Lake of the Woods down to Lake Winnipeg. The French built Fort Maurepas at the mouth of the Red River in 1734 (later abandoned and rebuilt at the mouth of the Winnipeg River). They also established Fort La Reine (near present-day Portage La Prairie) and Fort Rouge (where Winnipeg now stands) in 1738 (see Map 5). Arguably, therefore, the French in 1763 were in possession of almost the entire region that was used to create Manitoba in 1870. However, a very small portion of the new province was located north and east of the Winnipeg River. If the Privy Council's decision in the *Ontario Boundaries Case* that the Winnipeg River formed part of the northern boundary of Ontario was based on French possession up to the river, then it is not unreasonable to conclude that the river continued to mark the northern limit of French possession to the west of what was to become Ontario. Such an approach would mean that the small portion of the original province of Manitoba which was located north and east of the river was part of Rupert's Land prior to 1870 (see Map 5). This would conform with the provisions of the *Manitoba Act*, and have the added advantage of employing a natural division for that portion of the southern boundary of Rupert's Land.¹⁵⁵

The exclusion from Rupert's Land of the portion of Manitoba that was occupied by the French prior to 1763 means that the Red River Settlement, which was established by Lord Selkirk at the junction of the Red and Assiniboine rivers under an 1811 grant from the Hudson's Bay Company, lay outside the Company's territory (see Map 5). In other words, since the

¹⁵⁴ This mistake was corrected as between Britain and the United States by the Convention of Commerce of 1818.

¹⁵⁵ It should be noted that the Winnipeg River probably cannot be regarded as marking the extent of French possession all the way to Lake Winnipeg since the French Fort Maurepas was re-established on the east shore of Lake Winnipeg on the north side of the mouth of the Winnipeg River: see Map 5. Occupation of this point on the lake by the French does not, however, invalidate the suggestion that French possession did not extend to that portion of the original province of Manitoba located north and east of the river, since that parcel of territory is some distance upstream from Lake Winnipeg.

Company's Charter did not extend to that region, there was no legal authority for the powers exercised in the Settlement either by Lord Selkirk and his successors or by the Company itself.¹⁵⁶ Such a conclusion, it must be pointed out, conflicts with the 1874 decision of Chief Justice Wood of the Manitoba Court of Queen's Bench in *The Queen v. Ambroise Lépine*.¹⁵⁷ Lépine was charged, along with Louis Riel (who eluded arrest), with the murder of Thomas Scott at Red River in 1870. A preliminary objection to the jurisdiction of the court was raised. In disposing of the objection, the Chief Justice held that "the Province of Manitoba is a portion of Rupert's Land"¹⁵⁸ and therefore the jurisdiction exercised prior to 1870 by the General Court of the Hudson's Bay Company in the Red River Settlement was valid under the Charter of 1670.¹⁵⁹ He found support for this conclusion in section 5 of the *Rupert's Land Act, 1868*,¹⁶⁰ which provides that,

... until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the several Courts of Justice now established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full force and effect therein.

With respect, it is suggested that this provision would only apply to continue the jurisdiction of the General Court in Manitoba if the Chief Justice was correct in assuming that the province lay within the boundaries of Rupert's Land. This assumption was not supported by any analysis of the complicated issues relating to the extent of that territory. The Chief Justice simply stated:

The limits of Rupert's Land seem to be such territories as were drained by or formed the watershed of all the rivers, lakes and waters which flowed into Hudson's Straits, or into the Hudson's Bay, which were not then possessed by any subjects of His Majesty, or by the subjects of any other christian Prince or State.¹⁶¹

He did not consider the extent of French possession prior to 1763, nor did he mention the provision in section 1 of the *Manitoba Act* that the new province should be formed out of Rupert's Land and the North-Western Territory. In light of the *Ontario Boundaries Case*, it is therefore respectfully submitted that the *Lépine* decision is of doubtful authority insofar as it relates to the extent of Rupert's Land and the validity of the authority exercised by the Hudson's Bay Company in the Red River Settlement.

¹⁵⁶ The Selkirk grant was surrendered back to the Company on May 4, 1836.

¹⁵⁷ This judgment, in which McKeagney and Betournay, JJ., concurred, can be found in *Preliminary Investigation and Trial of Ambroise D. Lépine for the Murder of Thomas Scott*, specially reported and compiled by Messrs. Elliott and Brokovski of the Canadian Press (Montreal: Burland-Desbarats Lithographic Co., 1874), at pp.21-35.

¹⁵⁸ *Ibid.*, p.22.

¹⁵⁹ *Ibid.*, p.27.

¹⁶⁰ *Supra*, n.4.

¹⁶¹ Elliott and Brokovski, *supra*, n.157, p.22.

Furthermore, although Lord Selkirk and the Company did exercise jurisdiction over the Settlement for a period of almost sixty years, the legality of their actions was questioned in many quarters. The Hudson's Bay Company's purported monopoly over the fur-trade in the region, for example, was vigorously challenged by the North-West Company prior to the grant of an exclusive trading license to the Hudson's Bay Company and the principal figures of the North-West Company in 1821.¹⁶² It is significant that the British government adopted a policy of neutrality with regard to the rivalry between the two companies. The instructions to the military officer entrusted with the protection of Lord Selkirk on his journey to the Red River Settlement in 1816, for example, expressly forbade him from becoming involved in any disputes which might occur between Lord Selkirk and the employees of the North-West Company. The instructions read:

By such interference on your part, you would not only be disobeying your instructions, but acting in *direct opposition* to the *wishes and intentions* of the *Government*, to the COUNTENANCE, SUPPORT and PROTECTION of which, EACH PARTY has an equal claim.¹⁶³ (emphasis and capitalization retained)

This policy of neutrality is further evidenced by a despatch from Earl Bathurst, Secretary of State for the Colonies, dated February 6, 1817, and issued by order of the Prince Regent, instructing the Lieutenant General of Canada, Sir John C. Sherbrooke, to issue a proclamation ordering the cessation of hostilities between the two companies, the restoration of any captured forts or other property by both parties, and the removal of any impediment to free trade with the Indians "until . . . the great question at issue with respect to the rights of the two companies shall be definitely settled".¹⁶⁴ In fact the need to settle the respective legal rights of the companies was removed by the grant of the 1821 trading license. After that time the Hudson's Bay Company administered the north-west as though the whole region were included under the original Charter.

The amalgamation of the companies did not eliminate the challenges to the Hudson's Bay Company's authority in the Red River Settlement. The Company's fur-trading monopoly was once again called into question in 1849, this time by the Métis people, at the trial of Pierre Guillaume Sayer by the Company's General Quarterly Court on a charge of trading furs without a license.¹⁶⁵ An armed crowd of Métis gathered outside the courthouse in support of Sayer, and although he was convicted, the Métis regarded the outcome of the trial as a victory because no punishment was imposed. From

¹⁶² *Supra*, n.19.

¹⁶³ Letter from J. Harvey, Lt. Col., D.A.G., dated April 17, 1816. Quoted from *Ontario Boundaries*, *supra*, n.41, Joint Appendix, p.207.

¹⁶⁴ *Parliamentary Papers, House of Commons* (U.K.), No. 584 of 1819, pp.71-2. Reproduced in *Ontario Boundaries*, *supra*, n.41, Ontario Appendix, pp.146-7.

