GLOBAL PERSPECTIVES
ON LEGAL HISTORY 25

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Legal Transfer and Legal Geography in the British Empire

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Law and Legalism in Corporate Newfoundland, 1583–1699

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FOR LEGAL HISTORY AND LEGAL THEORY

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1. Introduction: Newfoundland and the Company-State

In 1699, the English Parliament enacted the "act to encourage the trade of Newfoundland".[1] The statute, which became known as King William's Act, consolidated the sporadic royal proclamations and charters that had to that point governed Newfoundland and its lucrative cod fishery.[2] Though England would not secure full control over Newfoundland until 1713 by the Treaty of Utrecht, the cod fishery – and control over it – was the primary driver of England's legal policy over the island for the preceding century.[3]

King William's Act represented the first major legal intervention by the English state in Newfoundland. The island's colonial status was perennially ambiguous. Notwithstanding a growing permanent population on the island since St. John's was established by royal charter in 1583, Newfoundland – an island larger than Ireland – was, as a matter of 17th century English law, merely a "fishing station".[4] This policy of ambiguity in turn fostered an environment that favoured the commercial interests of the fishery over the concerns of Newfoundland's colonial inhabitants.[5]

Prior to 1699, Newfoundland was dominated by "Company-States" – corporate entities endowed with sovereign powers from the monarch.[6]

1 10 & 11 William III, c 25 [King William's Act].
2 Pope (2004) 402. See also English/Curran (2020).
3 See e. g. Pope (2004) 2–3.
4 Simon (2005) 276–277.
5 Bannister (2003) 37, 93–94.
6 Stern (2011). Here, "sovereign power" refers to authority typically reserved for the state and state actors. As will be explained further in section 2. a), the notion that sovereign power would be exclusively exercised by state actors was not firmly established in the 17th century.

These non-state actors wielded substantial legal power as a means to profit from the cod fishery. As a model of colonial expansion, Company-States were not unique to Newfoundland, with its more familiar peers, the Hudson's Bay Company and Massachusetts Bay Company in the Atlantic and the East India Company in Asia.[7] In this period and context, the English state was content to exert its political – and legal – influence indirectly through these quasi-public/public entities. Because of the state's ambivalence in Newfoundland, at least until 1699, the charters that established and purported to regulate these entities were the only sources of (positive) law for company governors and Newfoundland's resident "planters".

In contrast to the imperious and acquisitive colonial policies that would emerge in the Atlantic world by the late 18th century as metropolitan London assumed more direct control over its possessions, Newfoundland's 17th century Company-States exercised their legal power judiciously. This restrictive view of their notionally broad authority was in line with their American peers to the north and south, but also influenced by the tension between profit and power. This economic tension, however, became the locus of interpretive conflict over the nature and extent of the power granted to Company-States from the sovereign. It also set the stage for friction between Newfoundland's various interests that were at least nominally subject to the Company-States' jurisdiction.

Newfoundland's Company-States exhibited a subtle sophistication in their deployment of legal power which, while consistent with colonial peers, was not fully responsive to all the interests on the island. This article takes a critical view to how Newfoundland's Company-States exerted their juridical authority in relation to the land and its resources – principally the cod fishery. Section 2 looks to the origins of Company-States in early modern Europe, and their legal character in the Atlantic world. Section 3 examines Newfoundland's Company-States in particular, and how they conceived of their powers as evinced through their constating documents. Section 4 interprets how Newfoundland's colonial players responded to this brand of legalism, and how their interactions fit into the colonial context of the north Atlantic in the 17th century in the lead up to the enactment of King William's Act.

