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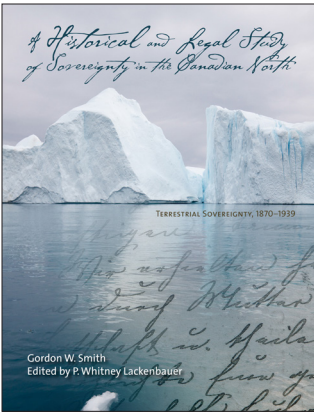
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**A HISTORICAL AND LEGAL STUDY OF SOVEREIGNTY
IN THE CANADIAN NORTH: TERRESTRIAL
SOVEREIGNTY, 1870-1939**

By Gordon W. Smith, Edited by P. Whitney Lackenbauer

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A Period of Relative Inactivity and Unconcern, 1880-95

In a period of just ten years, the young Dominion of Canada found itself responsible for virtually the northern half of the continent and adjacent islands, except Newfoundland, Alaska, and Greenland. Steps were speedily taken to develop the more fertile, habitable parts of the transferred territories and bring them under control, and progress in these parts, mainly the western Prairies, was rapid. But in the remoter northerly parts, especially the islands, very little was done in consequence of the transfer for fully fifteen years after 1880, and the Canadian government left the islands to keep “the noiseless tenor of their way.” This inactivity left the impression afterwards in some quarters that the Canadian authorities doubted the legality of the transfer and felt inhibited in assuming full responsibility until these doubts had been set at rest by the passing of the Colonial Boundaries Act by the Imperial Parliament in 1895.

One leading figure who seems to have held this view was Dr. William Frederick King, Canada’s Chief Astronomer at the turn of the century and author of the familiar *Report upon the Title of Canada to the Islands North of the Mainland of Canada*, which became, after its publication in 1905, probably the most highly regarded work on the subject.¹ Some aspects of King’s report were questioned by Hensley R. Holmden, Associate Archivist in charge of the Maps Division at the Public Archives, in his *Memo re the Arctic Islands*, written in 1921.² But King’s *Report* was published, even if only in a limited, confidential edition, while Holmden’s *Memo* was put out only in manuscript form for the benefit of a few government officials who were engaged in some troublesome business concerning the islands at the time. Thus King’s *Report* became relatively familiar to government and later to academic people, while Holmden’s *Memo* was left to gather dust on archives shelves. Little other writing was done on the matters discussed in the two reports, and the net result was that King’s document acquired an aura of unassailable authenticity and infallibility which was in some respects exaggerated. For example, it is easy to show, as Holmden did, that King was largely mistaken in his belief about the basic reason for the Canadian government’s inactivity respecting the Arctic Islands during the fifteen years after 1880. However, this explains only one aspect of an extremely complicated situation.

Shortly after the 1880 transfer, the Canadian government attempted to find out what might be done in the newly acquired territories. The Minister of Justice, Alexander Campbell, carried on a correspondence with the Hudson’s Bay Company in the hope of acquiring information about

the inhabitants which might aid in planning any necessary action.³ Company officials could tell him little, however, and finally he recommended that no steps should be taken to legislate for these regions until circumstances should warrant such activity. His recommendation was embodied in an order in council, promulgated on 23 September 1882, and forwarded to Secretary of State for the Colonies the Earl of Kimberley two days later⁴:

The Committee of Council have had under consideration a Despatch dated 16th August 1880, No. 131, from the Earl of Kimberley, enclosing an Order of Her Majesty in Council dated the 31st of July 1880, annexing to the Dominion of Canada from the 1st September 1880 such British possessions in North America (with the exception of the Colony of Newfoundland and its dependencies) as are not already included in the Dominion.

The Minister of Justice to whom the said Despatch was referred with a view to endeavour to obtain information regarding the occupants of the country North and North West of Hudson's Bay, and their habits and pursuits, reports that immediately after the reference he entered into a correspondence with the principal officer of the Hudson's Bay Company on the subject, and that gentleman very kindly caused Circulars to be addressed to such of the Agents of the Company as were likely to be able to furnish information on the points under consideration. On the 22nd of July last the Chief Executive Officer of the Company, Mr. James

Grahame, addressed a letter to him, the Minister, informing him that the parties to whom he had referred the enquiries were unable to furnish the required information.