¹⁶⁵ 2 *Western Law Times* (1891), pp.12-5.

that time on the Métis traded freely without interference from the Company.¹⁶⁶

Further opposition to the Hudson's Bay Company's pretensions came from the province of Canada, which during the 1850s claimed that Rupert's Land did not include any part of the "Fertile Belt", a term used to refer to the prairie region. The arguments of the province were taken up by the Dominion after Confederation in 1867, and were pressed vigorously by Sir George-Etienne Cartier and William McDougall, the Canadian delegates sent to London in 1868 to negotiate the terms of the surrender of Rupert's Land by the Company.¹⁶⁷ Lord Granville, Secretary of State for the Colonies, acted as mediator during those negotiations. In a letter dated March 9, 1869, written by Sir Frederic Rogers on behalf of Lord Granville, the Governor of the Hudson's Bay Company was reminded of the uncertainty of the Company's title in the following terms:

At present the very foundations of the Company's title are not undisputed. The boundaries of its territory are open to questions of which it is impossible to ignore the importance.¹⁶⁸

Under the settlement which Lord Granville eventually felt compelled to impose,¹⁶⁹ Canada agreed, *inter alia*, to pay £300,000 and to grant one-twentieth of all the land set out for settlement in the Fertile Belt to the Company in return for the surrender of Rupert's Land and its admission into Canada.¹⁷⁰ It must be emphasized, however, that Canada did not admit the validity of the Company's claims by agreeing to this settlement. The position of the Canadian government in this regard had already been stated by the Canadian delegates in a letter to Sir Frederic Rogers, dated February 9, 1869:

A person has taken possession of a part of your domain under the pretence that it is included in a deed which you gave him for some adjoining property, before you purchased the domain; you want to get rid of

¹⁶⁶ See Morton, *supra*, n.30, pp.814-6; Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis Publishers, 1972), pp.35-9; R.S.G. Stubbs, *Four Recorders of Rupert's Land* (Winnipeg: Peguis Publishers, 1967), pp.26-30.

¹⁶⁷ See "Copy or Extracts of Correspondence between the Colonial Office, the Government of the Canadian Dominion, and the Hudson's Bay Company, relating to the Surrender of Rupert's Land by the Hudson's Bay Company, and for the Admission thereof into Canada", *Parliamentary Papers, House of Commons* (U.K.), No.440 of 1868-9, esp. a letter written by Cartier and McDougall to Sir Frederic Rogers, Colonial Office, Feb. 9, 1869, at pp.52-63 (also reproduced in *Sessional Papers* (Can.), No.25 of 1869, at pp.31-3).

¹⁶⁸ Letter to Sir Stafford H. Northcote, *ibid.*, pp.40-2.

¹⁶⁹ See the same March 9, 1869, letter, *ibid.*

¹⁷⁰ See Imperial Order in Council of June 23, 1870, *supra*, n.2. The "Fertile Belt" is defined in article 6 of the Order in Council as bounded "[o]n the south by the United States' boundary; on the west by the Rocky Mountains; on the north by the northern branch of the Saskatchewan; on the east by Lake Winnipeg, the Lake of the Woods, and the waters connecting them".

him, but will be compelled to bring an action. He is artful, stubborn, wealthy, and influential. He will be able to worry you with a tedious litigation. How many acres will you allow him to "reserve," and how much will you pay to save yourself the cost and trouble of a law suit?¹⁷¹

Canada, therefore, did not "pay" the Company for the Fertile Belt — rather, the £300,000 and the land grant were given to extinguish any possible claims. That was the basis on which Canada accepted the admission of Rupert's Land into the Union.

It is therefore suggested that the *de facto* exercise of jurisdiction by the Hudson's Bay Company over the Red River Settlement from 1811 to 1870 in no way establishes the legality of that jurisdiction under the 1670 Charter. At the time, no other authority was in a position to provide administrative and judicial control over the region. The Company assumed that it had jurisdiction, and proceeded to exercise it. After the admission of Rupert's Land and the North-Western Territory into Canada on July 15, 1870, it was no longer in anyone's interest to question the legality of the Company's actions. The doubts which existed with regard to the validity of the land grants made by the Company were settled by section 32 of the *Manitoba Act*,¹⁷² which provided for the confirmation of those grants by the Crown.

A practical approach to the Company's exercise of jurisdiction was taken by Mr. Justice Killam in the Manitoba Court of Queen's Bench in *Sinclair v. Mulligan*.¹⁷³ At issue in that case was the date of reception of English law into the region of the Red River Settlement. Mr. Justice Killam concluded that the laws in force in the Settlement prior to its admission into Canada were the laws of England, so far as applicable, as of May 2, 1670, the date of the Hudson's Bay Company Charter. In doing so, however, he was careful not to decide the unresolved issue of the validity of the Charter. After reviewing the legal history of the Settlement, he stated:

The considerations to which I have adverted appear to me to render it unnecessary to determine how far King Charles could empower the Hudson's Bay Co. to govern and administer justice in this or any part of the North Western portions of this continent. It is sufficient that we must recognize the *de facto* authority of the company and the courts established by it, and adopt as the laws of the country those which the company and the courts, assuming their authority as valid, and to the extent to which that assumed authority would warrant, undertook to enforce and did enforce.¹⁷⁴

¹⁷¹ *Supra*, n.167, at p.59.

¹⁷² *Supra*, n.9. See also article 10 of the Order in Council of June 23, 1870, *supra*, n.2, which provides: "All titles to land up to the eighth day of March, one thousand eight hundred and sixty-nine, conferred by the Company are to be confirmed".

¹⁷³ (1886), 3 Man.L.R. 481.

¹⁷⁴ *Ibid.*, p.490.

Mr. Justice Killam's judgment was upheld on appeal without reference to this issue.¹⁷⁵

Thus, although the courts may have felt compelled out of necessity to recognize the validity of the Hudson's Bay Company's administrative and judicial acts, it is suggested that this recognition should not be interpreted as judicial acceptance of the Company's disputed territorial claims.

VII. DETERMINING THE BOUNDARIES OF RUPERT'S LAND AND THE NORTH-WESTERN TERRITORY

A. West of Ontario

If we are correct in adopting French possession up to 1763 as one basis for determining the extent of Rupert's Land, we now have a workable formula for establishing the boundary between that territory and the North-Western Territory. Taking the Hudson drainage basin as the starting point, we must then examine the historical evidence of French possession to determine what territory must be subtracted from the original grant.¹⁷⁶ It is beyond the scope of this paper to embark upon such an investigation. We have already seen, however, that this approach would lead to the exclusion of most of the original province of Manitoba. Since the French fur-trade also extended west along the Saskatchewan rivers and out across the prairies, it is likely that a large additional area of western territory would have to be excluded as well. Any territory so excluded would form part of the North-Western Territory.