7 Phillips / Sharman (2020).

2. Colonialism by contract: Legalism and the Atlantic charters

a) Sovereign charters and company-state governance in the Atlantic

By the early 17th century, European governance commonly featured the delegation of "sovereign" powers, responsibilities, and rights to political elites and institutions. This essentially medieval conception of governance held sovereignty as a bundle of distinct privileges that rulers could alienate and delegate.[8] As a normative system, it legitimated the exercise of sovereign power by non-state actors. Delegation of power was often accomplished by the issuance of a charter by the monarch or legislature that would function similarly to a constitution, specifying the legal nature and extent of the grant. The early modern emergence of the corporation, with its separate legal personality, permitted a new model combining sovereign prerogatives and economic authority with the capacity to attract private capital and assume risk against the prospect of substantial profit.[9]

At the same time, this period saw a rise in geopolitical competition amongst European powers. Phillips and Sharman note that the Habsburg domination on the continent spurred other rulers to seek control of extra-European resources. However, many (smaller) early modern European polities – notably England and the Dutch Republic – lacked the means to effectively exert power across vast expanses. They thus turned to "institutional experiments" by investing "private" ventures with sovereign and legal authority to pursue their interests with official state sanction.[10]

This empowerment was a fundamentally law-driven enterprise in the 16th and 17th centuries. Both the grantor of sovereign authority and the grantee were sensitive to the precise scope of power transferred through these charters. When the English Crown began issuing charters to groups and individuals in the Atlantic in this time, they purported to confer governmental rights and title to the land despite having no factual control of the territory.[11] As it was recognized that the Crown could not grant rights it did not hold, the charters bound the grantees to the limits they prescribed.

8 Phillips/Sharman (2020) 10.
9 Stern (2008) 2, 257, 283.
10 Phillips/Sharman (2020) 10.
11 Slattery (2005) 52.

Importantly, these early charters did not empower delegates to govern Indigenous peoples or seize their lands. In *Worcester v Georgia*, Chief Justice of the United States John Marshall explains the contemporary view:

> The extravagant and absurd idea that the feeble settlements made on the seacoast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not affect to claim, nor was it so understood.[12]

Thus, the Crown and its delegates had a legalistic understanding of the charters, recognizing their descriptive and normative limitations. For example, the charter for Virginia, granted April 10, 1606, conveyed various exclusive rights on the London and Plymouth Companies, but which were contingent upon the founding of a settlement. This charter is silent on conquest of Indigenous peoples, but permits the grantees to defend themselves. Moreover, the charter's grants of exclusive rights of settlement and trade are apparently enforceable against other English subjects and Europeans, but not Indigenous peoples.[13]

These charters initiated a cognizable legal framework for England's colonial participants in the Atlantic. For the grantees, their claims to jurisdiction were premised on what – specifically – the Crown delegated. Claims against grantees were predicated on the (interpretive) scope of that jurisdiction. For the growing number of corporate entities granted sovereign powers – i. e., would-be Company-States – mapped onto this legal framework was the commercial imperative. It was into this legal, commercial, and political environment that Newfoundland's companies – and Company-States – were born, notably the London and Bristol Company (1610), the "Province of

12 *Worcester v Georgia*, 31 US 515 (1832).

13 Charter of Virginia, 10 April 1606, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/17th_century/va01.asp [Virginia Charter]. This "internal" conception of legal limitations, both explicit and implicit, is consistent with even earlier grants by both the English and French Crowns. Slattery highlights that Elizabeth I's letters patent to Sir Humphrey Gilbert and Walter Raleigh in 1578 and 1584, respectively, conferred rights that were contingent upon settlement of lands not "actually possessed" having not been "planted or inhabited". Slattery (2005) 67; Slafter (1903) 95, 97; and Tarbox (1884) 95, 98.

Avalon" (1623), and later the West Country companies under the "Western Charter" (1634).

Given their broad legal authority, how would these companies act as they established themselves in the Atlantic world more broadly, and in Newfoundland specifically? What influence would the commercial imperatives of these companies have? What impact would the written charters have on conceptions of legal rights by those subject to them?

The remainder of this section will briefly canvass how some of these legalities came to be addressed in Newfoundland's peers, providing necessary background and a comparator for the legal experience of Newfoundland's colonial participants. In particular, how Company-States in Hudson's Bay and New England considered the extents of their jurisdiction and claims against them in a hybrid model of secular governance and commercial profiteering.

b) Hudson's Bay Company, jurisdictional limitations

Though founded somewhat later than its early modern contemporaries, the Hudson's Bay Company (HBC) was singular in its success as a Company-State if measured by how long it retained its sovereign privilege – at least nominally.[14] The HBC received its charter May 2, 1670;[15] it was not until some 200 years later, when the HBC's territories were incorporated into the Dominion of Canada in 1869, that it lost its sovereign legal character.[16] However, the early years of the company's history, which coincide with the subject of this article, show how company officials were sensitive and responsive to the legal character of their sovereign grants.