The Minister is not aware of any other source where such information as is desired may be sought, and he advises that no steps be taken with the view of legislating for the good government of the country until some influx of population or other circumstance shall occur to make such provision more imperative than it would at present seem to be.

The Committee concur in the report of the Minister of Justice and advise that a copy of this Minute when approved be transmitted to her Majesty's Secretary of State for the Colonies.⁵ [emphasis added]

Here, it would seem, lies the basic reason for the almost total lack of activity on the part of the Canadian government in the new territories for about fifteen years after 1880: no need for it could be found. It was not, as King apparently thought, doubt that the transfer was valid.⁶

King also misinterpreted and overestimated the relevance of the British Colonial Boundaries Act of 1895.⁷ The act itself is very short, its main clause stating:

1. – (1.) Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or letters patent the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony.



FIGURE 2-1: DR. W. F. KING. *NATURAL RESOURCES CANADA*.

Provided that the consent of a self-governing colony shall be required for the alteration of the boundaries thereof.

In this Act “self-governing colony” means any of the colonies specified in the schedule to this Act.

The self-governing colonies specified in the accompanying schedule were Canada, Newfoundland, New South Wales, Victoria, South Australia, Queensland, Western Australia, Tasmania, New Zealand, Cape of Good Hope and Natal.

About three weeks after the act was passed, Britain sent a copy to Canada, accompanied

by a copy of a circular from Colonial Secretary Joseph Chamberlain which read:

The Law Officers of the Crown having recently reported that where and Imperial Act has expressly defined the boundaries of a Colony, or has bestowed a Constitution on a Colony within certain boundaries, territory cannot be annexed to that Colony so as to be completely fused with it, as, e.g., by being included in a province or electoral division of it without statutory authority, it followed that certain annexations of territory to colonies falling within the above category which had been effected by Order in Council and Letters Patent, accompanied by Acts of the Colonial Legislatures, were of doubtful validity, and this Act has been passed to validate these annexations, and to remove all doubts as to Her Majesty’s powers in future cases.⁸

Dr. King seemed to assume in his report that the Imperial Parliament passed the Colonial Boundaries Act specifically or essentially to remove any doubt about the validity of the transfer of 1880.⁹ Holmden disagreed with this interpretation, noting that by the time the order in council of 31 July 1880 was passed the authorities in both Great Britain and Canada were satisfied that the transfer could be legally accomplished in this manner, and their remaining doubts related to the uncertain boundaries of the lands transferred in both 1870 and 1880. He believed that although the Colonial Boundaries Act would clear up any doubts about the validity of the transfer in 1880, it was not “intended to apply to Canada.”¹⁰

It seems to me that Holmden is generally correct, except that the act was obviously intended to be applicable to Canada, since Canada was one of the self-governing colonies named in the accompanying schedule. Perhaps he meant that in passing the act the Imperial authorities did not have Canada primarily in mind. Remarks passed in the British parliament when the proposed measure was being discussed provide strong evidence that the territories subject to this transfer were not the primary concern, since the colonies specifically mentioned were New Zealand, some of the Australian colonies, Cape Colony, and Natal.¹¹

Nevertheless, and in spite of the foregoing (and contrary to Holmden's view in 1921), additional evidence suggests that doubts about the 1880 transfer did figure into Britain's decision to enact the Colonial Boundaries Act. If Dr. King was partly off the track in his assessment of this connection, he was to a large extent only reflecting the view of it which had been taken by the authorities in London in 1895. On 21 May, Henry Jenkyns at the Office of the Parliamentary Counsel wrote a memo on the proposed act which was sent as a dispatch to Ottawa on 29 May. The most relevant parts of it read as follows.