Turning to the external boundaries of the combined territories as of 1870, the line follows the western boundary of Ontario, as defined by the Privy Council in 1884, south from the Winnipeg River to the boundary with the United States (see map 5). It continues along the international boundary south to the 49th parallel and west to the eastern boundary of British Columbia, set by Imperial statute in 1863 as "the *Rocky Mountains* and the One hundred and twentieth Meridian of West Longitude".¹⁷⁷ The boundary of the combined territories then proceeds north along that provincial boundary to the sixtieth parallel (established as the northern boundary of British Columbia by the same Imperial statute) and west along that parallel

¹⁷⁶ Detailed evidence of French possession was examined in the *Ontario Boundaries Case*: see n.126. On this issue the Lord Chancellor commented that it must be proved that the territory sought to be excluded was actually part of French Canada in 1763. It would not be enough to merely show that there were "some French people within the territory who may have established forts": *The Proceedings, supra*, n.40, p.82.

¹⁷⁷ 26 & 27 Vic., c.83, s.3 (U.K.).

¹⁷⁵ (1888), 5 Man.L.R. 17 (Manitoba Q.B. *en banc*).

to the boundary of Alaska, which it follows north, probably to the shore of the Beaufort Sea (see part VII.B, below).

B. In the North

The position of the Arctic islands as of July 15, 1870, the date of the admission of Rupert's Land and the North-Western Territory into Canada, presents difficulties. Following the Hudson watershed approach, the portion of Baffin Island lying south of the height of land dividing the island would have to be included in Rupert's Land (see Map 1). However, there would appear to be some doubt as to whether the rest of the Arctic Archipelago was transferred to Canada in 1870 as part of the North-Western Territory.¹⁷⁸

Questions as to the location of Canada's northern boundary were raised both in Canada and in Britain in the 1870s, with the result that in 1878 the Canadian Parliament adopted a Joint Address to Her Majesty requesting a transfer of any remaining British territory (and the islands adjacent thereto) to Canada and a definition of Canada's northern boundary.¹⁷⁹ The British response was an Order in Council dated July 31, 1880, which provided:

From and after the first day of September, 1880, all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any such Territories or Possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.¹⁸⁰

This is a remarkable provision. In the first place it transferred to Canada the remaining possessions of Britain in North America without any definition of those possessions other than the exclusion of Newfoundland and the territory already included in Canada. Furthermore, it purported to transfer all the islands adjacent to those possessions, thereby implying that those islands were not under British sovereignty at the time. If the islands were not British possessions, one might ask under what authority Britain purported to transfer them to Canada. Be that as it may, the importance of

the Order in Council for our purposes is that it provided no definition of the northern limits of Canada prior to September 1, 1880. As a result, it remains uncertain whether any of the Arctic islands were admitted into Canada as part of the North-Western Territory in 1870. However, the mere fact that the Order in Council was made carries with it the implication that at least some, if not all, of the Arctic islands, and perhaps parts of mainland British North America as well (other than Labrador, a dependency of Newfoundland), were not included in Canada as of July 15, 1870.

C. East of Hudson Bay

The only boundary question remaining is the south-eastern limit of Rupert's Land from the Ontario-Quebec boundary to Hudson Strait. This matter arose between the governments of Canada and Quebec around the time the Privy Council was hearing the *Ontario Boundaries Case*.¹⁸¹ As in the case of Ontario, the *Quebec Act* appears to have established the southern boundary of the Hudson's Bay Company territory as the northern boundary of Quebec. Negotiations between the two governments finally led to an agreement, which was incorporated in legislation enacted by the Parliament of Canada and the Legislature of Quebec in 1898.¹⁸² Under the legislation the northern boundary of Quebec followed the shore of James Bay from the Ontario boundary to the mouth of the Eastmain River, from which point it ran up that river to the most northerly point of Patamisk Lake, then due east to the Hamilton River, and down that river to the western boundary of Labrador (see Map 4). It must be emphasized that this boundary was set by agreement — it was not based on a legal determination of the respective rights of Quebec and Canada.¹⁸³ Nonetheless, it is worth

¹⁸¹ See Nicholson, *supra*, n.28, p.104; Gérin-Lajoie, *supra*, n.142, pp.68-70.

¹⁸² S.C. 1898, c.3; S.Q. 1898, c.6.

¹⁸³ Apparently the legal location of the boundary prior to the 1898 Acts continued to be a matter of dispute: see *House of Commons Debates*, 1911-2, vol.IV, pp.6159-75, where Quebec Members of Parliament argued that the Acts simply determined the existing boundary whereas some Members of Parliament from English Canada contended that the Acts extended Quebec's boundary north from its previous limits (the height of land). The latter contention is supported by *La Société de Développement de la Baie James c. Chef Robert Kanatewat*, [1975] Que.C.A. 166 where it was held that the Acts of 1898 extended the limits of Quebec north to the Eastmain River (at p.172). This conclusion was apparently based on the admission that the construction undertaken pursuant to the *Loi du développement de la région de la Baie James* was located within Rupert's Land (at pp.170 and 172). With respect, it is suggested that these findings should not be considered as authoritative. In the first place, the court was not called upon to decide the merits of the case because the appeal was against an interlocutory injunction only. Furthermore, the judgments do not reveal any analysis of the extremely complicated issues involved in these findings. The *Ontario Boundaries Case* was not even mentioned.

¹⁷⁸ See Nicholson, *supra*, n.28, pp.57-60; W.F. King, *Report upon the Title of Canada to the Islands North of the Mainland of Canada* (Ottawa: 1905); W.H. McConnell, "Canadian Sovereignty Over the Arctic Archipelago" (LL.M. thesis, University of Saskatchewan, 1970).

¹⁷⁹ Nicholson, *supra*, n.28, p.60. The Resolution on which the Address was based may be found in *House of Commons Debates*, 1878, vol.II, p.2386 (May 3, 1878).

¹⁸⁰ R.S.C. 1970, App.II, No. 14. It should be noted that this Order in Council is further evidence that the Charter of 1670 did not include the Arctic watershed.

noting that the choice of the Eastmain River as the starting point on James Bay corresponded with the southern boundary which the Hudson's Bay Company itself had been prepared to accept in 1701 after the Treaty of Ryswick (see Map 5). In this respect the Acts of 1898 were consistent with the Arbitration Award of 1878 and the *Canada (Ontario Boundary) Act, 1889*, which had established the Albany River, the boundary proposed by the Company in 1700-1 on the west side of James Bay, as the northern boundary of Ontario. Furthermore, we have seen that the Imperial commissions appointing Governors General for Lower Canada and the Province of Canada, from Lord Durham in 1838 to Lord Elgin in 1846, described the boundary between the provinces of Upper and Lower Canada as continuing north to "the shore of Hudson's Bay".¹⁸⁴ The British Crown therefore viewed Lower Canada as extending north beyond the height of land at least to James Bay.

There is some justification, then, for adopting the 1898 boundary of Quebec as the southern boundary of Rupert's Land, though contrary arguments can be made.¹⁸⁵ However, consideration must also be given to the 1927 Privy Council decision which determined the location of the boundary between Labrador and Canada.¹⁸⁶ As regards the northern portion of that boundary, the Privy Council decided that the line follows the height of land separating the Atlantic and the Hudson watersheds (see Map 4). Viscount Cave, L.C., dealt directly with the issue of the extent of Rupert's Land as follows:

A further argument for the adoption of the watershed as the boundary of Newfoundland-Labrador is based on the position at that time of the Hudson's Bay Co. That company has always claimed to be entitled under its charter to the land reaching to the watersheds from which the rivers ran into Ungava Bay, James Bay and Hudson's Bay, and this claim was ultimately conceded by the British Government. Upon this footing the line of the watershed running from Cape Chidley southward was for a considerable distance the eastern boundary of the Hudson's Bay territory,

and so that watershed might for that distance form a political as well as a natural boundary for the "coast" of Labrador.¹⁸⁷

Although *obiter dicta*, those comments amount to an authoritative judicial acceptance of the Hudson watershed definition of Rupert's Land on the east. Assuming that the 1898 boundary of Quebec is adopted as the southern boundary of Rupert's Land, the eastern boundary of the territory would thus follow the height of land south from Cape Chidley to the 1898 boundary.