The charter granted the HBC proprietary rights according to accepted English legal principles, with land held "as of Our Manor of East Greenwich in our County of Kent, in free and common Soccage".[17] While the charter

14 Phillips/Sharman (2020) 94–95.

15 HBC History Foundation, The Royal Charter of the Hudson's Bay Company (2 May 1670), https://www.canadiana.ca/view/oocihm.21022 [HBC Charter].

16 Rupert's Land and North-Western Territory – Enactment No. 3: Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870 (1870); An Act for the Temporary Government of Rupert's Land and the Northwestern Territory when united with Canada (1869) 31 & 32 Vic, c 3.

17 HBC Charter 3.

supported the HBC's commercial endeavour of acquiring furs for trade in Europe, the Crown also placed some emphasis on the potential for settlement of the company's domains.[18] In 1690, Parliament enacted an Act for Confirming to the Governor and the Company Trading to Hudson's Bay Their Privileges and Trade, which essentially affirmed in legislation the grant of power conferred by the King only 20 years prior.[19] E. E. Rich has suggested that the push for this legislation was a desire by the HBC to derive its privileges from a legal source more reliable than the royal prerogative.[20] As Paul Nigol notes:

> Despite the fact that the charter gave the company an adequate claim to its political and economic powers, the additional legislation of 1690 confirmed the company's legal basis when its governors secured commission by royal warrant with powers to maintain English sovereignty on the bay.[21]

In other words, early in the HBC's existence, there was a legalistic view to the nature of its power rather than brute political (or military) force on the ground.[22]

Critical scholarship demonstrates that, while the HBC had been granted broad legal powers by its 1670 charter and 1690 supplemental legislation, it exercised this authority judiciously. The charter vested the company with judicial power over civil and criminal matters, to be executed "according to the Laws of this Kingdom". Importantly, this clause extended to "all persons that shall live under" the company's governance.[23] As the HBC's grant covered all the lands drained by rivers flowing into Hudson's Bay, their claim nominally stretched from Labrador to the Rocky Mountains.[24] It was, in theory at least, open to interpretation that this grant was wide enough to include Indigenous peoples in its ambit.[25]

Company officials were, however, guided by practical and normative concerns on whether, or even how, to exercise jurisdiction over non-Euro-

18 HBC Charter 3.
19 2 Wm & Mary (1690) c 23.
20 Rich (1960) 57.
21 Nigol (2005) 150–151.
22 *Contra* Phillips / Sharman (2020) 10–11.
23 HBC Charter 5.
24 Foster (2005) 68.
25 Slattery (1991) 197–217.

peans since for most of its history, the company exerted only marginal territorial control over the lands that were nominally subject to its authority.[26] Moreover, given the HBC's economic model of trading with Indigenous groups for furs, the company was incentivized to maintain good relations with them. Hamar Foster notes that in the early years of the HBC's enterprise – when it was focused on the fur trade rather than settlement – the company was loathe to extend its jurisdiction beyond its own operations and employees.[27]

The charter *did* clearly grant the HBC legislative and judicial authority over its staff and officials. The criminal branch of the HBC's jurisdiction was primarily concerned with employee discipline. For example, the HBC passed ordinances concerning desertion, and perhaps unsurprisingly, unauthorized trading by employees.[28] On the civil side, Foster notes the HBC operated a "government by debt"; the company would advance Indigenous trappers and freemen traps and supplies that were in turn paid for in furs sold well below market rates. The system was backed by the company's monopoly since employees and freemen were not permitted to conduct private trade.[29]

Thus, while early company policy had been to restrict its jurisdiction to its own employees, it was not for want of legal authority *per se* – at least as expressed in the text of its constating instruments. However, the legalities surrounding the HBC's power were of primary concern to company officials. But these sensibilities were in turn influenced by the commercial imperatives

26 This stance became more fraught, however, as the HBC's role evolved from commercial outfit in the 17th and 18th centuries to civilian government in the 19th, when its first legally-trained officers were tasked with reconciling London's colonial policy with the unique legal order that had by then arisen in Rupert's Land. Gibson (1995) 253–254. See also Foster (2005) 71.