It appears from three reports from the Law Officers, dated respectively the 25th August 1894, the 27th February 1895, and the 27th February 1895 [*sic*], that the law as to the alteration of the boundaries of colonies is as follows: –

I. Where an Imperial Act has expressly defined the boundaries of a colony or has bestowed a constitution on a colony within certain boundaries, territory

cannot be annexed to that Colony so as to be completely fused with it, as e.g., by being included in a province or electoral division of it, without statutory authority ...

II. But the Queen can, unless restrained by an Imperial Act, give to any such colony as above mentioned and the colony can accept the administration and government of any territory. The most solemn mode of such acceptance is colonial legislation.

In such a case [*sic*] the territory is not incorporated with and does not become part of the colony, but is only administered by the same government.

III. The same law appears to apply –

(a) Where the boundaries have been fixed by Order in Council or letters patent issued in pursuance of statutory authority....

V. An annexation, even if irregular in the outset, may possibly, if followed by a de facto incorporation for a long period of time, acquire, like any other constitutional changes, validity through usage....

It follows from the above that certain annexations of territory by Order in Council and letters patent accompanied by Acts of the Colonial Legislatures are invalid. For instance –

(a) The annexation to Canada of all British territory in North America and of the adjacent islands by Order in Council of the 31st July 1880 (the limits of the Dominion having been fixed by the British North America Acts, 1867 and 1871).

(b) The annexation to Queensland of all islands within 60 miles of the coast of Queensland ...

(c) The annexation to New Zealand of the Kermadec Islands....

It will be observed that the Bill applies only where the boundary has been fixed by or under an Act of Parliament, and does not touch the case where the boundaries have been already fixed by the prerogative power of the Queen.¹²

Thus, if doubts about the “sufficiency” of the 1880 order in council were in any way justified, the Colonial Boundaries Act of 1895 retroactively removed the need for them. One may assume, however, that the above documents were received in Ottawa with consternation, even if the presumed insufficiency was being corrected. Particularly unsettling must have been the categorical statement in Jenkyns’ memo that the transfer of 1880 was one of the annexations by order in council now regarded as “invalid.” The obvious issue, which must have troubled Canadian officials greatly, is simply this: Was the confirmation provided by the Colonial Boundaries Act really necessary for the 1880 transfer? A number of questions and comments spring immediately to mind.

1. One of the most fundamental, and most disturbing, questions is the following. How is it that the transfer could be pronounced valid, after full consideration and on repeated occasions, by law officers in the 1870s, and then pronounced invalid by law officers in 1895? A question, which cannot be answered from the documents cited, is whether the revised 1895 opinion about the transfer was actually that of the law officers themselves or a conclusion reached through analogy by Colonial Office officials.

2. Even if the annexation of 1880 was “irregular in the outset,” would it not have acquired “validity through usage,” in accordance with the fifth point in Jenkyns’ memo? After all, it had been treated as valid for fifteen years.

3. Considering that the order in council had been judged adequate in all respects in 1880, could a reversal of opinion by the law officers or someone else in 1895 have the retroactive effect of making it invalid?

4. Were the law officers and others aware in 1895 of the purpose and significance of the BNA Act of 1871 in connection with territories admitted into the Dominion of Canada? This act had been overlooked by the Law Officers of the Crown in the 1870s. It is mentioned once in the correspondence presently under discussion, but in a somewhat different context. It would be remarkable, to say the least, if the relevance of the act was overlooked a second time in 1895.

5. Assuming that the authorities in 1895 were fully aware of the BNA Act of 1871 and its purpose, why did they not accept it as covering the territories subject to the transfer of 1880? The following is surmise, but may suggest an answer. The act of 1871 dealt with territories “admitted, or which may hereafter be admitted” into the Dominion, and authorized the Parliament of Canada to create provinces from them and otherwise administer and govern

them. Presumably, then, all would be in order after they had become part of the Dominion, so long as they had been admitted into it by legal and constitutional means. But if they had not, the BNA Act of 1871 could not in itself legitimize their entry. Perhaps this was what was seen as the fly in the ointment in 1895.