¹⁸⁴ *Supra*, n.100.

¹⁸⁵ For example, it might be argued that the arbitrators were mistaken in finding that the Albany River formed the southern boundary of Rupert's Land on the west side of James Bay because that finding may have been based on an erroneous interpretation of the Treaty of Ryswick. Since the Canada and Quebec statutes of 1898 which defined the northern boundary of Quebec were the result of an agreement rather than a judicial decision, those statutes are of no legal authority as far as the question of the southern limit of Rupert's Land is concerned. Following this approach, then, a court could ignore the Acts of 1898 and adopt its own criteria for determining the boundary east of the Bay.

¹⁸⁶ *Re Labrador Boundary*, [1927] 2 D.L.R. 401.

¹⁸⁷ *Ibid.*, pp.416-7. It must be pointed out that Viscount Cave was referring to an area where there was no question of French possession prior to 1763. It was therefore unnecessary for him to consider to what extent the watershed definition of Rupert's Land must be limited by such possession. The writer has been unable to find any authority for his Lordship's statement that the Company's claim to the entire watershed was ultimately conceded by the British Government.

VIII. THE RUPERT'S LAND ACT, 1868

One other matter must be considered. Rupert's Land was admitted into Canada in 1870 pursuant to section 146 of *The British North America Act, 1867*¹⁸⁸ and the *Rupert's Land Act, 1868*.¹⁸⁹ It will be remembered that the latter Act authorized the Hudson's Bay Company to make, and Her Majesty to accept, a surrender of the Company's rights in Rupert's Land. Section 2 of that Act defines the territory as follows:

2. For the Purposes of this Act the Term "Rupert's Land" shall include the whole of the Lands and Territories held or claimed to be held by the said Governor and Company.

How is this section to be interpreted? In the first place, it is suggested that the term "held" must refer to title rather than mere possession. Otherwise the addition of the phrase "or claimed to be held" would mean that the Company could claim to be in possession where in fact it was not in possession. Furthermore, if "held" was intended to refer to possession, arguably section 2 would have permitted the Company to defeat the legal rights of others by actual possession. The *Rupert's Land Act* was referred to at the Ontario Boundary Arbitration. In relation to section 2, Sir Francis stated in his lecture:

My interpretation of the Rupert's Land Act is that it was intended to convey to the Dominion the whole property of the Hudson's Bay Company, with certain specified reservations that have no bearing on the point under consideration. I did not imagine that the Act could be so interpreted as to transfer territory belonging to a third party, and I am perfectly certain that if Sir John Macdonald's construction of the statute could be maintained, it would be in direct contradiction to the spirit and intention of the Act, and a gross act of injustice.¹⁹⁰

Sir John A. Macdonald's construction of section 2, referred to by Sir Francis, was that "the Act says that Rupert's Land shall be held to be whatever was in possession or deemed to be in possession of the Hudson's Bay Company".¹⁹¹ Thus, the only arbitrator to give an opinion on the matter expressly rejected the contention that the term "held" refers to posses-

sion rather than title.¹⁹²

Assuming then that the word "held" refers to title, how are we to interpret the phrase "or claimed to be held"? There are two possibilities: first, these words were meant to extend the definition of Rupert's Land beyond that to which the Company could actually prove title and include all the territory which the Company claimed as well or, second, they refer simply to the unresolved legal issue regarding the validity of the Charter, and preclude any subsequent challenges to its validity for the purposes of the Act. In the writer's view, the first interpretation can be rejected. The section does not specify a date for determining the extent of the Company's claims, and, as we have seen, those claims varied greatly over the two centuries of the Charter's existence. But even if we adopt the claims which the Company maintained immediately prior to the enactment of the *Rupert's Land Act* in 1868, that is, to the entire Hudson watershed, we find that these included territory which the Privy Council, in the *Ontario Boundaries Case*, decided was part of the province of Ontario in 1867. The first interpretation is therefore inconsistent with the Privy Council decision of 1884.¹⁹³ Furthermore, it conflicts with the provision in the *Manitoba Act* that the new province, all of which lay within the watershed, was to be created out of Rupert's Land *and* the North-Western Territory. We therefore conclude that the phrase "or claimed to be held" was added simply to prevent the unresolved issue of the validity of the Charter from arising in connection with the transfer. This interpretation is confirmed by section 3 of the *Rupert's Land Act*, which empowered the Crown to accept a surrender from the Company of "all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities whatsoever granted or *purported to be granted* by the said Letters Patent to the said Governor and Company within Rupert's Land . . ." (emphasis added). The emphasized phrase obviously refers to the question of validity rather than geographical extent.

If our interpretation is correct, the *Rupert's Land Act* does not have any effect on the extent of the surrendered territory. It is therefore of no significance as far as the issues examined in this paper are concerned.

¹⁹² The French version of section 2 of the *Rupert's Land Act* (in R.S.C. 1970, App.II, No.6) uses the phrase "possèdent ou prétendent posséder" for "held or claimed to be held". However, since the Act is an Imperial rather than a Dominion statute, the French version must just be a translation and therefore it is without legal significance.

¹⁹³ The interpretation of section 2 did arise before the Privy Council: see *The Proceedings, supra*, n.40, pp.124-5, 152-63, 307-18, 373-8. Certain comments made by their Lordships appear to support the view that the section did include in Rupert's Land all lands claimed, whether rightly or wrongly, by the Hudson's Bay Company. In the end, however, their Lordships rejected the argument of Manitoba and the federal government that section 2 had the effect of taking away territory which belonged to Ontario prior to the enactment of the *Rupert's Land Act*. In doing so, they must likewise have rejected an interpretation of that section which would have included in Rupert's Land all the territory claimed by the Company because part of the territory which they decided was part of Ontario had been claimed by the Company prior to the 1870 transfer.

¹⁸⁸ *Supra*, n.1.

¹⁸⁹ *Supra*, n.4.

¹⁹⁰ "Lecture", *supra*, n.92, p.124.

¹⁹¹ Quoted by Sir Francis from *Hansard*, Mar. 18, 1881 (*House of Commons Debates*, 1880-1, vol.II, p.1458): *ibid.*, p.123.

of the two territories into Canada. The obligations of the Canadian government to any given native group can only be ascertained by first determining whether the group inhabits one of the two territories and, if so, which one.

IX. CONCLUSION

The most satisfactory starting point for determining the boundaries of Rupert's Land is the Hudson watershed. One must then subtract the portion of the drainage basin which the Privy Council, in the 1884 *Ontario Boundaries Case*, held to be within the province of Ontario. The area south of the Albany River that was included in Ontario by the *Canada (Ontario Boundary) Act, 1889* probably should be excluded as well. Arguably, one must also eliminate that portion of the watershed which was made part of the province of Quebec by the Quebec Boundary Acts of 1898. The eastern boundary of Rupert's Land then follows the boundary of Labrador north to Hudson Strait.