27 Foster (2005) 70–71. Foster also notes here that the rationale for legitimating the extension of charter jurisdiction to Indigenous peoples was subject to change with the context: "But when the point of the exercise is not the fur trade but settlement, the situation changes. Colonists generally knew little about the laws of the tribes among whom they had come to live and were likely to feel insecure if they did not extend their own laws, geographically, as far as resources would permit – which in the early years of most colonial projects was not much farther than the immediate vicinity of the settlement. Eventually, and usually without Aboriginal consent, this extension would include not only offences by Aboriginal people against settlers but also – where a threat to the security of the colony was perceived – offences by Aboriginals against other Aboriginals."

28 Foster (2005) 70; and Nigol (2005) 152.

29 Foster (2005) 71. See also Reid (1991) 154–158.

of the company – i. e., what was expedient in terms of legal exercise to maximize the commercial potential of the HBC's privileges. In other words, the HBC's use of legal power was inextricably tied to its economic context.

The HBC presents one extreme of the Company-State experience. As noted, the company never took their official role of colonial administrator seriously in the sense of fostering civilian settlement in Rupert's Land, at least until the early 19th century. That is, the early modern iteration of the HBC never had to contend with the intricacies of claims against its authority by those "who shall live" under its jurisdiction.

c) Massachusetts Bay Company, charter as constitution

While the HBC maintained its charter powers in an environment where those living "under" its control were relatively few, the experience in what would become New England was markedly different. The Massachusetts Bay Company (MBC) was chartered on March 4, 1629, with the object of establishing an English colony in its namesake.[30] The wording of the MBC charter was, in substance, nearly identical to the Virginia charter of 1606; it was one of many municipal and trading corporations given a charter by the English Crown. Like the HBC, the MBC was chartered, "as of his Mannor of East Greenewich in the County of Kent, in free and comon Soccage".[31]

The venture, or colony, turned out to be a success, and through the 1630s boasted a population of some 20,000.[32] By contrast, the HBC's "resident" population in Rupert's Land was only about 60 through the 1670s, and all were employees.[33] For whereas the HBC exercised its charter powers (and limitations) with a view to commerce, the MBC's charter objective was self-government.[34] In general, these chartered companies (and Company-States) were administered from boardrooms in England, including the HBC, under the watchful eye of the Crown. The MBC founders had other ideas. They

30 Charter of Massachusetts Bay, 4 March 1629, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/17th_century/mass03.asp [MBC Charter].

31 MBC Charter, para 1.

32 Ashley (1908) 52.

33 Rich (1960) 119; Newman (1998) 129, 157.

34 Bowie (2019) 1418–1421.

took the innovative approach of taking both their charter – and the company's corporate governance – to New England. From there, residents could govern themselves.[35]

Nikolas Bowie has argued that the MBC founders' "innovation" of practising government-by-charter in the 17th century paved the way for American enthusiasm for written constitutionalism by the end of the 18th century.[36] Bowie notes that the types of arguments that became enmeshed in New England's social and political culture were the legalistic ones articulated by the MBC in a host of 17th century litigation that challenged the MCB's charter.

Nearly from its outset, the MBC was a project of Puritans looking to emigrate from the persecution of Stuart England.[37] By the end of 1629, the year the MBC charter was granted, the company hatched a plan where shareholders and directors emigrating to New England would buy out those remaining in England. Henceforth, only New Englanders could become shareholders – by becoming "members of [one] of the churches" there.[38] Through the MBC's corporate structure, the government (i. e., the directors) would exercise authority on behalf of the electorate (i. e., the shareholders). But within a few years, as the population of religious dissidents from England surged, the Crown's advisors attempted to dissolve the corporation by suing it in court, alleging that the corporation's founders had taken actions inconsistent with the charter's text.[39] While the threat of dissolution was not uncommon to early modern corporations, the threat was more existential to the New Englanders: the MBC corporate "government" was unique in that it met in New England, and was the only authority with whom its constituents regularly interacted.