6. Did the fundamental circumstances which the Colonial Boundaries Act was intended to take care of really exist in connection with the transfer of 1880? It would seem that they did not. The documents make clear that the act was designed to correct situations where an Imperial act had “expressly defined the boundaries of a colony,” and where subsequently territory had been annexed the colony without statutory authority, for example by order in council, so as to be “completely fused” with it, by being included in a province. Neither of these basic circumstances existed in the case of the 1880 transfer. It is true that the Province of Canada was admitted to Confederation with the boundaries of former Upper and Lower Canada, these becoming Ontario and Quebec respectively; but the northern boundary with the HBC territories was not specified, either before, at the time of, or after Confederation. The BNA Act of 1867 gave statutory authority for the admission by order in council of Rupert’s Land and the North-Western Territory to Canada (art. 146), and the BNA Act of 1871 confirmed the power of the Parliament of Canada to create provinces from territories within Canada and govern non-provincial territories. But nowhere in either act was there, as apparently suggested in Jenkyns’ memo, any definition of the territorial limits of either Rupert’s Land or the North-Western Territory. And these, rather than any province or provinces, were adjacent to the territories involved in the transfer of 1880. As for the second point, the territories subject to the transfer had purportedly been

annexed simply as territories, and had not been fused with any province. This would have been difficult, because the vast expanse of the former HBC empire intervened between them and the existing provinces. There was nothing to suggest that they were supposed to have been fused with any of the provinces, or even with these HBC lands.

In sum, it seems clear that if there were any flaws in the constitutional aspects, or the mechanics, of the transfer of 1880, these flaws were overcome by the Colonial Boundaries Act of 1895. But this act, evidently necessary for a number of annexations in other parts of the Empire, does not seem to have been really needed so far as the transfer of 1880 was concerned. It was designed to deal with cases where Imperial legislation had precisely defined colonial boundaries, but there had been no such definition of the northern boundaries in British North America. It was designed also to take care of cases where territories had been “completely fused” with existing colonies as parts of provinces, etc., but there had been no such fusion in 1880. The transfer had been judged entirely satisfactory when it was made and had been so regarded afterwards, and the BNA Act of 1871 covered the situation so far as later developments were concerned. For these reasons it is difficult to see that there was anything particularly wrong with the transfer in an internal, constitutional sense. If there was, surely it amounted to no more than a minor technicality.

What was wrong with the transfer, as already indicated, was that it purported to annex to Canada, in the vaguest and most imprecise way, unnamed territories of unknown and unspecified extent, to which Great Britain’s title was uncertain, and for which no boundaries were given. In this sense it was vulnerable to

the charge that it was not really a transfer at all. This deficiency had a more international aspect, and if other states had become interested in establishing serious claims within the archipelago during the years immediately following the transfer, Great Britain and Canada might have found that their arrangement was by no means immune to challenge. Ironically enough, this could have happened given foreign explorers' activities during the early 1880s (see chapter 6). On the whole, however, if Canada was doing little to consolidate her claim to the archipelago during these years, other states were doing very little that would give them a basis for making counterclaims.

The Expeditions of Lieutenant A. R. Gordon: 1884, 1885, 1886

A series of three Canadian expeditions to Hudson Bay and Strait during the successive years of 1884, 1885, and 1886, all commanded by Lieutenant Andrew Robertson Gordon of the Royal Navy and supervised by the federal Minister of Marine and Fisheries, stands as a rare example of Canadian activity in the Arctic.¹³ A select committee of the Canadian House of Commons had conducted an inquiry in February and March 1884 into the possibilities of commercial navigation in Hudson Bay and Strait, and reported optimism about the prospect of developing this passage as the shortest sea route between the Canadian Northwest and Great Britain. The committee had further recommended that immediate steps be taken to conduct investigations and observations over a three-year period to ascertain the feasibility of the route.¹⁴ Lieutenant Gordon's three voyages were primarily concerned with carrying out

the recommendations of the report, and were thus chiefly occupied with observing navigation and weather conditions in these waters.¹⁵