To the west of Ontario, the boundary coincides with the north-eastern boundary of the North-Western Territory. According to the *Manitoba Act, 1870*, that common boundary crosses the original province of Manitoba at some point, which means that it is located north of the height of land. The only possible justification for locating the common boundary within the Manitoba of 1870 would be that, prior to the cession of Canada to Britain in 1763, the French were in possession of most of the territory out of which that province was formed. The Hudson watershed definition of Rupert's Land must therefore be modified in the west to exclude any territory to the north and east of the height of land that was in French possession prior to 1763. This territory would be included in the North-Western Territory. A combination of the western boundary of Ontario (as determined by the Privy Council in 1884), the international boundary, the eastern and northern boundary of British Columbia, and the boundary of Alaska complete the southern and western boundaries of the combined territories.

The location of the northern boundary is less certain. Following the watershed definition of Rupert's Land, the portion of Baffin Island draining south into Hudson Bay and Strait should be included in that territory. However, in light of the Imperial Order in Council of 1880 annexing Britain's remaining possessions in North America (with the exception of Newfoundland and its dependencies) to Canada, it is questionable whether any Arctic islands form part of the North-Western Territory. Moreover, it can be implied from that Order in Council that a portion of mainland British North America (other than Labrador, a dependency of Newfoundland) remained outside of Canada after the 1870 transfer of the two territories.

The relevance of the location of the boundaries of Rupert's Land and the North-Western Territory to native rights is to be found primarily in the discrepancy between the terms and conditions governing the 1870 admission

Given under our hands, at Ottawa, in the Province of Ontario, this third day of August, 1878.

Robt. A. Harrison,
Edwd. Thornton,
F. Hincks.

APPENDIX A

AWARD OF THE ARBITRATORS, 3rd AUGUST, 1878

[Reproduced from *The Proceedings, supra*, n.40, p.406]

TO ALL TO WHOM THESE PRESENTS SHALL COME:

The undersigned having been appointed by the Governments of Canada and Ontario as arbitrators to determine the northerly and westerly boundaries of the Province of Ontario, do hereby determine and decide that the following are and shall be such boundaries; that is to say:—

Commencing at a point on the southern shore of Hudson's Bay, commonly called James' Bay, where a line produced due north from the head of Lake Temiscaming would strike the said south shore; thence along the said south shore westerly to the mouth of the Albany River; thence up the middle of the said Albany River, and of the lakes thereon, to the source of the said river at the head of Lake St. Joseph; thence by the nearest line to the easterly end of Lac Seul, being the head waters of English River; thence westerly through the middle of Lac Seul and the said English River to a point where the same will be intersected by a true meridional line drawn northerly from the international monument placed to mark the most north-westerly angle of the Lake of the Woods by the recent Boundary Commission; and thence due south, following the said meridional line to the said international monument; thence southerly and easterly, following upon the international boundary line between the British possessions and the United States of America into Lake Superior.

But if a true meridional line drawn northerly from the said international boundary at the said most north-westerly angle of the Lake of the Woods, shall be found to pass to the west of where the English River empties into the Winnipeg River, then, and in such case, the northerly boundary of Ontario shall continue down the middle of the said English River to where the same empties into the Winnipeg River, and shall continue thence on a line drawn due west from the confluence of the said English River with the said Winnipeg River, until the same will intersect the meridian above described; and thence due south, following the said meridional line to the said international monument; thence southerly and easterly, following upon the international boundary line, between the British possessions and the United States of America, into Lake Superior.

APPENDIX B

IMPERIAL ORDER IN COUNCIL, EMBODYING HER MAJESTY'S DECISION

[Reproduced from *The Proceedings, supra*, n.40, pp.416-8]

At the Court, at Osborne House, Isle of Wight, the 11th day of August, 1884.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY.

His Royal Highness the Prince of Wales.

Lord President, Earl of Northbrook,
Lord Steward, Sir T. Erskine May,
Earl Granville, Sir A. Cooper Key.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 22nd of July last past, in the words following, viz:

“Your Majesty having been pleased by your Order in Council of the 26th June, 1884, to refer unto this Committee the humble petition of Oliver Mowat, Your Majesty's Attorney-General for the Province of Ontario, as representing that Province, and of James Andrews Miller, Your Majesty's Attorney-General for the Province of Manitoba, as representing that Province, in the matter of the boundary between the Provinces of Ontario and Manitoba, in the Dominion of Canada, between the Province of Ontario of the one part and the Province of Manitoba of the other part, setting forth that a question has arisen, and is in dispute, between the Provinces of Ontario and Manitoba, respecting the western boundary of the Province of Ontario, and it has been agreed between those Provinces to submit such question to Your Majesty in Council for determination; the following Special Case has accordingly been agreed upon between the petitioners as representing the two Provinces aforesaid:—

“ ‘Special Case.

“ ‘The Province of Ontario claims that the western boundary of that Province is either (1) the meridian of the most north-westerly angle of the Lake of the Woods, as described in a certain Award made on the 3rd August, 1878, by the Honourable Chief Justice Harrison, Sir Edward Thornton, and Sir Francis Hincks, or (2) is a line west of that point.

“ ‘The Province of Manitoba claims that the boundary between that Province and the Province of Ontario is (1) the meridian of the confluence of the Ohio and Mississippi Rivers, or (2) is that portion of the height of land dividing the waters which flow into Hudson's Bay from those which empty into the valley of the Great Lakes, and lying to the west of the said meridian line.

“ ‘It has been agreed to refer the matter to the Judicial Committee of Her Majesty's Privy Council, and an Appendix has been prepared containing the materials agreed to be submitted with this Case for the adjudication of the dispute; each and every of the particulars in the said Appendix is submitted *quantum valeat*, and not otherwise.

“ ‘In addition to the particulars set forth in the Appendix, any historical or other matter may be adduced which, in the opinion of either party, may be of importance to the contention of such party, and (subject to any rule or direction of the Judicial Committee in that behalf) such additional matter is to be printed as a separate Appendix by the party adducing the same, and copies are to be furnished at least ten days before the argument.

“ ‘The book known as the Book of Arbitration Documents may be referred to in the argument for the purpose of shewing in part what materials were before the Arbitrators.

“ ‘It is agreed that in the discussion before the Judicial Committee of the Privy Council reference may be made to any evidence of which judicial notice may be taken, or which (having regard to the nature of the case and the parties to it) the Privy Council may think material and proper to be considered, whether the same is or is not contained in the printed papers.

“ ‘The questions submitted to the Privy Council are the following:—

“ ‘(1) Whether the Award is or is not, under all the circumstances, binding?

“ ‘(2) In case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said Provinces?

“ ‘(3) Whether, in case legislation is needed to make the decision on this case binding or effectual, Acts passed by the Parliament of Canada and the Provincial Legislatures of Ontario and Manitoba in connection with the Imperial Act 34 and 35 Vict., cap. 28, or otherwise, will be sufficient, or whether a new Imperial Act for the purpose will be necessary.

“ ‘O. Mowat,

“ ‘Attorney-General of Ontario.