The Crown's challenge was in the form of an information in the nature of *quo warranto* – essentially calling up the corporation's leadership to source,

35 Ibid.

36 Bowie (2019).

37 Bremer (2003) 147–157; Weisbrod (2002) 28. Bowie also highlights that these founders were centrally concerned with proper governance, in contrast to the absentee aristocracy that oversaw Virginia and the apparent "misgovernment" that ensued there. See Bowie (2019) 1419.

38 Minutes of May 18, 1631, in: Shurtleff (1853), Records of the Governor and Company of the Massachusetts Bay in New England, 1, Boston, 86–87. Bowie (2019) 1420.

39 Bowie (2019) 1402; A Quo Warranto Brought Against the Company of the Massachusetts Bay by Sir John Banks Attorney-General (1635), in: Hutchinson (1769) 101.

in law, the basis for the actions alleged to be contrary to the charter in 1635.[40] In the years leading up to the *quo warranto*, the Crown's growing concern over its charter led the MBC leadership to ensure it strictly complied with the charter's terms. The MBC insisted on the charter's "bicameral" law-making structure between the shareholders and directors; kyboshed a legal code that was arguably "repugnant" to English law; and took action against community members who spoke against the charter.[41] Bowie notes:

> Because no one wanted to take a position that would lead the company to violate its charter and hurt its legal standing in the quo warranto proceeding, participants in all sorts of domestic debates explicitly cited the text of the charter to defend their positions regarding taxation, voting rights, the separation of powers, religious disagreements, and other disputes. That said, these interpretations of the charter's text were more sophisticated than mere recitals of the charter's words. Methods of interpreting the charter were as varied as methods of constitutional interpretation in the present day, when people interpret constitutional provisions with reference to their original public meaning, the general principles they reference, or how their meaning has evolved over time.[42]

However, in 1637, the Court of King's Bench entered a default judgment against the MBC in the *quo warranto* proceedings and ordered the charter be "Seized into the King's hands".[43] But, the New Englanders resisted, and enforcement of the *quo warranto* proved slow enough that circumstances intervened in the form of the English Civil War from 1642–1651.

Interest was revived when, in 1646, a group of political dissidents in New England petitioned the company and Parliament, complaining that the company had erected an "Arbitrary Government" that violated specific provisions of its "Generall Charter".[44] The MBC responded in kind, writing to Parliament at length, explaining how its government and institutions were constructed according to the express provisions of the charter.[45] The company drafted a chart of all the "lawes and customes as are in force and use in this jurisdiction, shewing withall (where occasion serves) how they are war-

40 Bowie (2019) 1423–1424.
41 Bowie (2019) 1426–1427.
42 Bowie (2019) 1428.
43 Minutes of the Proceedings in the King's Bench (Easter Term 1637), UK National Archives Class 1/9, Doc. No. 50, at 127a.
44 Child (1647) 8–9.
45 Bowie (2019) 1434.

ranted by our charter".[46] The Parliamentary Commission tasked with investigating the competing petitions was entirely mollified by the MBC's explanation, and it wrote, in 1647, that it would not "incourage any Appeales from your Justice: nor to restraine the boundes of your Jurisdiction, to a narrower Composse, then is helde forthe by your Lettres Patentes".[47]

And so ended the challenge to the MBC's charter, but Bowie highlights that the two decades of paying close attention to the charter had cemented a political culture premised on a view that government without written limits is an "arbitrary" one. In 1641, the MBC published the *Body of Liberties*, a written code of laws that protected, among other things, inhabitants' right to a trial by jury, right to counsel, freedom from excessive bail, and freedom from cruel and inhumane punishment.[48] At the same time, the MBC's leadership continued to justify their actions by reference to the charter – such that their authority was tied to some fundamental, written text.