Using the chartered steamers *Neptune* in 1884 and *Alert* (of the Nares expedition) in 1885 and 1886, Gordon cruised extensively in Hudson Strait and Hudson Bay, and visited numerous points, including Port Burwell, Chesterfield Inlet, Marble Island, Churchill, York Factory, and Digges Island. Groups of observers were left at half a dozen points in the strait in 1884, relieved in 1885, and the relieving parties picked up in 1886. They took note of navigation conditions, including water currents and ice, weather, flora and fauna, natural resources, and the native population; Gordon himself also wrote lengthy memoranda on these matters. Dr. Robert Bell of the Geological Survey, who accompanied the expeditions, furnished detailed geological reports. In 1886, Gordon surveyed the mouths of both the Churchill and the Nelson-Hayes river systems as prospective harbours and sites for the terminus of the projected Hudson Bay railway, and he emphasized that in his view Churchill was by far the more suitable of the two.¹⁶ He also advised that a four-month navigation season, from July through October, was the maximum that could be expected – with delays in July and difficulties in October.¹⁷

Some authors have supposed that Gordon's three voyages were directly connected with the transfer of 1880 and Canada's assumption of responsibility in the newly acquired territories.¹⁸ I can find little to justify this supposition since, as Gordon's narratives and other evidence make clear, the voyages were designed primarily to gather information about navigation in Hudson Bay and Strait, and they penetrated no farther north. In his 1884 report, Gordon himself noted that "the primary object of the whole expedition is to ascertain for what period of the year the Straits are navigable."¹⁹ Dr. Bell, in his