“ ‘James A. Miller,

“ ‘Attorney-General of Manitoba.’ ”

“And humbly praying that Your Majesty in Council will be pleased to take the said Special Case into consideration, and that the said Special Case may be referred by Your Majesty to the Lords of the Judicial Committee of the Privy Council to report thereon to Your Majesty at the Board, and that such Order may be made thereupon as to Your Majesty shall seem meet. The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, have taken the said humble Petition and Special Case into consideration, and having heard counsel for the Province of Ontario, and also for the Province of Manitoba, their Lordships do this day agree humbly to report to Your Majesty as their opinion:—

“1. That legislation by the Dominion of Canada, as well as by the Province of Ontario, was necessary to give binding effect as against the Dominion and the Province to the Award of the 3rd August, 1878, and that, as no such legislation has taken place, the Award is not binding.

“2. That, nevertheless, their Lordships find so much of the boundary lines laid down by that Award as relate to the territory now in dispute between the Province of Ontario and the Province of Manitoba to be substantially correct and in accordance with the conclusions which their Lordships have drawn from the evidence laid before them.

“3. That, upon the evidence, their Lordships find the true boundary between the western part of the Province of Ontario and the south-eastern part of the Province of Manitoba to be so much of a line drawn to the Lake of the Woods, through the waters eastward of that lake and west of Long Lake, which divide British North America from the territory of the United States, and thence through the Lake of the Woods to the most north-western point of that lake, as runs northward from the United States boundary, and from the most north-western point of the Lake of the Woods a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul, or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and their Lordships find the true boundary between the same two Provinces to the north of Ontario and to the south of Manitoba, proceeding eastward from the point at which the before mentioned line strikes the middle line of the course of the river last aforesaid, to be along the middle line of the course of the same river (whether called by the name of the English River or, as to the part below the confluence, by the name of the River Winnipeg) up to Lake Seul, or the Lonely Lake, and thence along the middle line of Lake Seul, or the Lonely Lake, to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves, until it reaches a line drawn due north from the confluence of the rivers Mississippi and Ohio which forms the boundary eastward of the Province of Manitoba.

“4. That without expressing an opinion as to the sufficiency or otherwise of concurrent legislation of the Provinces of Ontario and Manitoba, and of the Dominion of Canada (if such legislation should take place), their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual.”

Her Majesty, having taken the said Report into consideration, was pleased by and with the advice of Her Privy Council to approve thereof, and to order, as it is hereby ordered, that the same be punctually observed, obeyed and carried into execution. Whereof the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario, the Lieutenant-Governor of the Province of Manitoba, and all other per-

sons whom it may concern, are to take notice and govern themselves accordingly.

C. L. Peel.

APPENDIX C

IMPERIAL ORDER IN COUNCIL, 24th AUGUST, 1791, ESTABLISHING THE PROVINCES AND UPPER AND LOWER CANADA.

[Reproduced from *Ontario Boundaries, supra*, n. 41,
Joint Appendix, pp.399-400]

At the Court at St. James's, the 24th of August, 1791.

Present:

THE KING'S MOST EXCELLENT MAJESTY.

Lord Chamberlain,	Lord Dover,
Lord Frederick Campbell,	Mr. Secretary Dundas,
Lord Grenville.	Mr. Chancellor of the Exchequer.

Whereas there was this day read at the Board a Report from the Right Honorable the Lords of the Committee of Council, dated the 19th of this instant, in the words following, viz:

"Your Majesty having been pleased by your Order in Council, bearing date the 17th of this instant, to refer unto this Committee a letter from the Right Honorable Henry Dundas, one of Your Majesty's principal Secretaries of State, to the Lord President of the Council, transmitting a printed copy of an Act passed in the last session of Parliament, entitled 'An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled, An Act for making more effectual provision for the government of the Province of Quebec in North America, and to make further provision for the government of the said Province'; and also copy of a paper presented to Parliament previous to the passing of the said Act, describing the line proposed to be drawn for dividing the Province of Quebec into two separate provinces, agreeable to Your Majesty's royal intention, signified by message to both Houses of Parliament, to be called the Province of Upper Canada and the Province of Lower Canada, and stating, that by Section 48 of the said Act, it is provided, that by reason of the distance of the said Provinces from this country and of the change to be made by the said Act in the government thereof, it may be necessary that there should be some interval of time between the notification of the said Act to the said Provinces respectively, and the day of its commencement within the said Provinces respectively, and that it should be lawful for Your Majesty, with the advice of your Privy Council, to fix and declare, or to authorize the Governor or Lieutenant-Governor of the Province of Quebec,

or the person administering the government there, to fix and declare the day of the commencement of the said Act within the said Provinces respectively, provided that such day shall not be later than the 31st of December, 1791: The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, this day took the said letter into their consideration, together with the Act of Parliament therein referred to, and likewise copy of the said paper describing the line proposed to be drawn for separating the Province of Upper Canada and the Province of Lower Canada; and their Lordships do thereupon agree humbly to report as their opinion to Your Majesty, that it may be advisable for Your Majesty by your Order in Council to divide the Province of Quebec into two distinct provinces, by separating the Province of Upper Canada and the Province of Lower Canada, according to the said line of division described in the said paper, *copy of which is hereunto annexed*: And the Lords of the Committee are further of opinion that it may be advisable for Your Majesty, by warrant under your Royal Sign Manual, to authorize the Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the government there, to fix and declare such day for the commencement of the said before mentioned Act within the said two Provinces of Upper and Lower Canada respectively, as the said Governor or Lieutenant-Governor of the Province of Quebec, or the person administering the government there, shall judge most advisable, provided that such day shall not be later than the 31st day of December in the present year, 1791.

"The *Proposed Line of Division* to commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Boudet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit in the direction of north thirty-four degrees west to the westernmost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees East until it strikes the Ottawas River, to ascend the said River into the Lake Tomiscanning, and from the head of the said Lake by a line drawn due north until it strikes the boundary line of Hudson's Bay, *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."

His Majesty this day took the said report into His royal consideration and approving of what is therein proposed, is pleased, by and with the advice of His Privy Council, to order, as it is hereby ordered, that the Province of Quebec be divided into two distinct provinces, to be called the Province of Upper Canada and the Province of Lower Canada, by separating the said two provinces, according to the following line of division, viz:

"To commence at a stone boundary on the north bank of the Lake St. Francis, at the cove west of Pointe au Boudet, in the limit between the Township of Lancaster and the Seigneurie of New Longueuil, running along the said limit in the direction of north thirty-four degrees; West to the

westernmost angle of the said Seigneurie of New Longueuil, thence along the north-western boundary of the Seigneurie of Vaudreuil, running north twenty-five degrees, East until it strikes the Ottawas River, to ascend the said River into the Lake Tomiscanning, and from the head of the said Lake, by a line drawn due north until it strikes the boundary line of Hudson's Bay, *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."

Whereof the Governor, Lieutenant-Governor, or Commander-in-Chief of the Province of Quebec and all other His Majesty's officers in the said Provinces, and all whom it may concern, are to take notice and yield due obedience to His Majesty's pleasure, hereby signified.

APPENDIX D

CANADA (ONTARIO BOUNDARY) ACT, 1889

52 & 53 Vic., c. 28 (U.K.)