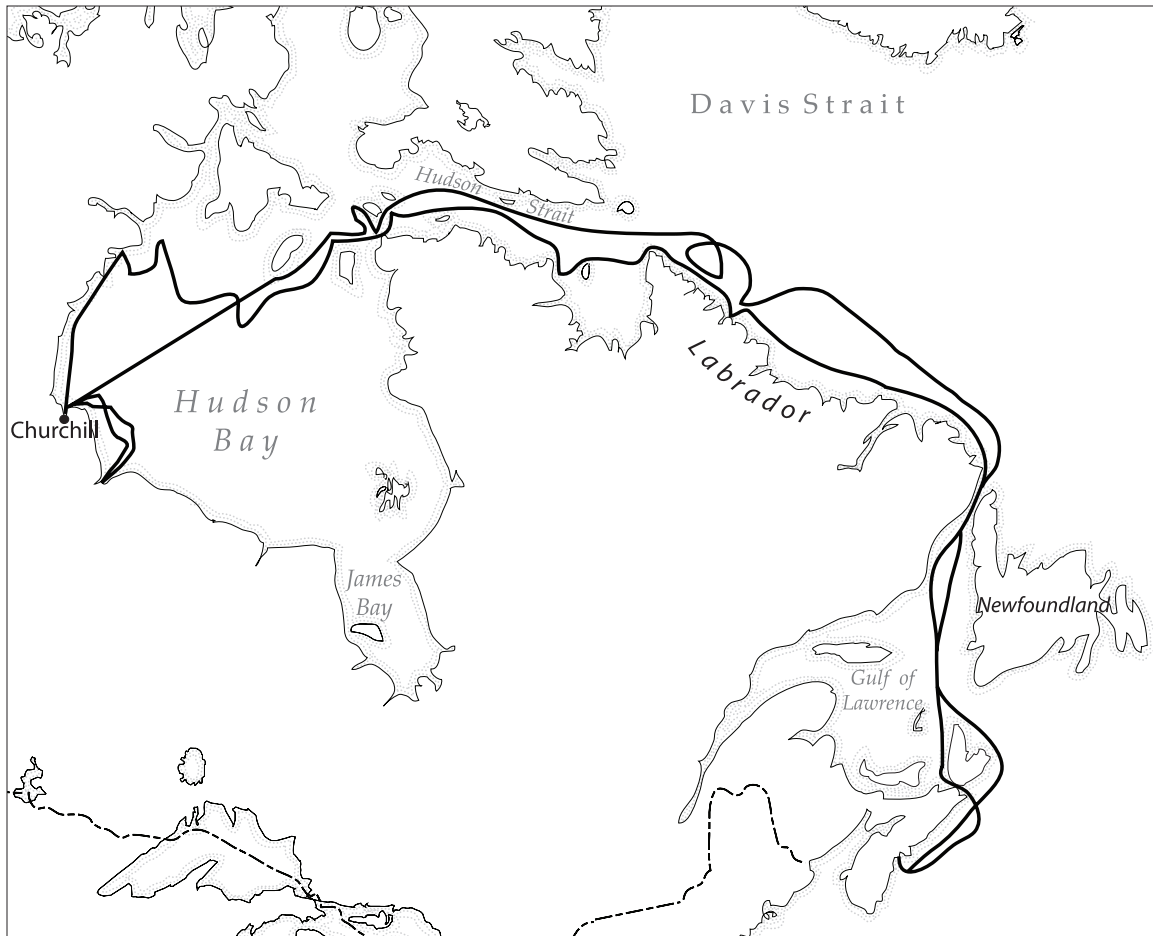


FIGURE 2-2: CHART SHOWING THE TRACK OF THE DSS ALERT HUDSON'S BAY EXPEDITION 1886. JENNIFER ARTHUR-LACKENBAUER BASED ON A. R. GORDON, *REPORT OF THE HUDSON'S BAY EXPEDITION OF 1886 UNDER THE COMMAND OF LIEUT. A. R. GORDON* (OTTAWA: DEPT. OF MARINE AND FISHERIES, 1887).

report for the same year, stated “that the main object of the expedition, sent out by steamship the present season, was to establish six observatory stations on the shores of Hudson’s Strait ... all with a view to throw additional light on questions regarding the navigation of these waters.”²⁰ Minister of Marine and Fisheries George Eulas Foster instructed Gordon prior to the 1886 voyage to “bear in mind that it is the wish of the Department to demonstrate as far as possible the navigability of the Straits, for purposes of commerce.”²¹ A few weeks earlier,

Foster had emphasized the same point in the House of Commons in his reply to a question about the voyages of 1884 and 1885. “In sending the *Alert* to visit the Hudson’s Straits last year,” he explained, “it was intended by the Government that the navigability of these waters should be tested by that vessel, as that was the primary object of fitting out the expedition to the Hudson’s Bay and Straits in 1884–85.”²² Unless there is other evidence as yet unrevealed, there would seem to be no reason why the above statements should not be taken

at face value, and therefore it is probably safe to conclude that from the Canadian government's point of view the voyages of Gordon were not directly connected with the 1880 transfer of the Arctic Islands.

Even so, Gordon became concerned about the assertion of Canada's jurisdiction in the regions he visited. In his 1884 report, he took note of the profitable whaling and fishing industries carried on freely by American citizens and by the HBC. With regard to the Americans in particular, he wrote:

I have the honour to urge that in any negotiations with the Government of the United States, relative to a treaty of reciprocal trade, due allowance should be made for the great value of the fisheries of Hudson's Bay.

If American whalers are to be permitted to continue to fish in those waters, arrangements should be made by which Canada would receive a substantial equivalent for the privilege.

I would further suggest that unless a very large consideration is granted in return for the privilege, the Canadian Government should reserve the right to make and enforce such regulations as will prevent the extermination of these valuable mammals from our northern waters.²³

He also observed that Newfoundland authorities were collecting customs duties in their Labrador ports on goods destined for consumption at Fort Chimo in Canadian territory, and that although the HBC had to pay duties to the Canadian government on trade goods imported into Hudson Bay, the American whalers

were bringing in such goods, evidently including liquor, and paying nothing.²⁴

Gordon apparently made no formal proclamations of Canadian sovereignty during his three expeditions, unlike his successors William Wakeham, Albert Peter Low, and Joseph-Elzéar Bernier, but he did protest that the waters of Hudson Bay were wholly within Canadian territory and should be so regarded. A passage in his 1885 report reads as follows:

The waters of Hudson's Bay are wholly within the Dominion, and the right of Canada to protect these waters and keep them for her own citizens is, I think, unchallenged. In the case of the White Sea in Northern Russia, the Russian Government charge high licenses for the privilege of fishing, and prescribe the methods to be used in capturing the fish. I would strongly urge the advisability of protecting these fisheries; and in any negotiations with the United States Government in reference to right of United States citizens to fish within the territorial waters of Canada, the value of the Hudson's Bay and Straits region as a fishing ground should be strongly insisted on; and under any circumstances, our Government should retain the right to prescribe the methods which may be used.²⁵

In his 1886 report, Gordon returned to the same themes and embodied his earlier points in a series of formal recommendations, adding his opinion that a Canadian government vessel should visit the region annually to regulate the fisheries and for any other purposes necessary.²⁶ Obviously the Canadian government did

not carry out promptly all his recommendations (particularly regarding annual voyages), but they remain interesting and significant in the light of later events.

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Other Activities, Mainly in Former HBC Lands (1880–95)

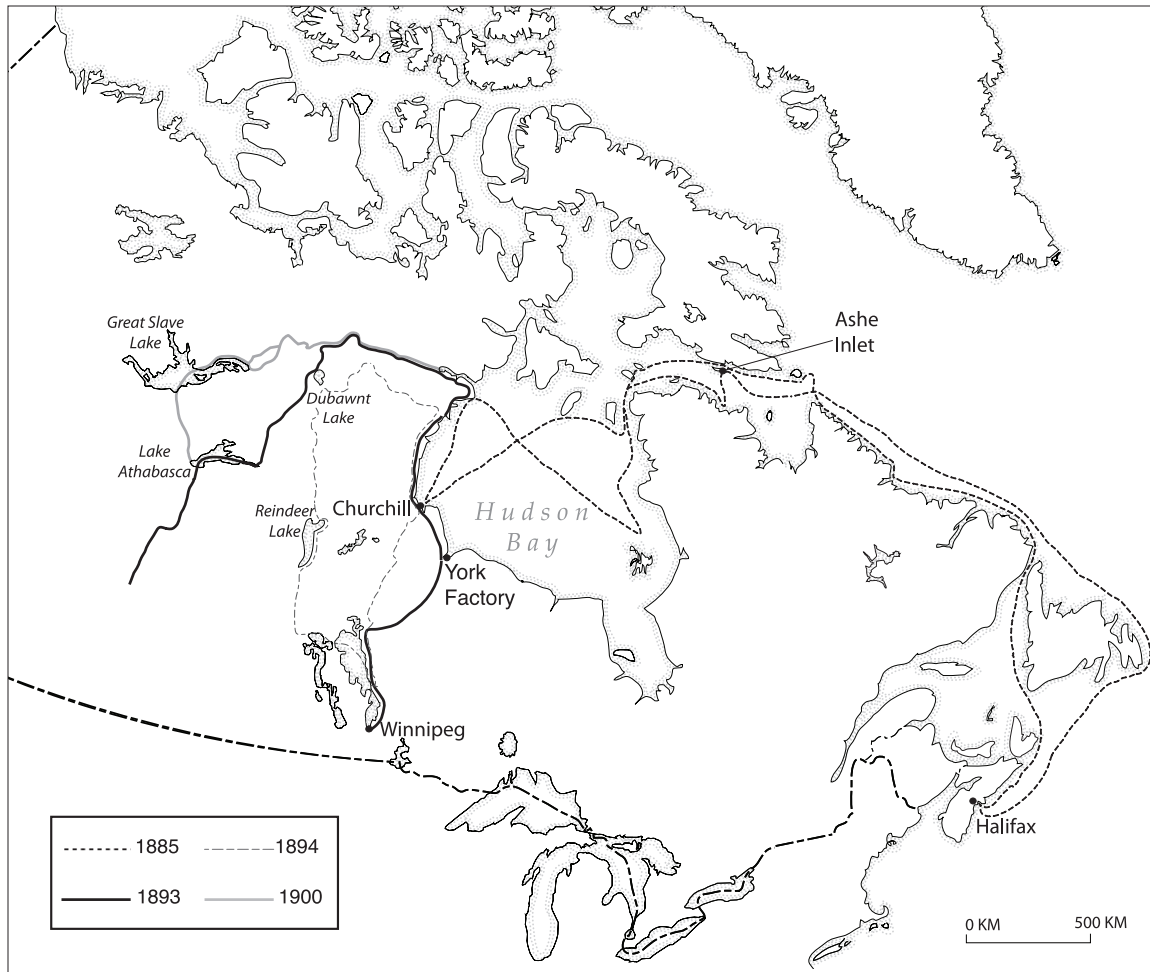
Other Canadian expeditions during this period were concerned essentially with the northern mainland rather than the Arctic islands. Most of them were carried on by members of the Geological Survey, and thus were primarily scientific in character. Among the more important were those of Joseph Burr Tyrrell in the so-called Barren Grounds west of Hudson Bay in 1892, 1893, and 1894. He was accompanied in 1893 by his younger brother James Williams (J. W.), who had been with Gordon in 1885–86. In 1887–88, Dr. George Mercer Dawson, William Ogilvie, and Richard George McConnell carried out extensive surveys along the Yukon and Mackenzie Rivers and their tributaries. Other members of the Geological Survey were at work elsewhere in the North, notably Dr. Bell and A. P. Low in the Hudson Bay region. For the most part, these expeditions were not directly connected with the Canadian assumption of responsibility in the newly acquired regions, but they did constitute significant initial attempts to reveal the geography and natural resources of remote parts of the lands acquired in 1870. For example, J. W. Tyrrell mentioned building cairns and raising the flag in various places as traditional symbols of sovereignty,²⁷ and Ogilvie completed the specific task of locating the 141st meridian as the boundary between Alaska and Canadian territory.²⁸