AN ACT TO DECLARE THE BOUNDARIES OF THE PROVINCE OF ONTARIO IN THE DOMINION OF CANADA

[12th August 1889.]

Whereas the Senate and Commons of Canada in Parliament assembled have presented to Her Majesty the Queen the address set forth in the schedule to this Act respecting the boundaries of the province of Ontario:

And whereas the Government of the province of Ontario have assented to the boundaries mentioned in that Address:

And whereas such boundaries so far as the province of Ontario adjoins the province of Quebec are identical with those fixed by the proclamation of the Governor-General issued in November, one thousand seven hundred and ninety-one, which have ever since existed:

And whereas such boundaries, so far as the province of Ontario adjoins the province of Manitoba, are identical with those found to be the correct boundaries by a report of the Judicial Committee of the Privy Council, which Her Majesty the Queen in Council, on the eleventh day of August one thousand eight hundred and eighty-four, ordered to be carried into execution:

And whereas it is expedient that the boundaries of the province of Ontario should be declared by authority of Parliament in accordance with the said address:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Canada (Ontario Boundary) Act, 1889.
2. It is hereby declared that the westerly, northerly, and easterly boundaries of the province of Ontario are those described in the address set forth in the schedule to this Act.

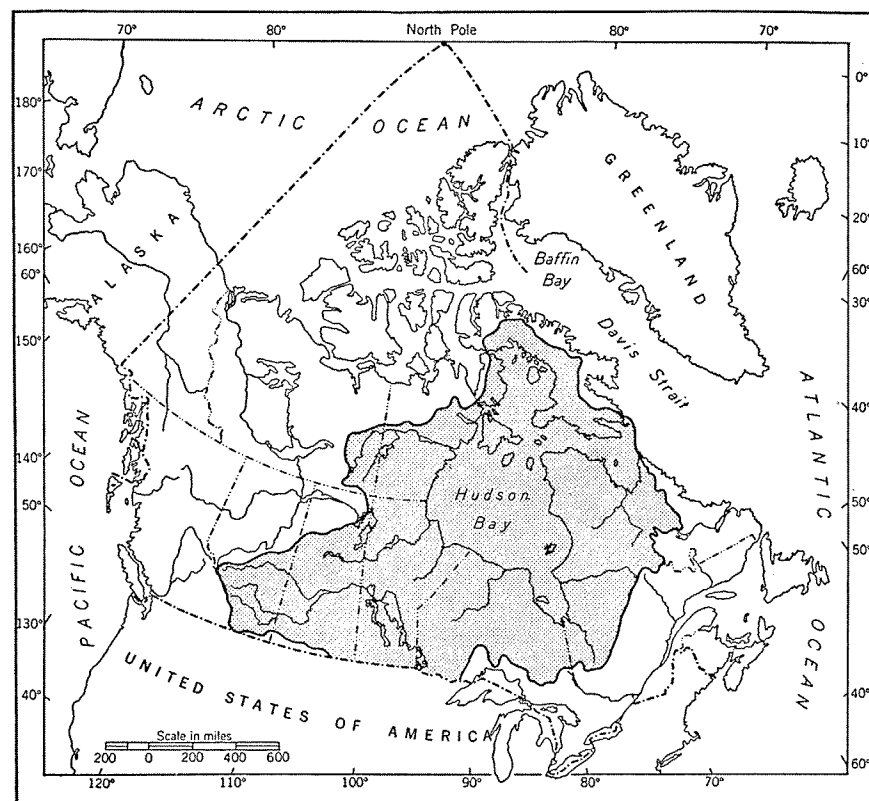
SCHEDULE.

ADDRESS TO THE QUEEN FROM THE SENATE AND
HOUSE OF COMMONS OF CANADA

We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada, in Parliament assembled, humbly approach Your Majesty with the request that Your Majesty may be graciously pleased to cause a measure to be submitted to the Parliament of the United Kingdom, declaring and providing the following to be the westerly, northerly, and easterly boundaries of the province of Ontario, that is to say:—

Commencing at the point where the international boundary between the United States of America and Canada strikes the western shores of Lake Superior, thence westerly along the said boundary to the north-west angle of the Lake of the Woods, thence along a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and thence proceeding eastward from the point at which the before-mentioned line strikes the middle line of the course of the river last aforesaid, along the middle line of the course of the same river (whether called by the name of the English River or, as to the part below the confluence, by the name of the River Winnipeg) up to Lake Seul or the Lonely Lake, and thence along the middle line of Lake Seul or Lonely Lake to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves to the shore of the part of Hudson's Bay commonly known as James' Bay, and thence south-easterly following upon the said shore to a point where a line drawn due north from the head of Lake Temiscamingue would strike it, and thence due south along the said line to the head of the said lake, and thence through the middle channel of the said lake into the Ottawa River, and thence descending along the middle of the main channel of the said river to the intersection by the prolongation of the western limits of the Seigneurie of Rigaud, such mid-channel being as indicated on a map of the Ottawa Ship Canal Survey made by Walter Shanly, C.E., and approved by Order of the Governor-General in Council, dated the twenty-first July one thousand eight hundred and eighty-six; and thence southerly, following the said westerly boundary of the Seigneurie of Rigaud to the south-west angle of the said Seigneurie, and then southerly along the western boundary of the augmentation of the township of Newton to the north-west angle of the Seigneurie of Longueuil, and thence south-easterly along the south-western boundary of said Seigneurie of New Longueuil to a stone boundary on the north bank of the Lake St. Francis, at the cove west of Point au Baudet, such line from the Ottawa River to Lake St. Francis being as indicated on a plan of the line of boundary between Upper and Lower

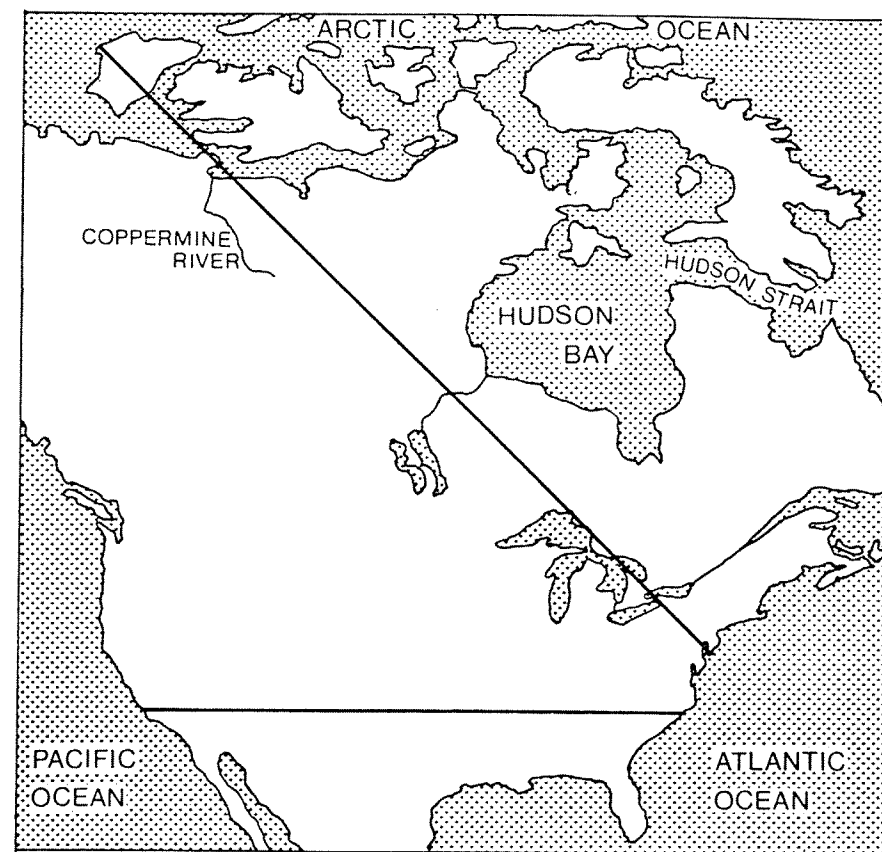
Canada, made in accordance with the Act 23 Victoria, chapter 21, and approved by order of the Governor-General in Council, dated the 16th of March 1861.