Responsibility for the maintenance of law and order in the Canadian North fell to the

Royal Canadian Mounted Police when its authority extended to this region. Created as the North West Mounted Police (NWMP) in 1873 by a federal act²⁹ and a federal order in council,³⁰ it was conceived as a police force in and for the Northwest Territories. Initially, however, the NWMP's primary responsibility was to establish law and order in the comparatively small portion of the North-West Territories which lay immediately north of the American border and between the newly created provinces of Manitoba and British Columbia. For about twenty years their chief concern was with this rapidly developing region. During these stirring times the NWMP had conspicuous success in maintaining law and order on a frontier previously lacking both, and, incidentally, in building for themselves a solid reputation for justice, fair play, and devotion to duty.

In the summer of 1890, Inspector J. V. Bégin carried the force's flag for the first time to Hudson Bay, making a long patrol overland and by river from Norway House at the outlet of Lake Winnipeg to York Factory and back.³¹ In so doing he started the movement northwards of the NWMP, which was eventually to extend their supervision to the farthest extremities of the Canadian Arctic. In 1893, Inspector D. M. Howard and eight constables were sent to establish a post at Athabaska Landing, on the Athabaska River, with subsidiary detachments at Lesser Slave River and Grand Rapids. These were the most northerly posts at that time but were kept open only during the summer.³²

There does not seem to be a great deal more of relevance to say about the northern territories during the period 1880–95. Canada's main interest was in the more southerly, fertile parts of the HBC lands transferred in 1870, and activity was concentrated therein. Such activity as was carried on in the more remote parts of former Rupert's Land and the old North-Western



2-3: THE 1893 AND 1894 TYRRELL EXPEDITIONS. JENNIFER ARTHUR-LACKENBAUER.

Territory was not primarily intended to assert Canadian ownership and rights of jurisdiction, and the Arctic islands were ignored almost completely. Hensley Holmden, in commenting upon the apparent lack of action by the Canadian Government between 1882 and 1895, “found no despatch or Minute of Council dealing in any way, or even relating to the question of the extension of Canada’s boundaries towards

the North and northwest” during these years.³³ Similarly, W. F. King observed that although the *Revised Statutes* of 1886 took account of the withdrawal of Manitoba and Keewatin from the Northwest Territories, they made no provision for the inclusion of the territories subject to the transfer of 1880.³⁴ The organization and administration of the Dominion’s northern inheritance remained incomplete.