MAP 1

Extent of Rupert's Land (shaded area) according to an 1857 map drawn by J. Arrowsmith and based on the Hudson drainage basin.

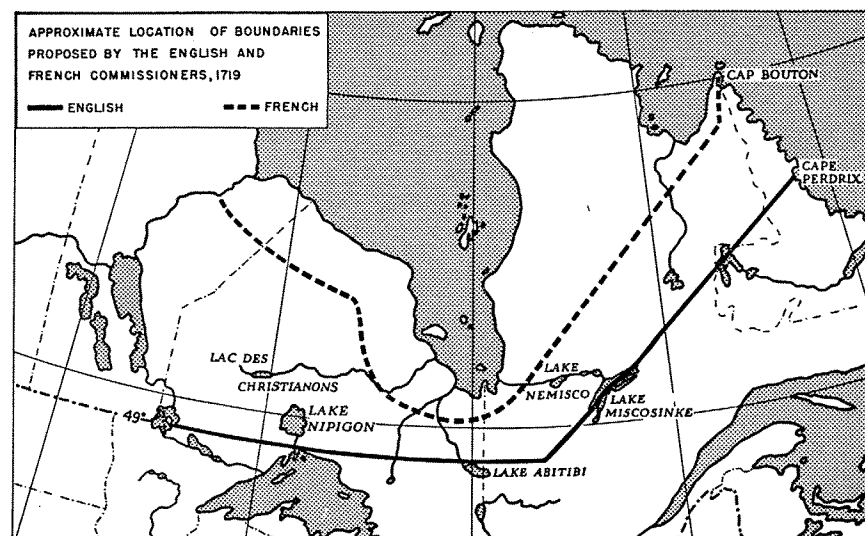
Source: Norman L. Nicholson, *The Boundaries of Canada, Its Provinces and Territories* (Ottawa: Geographical Branch, Department of Mines and Technical Surveys of Canada, 1954), p.35. Reproduced by permission of the Minister of Supply and Services Canada.



MAP 2

Boundaries of Virginia on a literal interpretation of the Royal Charter of 1609.

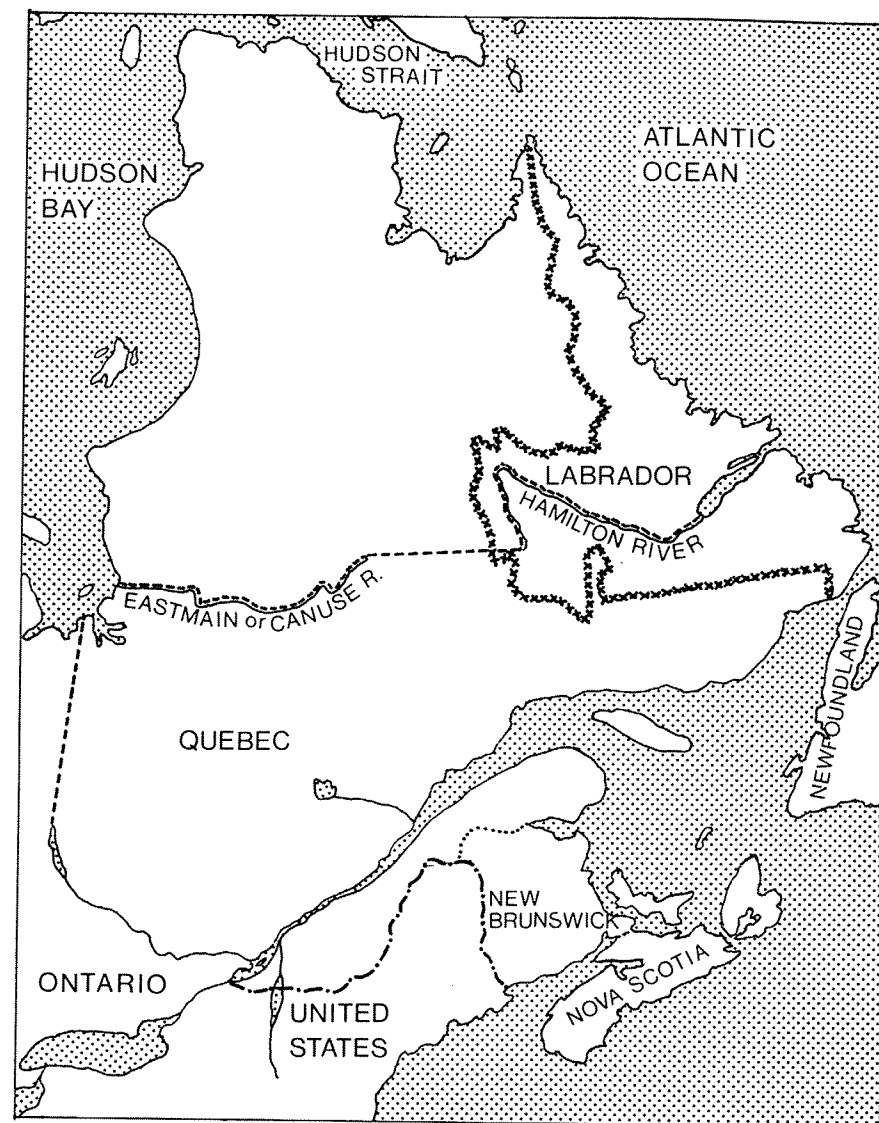
Based on a map in Brian Slattery, *Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), map 1.19. Redrawn by Waltraude Stehwien, D.A.V.S. Graphics, University of Saskatchewan.



MAP 3

Boundaries between British and French territory proposed by commissioners in 1719, after the Treaty of Utrecht.

Source: Max Savelle, "The Forty-Ninth Degree of North Latitude as an International Boundary, 1719: The Origin of an Idea" (1957), 38 *Canadian Historical Review*, p.198. Reprinted by permission of University of Toronto Press.



MAP 4

Boundaries of Quebec:

———— As set by the Quebec Boundary Acts of 1889

xxxxxx As determined by the Privy Council in *Re Labrador Boundary*, [1927] 2 D.L.R. 401.

Based on maps in Jean Hamelin, ed., *Histoire Du Québec* (St.-Hyacinthe, Qué.: Edisem Inc., 1977), at pp.418, 462. Redrawn by Waltraude Stehwien, D.A.V.S. Graphics, University of Saskatchewan.