So, New England's early modern Company-State experience was one where the MBC charter served as a model for good – or at least non-arbitrary – governance. Under the MBC model, both the government *and* the governed had a legally-sanctioned voice in the direction of the Company-State.[49]

3. Newfoundland's early modern charters

Newfoundland presents something of a hybrid case to Rupert's Land and the HBC, and to New England and the MBC. Like Rupert's Land, Newfoundland's colonial *raison d'être* in the 17th century was commercial; just as the fur trade was dominant in influencing the economic, legal, and political culture of the Canadian west, cod was king in Newfoundland. Like New England, however, Newfoundland's population was not insignificant,[50] and

46 A Declaration of the General Court Holden at Boston, Concerning a Remonstrance and Petition Exhibited at Last Session of This Court by Doctor Child, Thomas Fowle, Samuel Maverick, Thomas Burton, John Smith, David Yale, and John Dand (4 September 1646), in: Hutchinson (1769) 196, 199–200.

47 Dunn (1996) 702–704 (entry of May 25, 1647) (reporting a letter from the Warwick Commission).

48 Bowie (2019) 1435.

49 Bowie goes on to note that this state of affairs continued through until the MBC's ultimate dissolution later in the 17th century. See generally, Bowie (2019).

50 Simon (2005) 276–277.

necessitated some form of official coordination between the steadily-growing resident populace and the seasonal fishers arriving each year, typically from the West Country. And, like in both of its temporal and geographic peers, chartered companies were the *de jure* and *de facto* governments, i. e., Company-States.

It is difficult to overstate the historical importance of the cod fishery in Newfoundland: from the early 1500s, when European fishermen began seasonal fishing off Newfoundland's shores,[51] to the early 1990s, when it collapsed altogether, the cod fishery singularly shaped the island's society.[52] Notions of permanent settlement on the island only became fashionable toward the end of the 16th century and beginning of the 17th when the English Crown began chartering similar ventures elsewhere in the Atlantic (like Virginia and Massachusetts Bay).[53] The commercial logic of settlement on Newfoundland – or rather, creation of a resident fishery – was to preempt or monopolize the fishery against the seasonal fishery, particularly the competition from the West Country. And, while economic and social diversification was in mind for some of the first ventures, the fishery was always the primary focus.

a) The Newfoundland Company

On May 2, 1610, James I chartered the London and Bristol Company, which came to be known as the Newfoundland Company. This charter bears many of the hallmarks of its early modern peers, for example, the lands purported to be granted by the charter are held, "as of our mannor of East Greenewich in the County of Kent in fre and Comon socage".[54] However, the grant is conspicuous for several textual idiosyncrasies.

For one, the charter acknowledges the apparent "vacancy" of the island from Indigenous inhabitants as both a convenience and a justification for the imposition of English sovereignty:

51 Pope (2004) 15.
52 Hamilton / Butler (2001) 1–2.
53 See section 2. c).
54 Patent Roll (2 May 1610), 8 James I, Part VIII, No. 6, Charter of the London and Bristol Company, Earl of Northampton and Associates, 1701 [1610 Charter].

> we being well assured that the same lande or Countrie adioyning to the foresaid Coastes […] remayneth soe destytute and soe desolate of inhabitance that scarce any one savage p'son hath in manye yeares byn seene in the most partes thereof And well knowing that the same lying and being soe vacant is as well for the reasons of foresaide as for manye other reasons verie coodious for [u]s and our domynions.[55]

Of course, this pretence was untrue – at least in 1610. Newfoundland's Indigenous inhabitants, principally the Beothuk peoples, were well-known to Europeans who frequented Newfoundland, relations with whom were at least partially a driver of the push for permanent English settlement there. Under the seasonal fishing model, caches of equipment were left in Newfoundland during the winter months for storage; for the Beothuk, these caches were a valuable source of iron.[56] Thus, permanent settlement could limit potential losses of capital and equipment by fishing operations, while also providing opportunities for friendly trade.[57] However, the pretence of vacancy also informed the charter's claims against other Europeans, asserting English sovereignty by virtue of *possession* of theretofore *vacant* lands,[58] which was typical of other similar grants.[59]

The 1610 charter also contained an exceptionally broad grant of institutional and law-making power. The Newfoundland Company was empowered

> to make ordayne and establishe all manner of orders lawes direcons instrucons formes and ceremonies of goument and magistracie fitt and necessarie for and concerning the goument of the saide Colonye or Colonyes […] and […] to abrogate revoke or chang not onlye within the p'cinctes of the said Colonye or Colonyes but alsoe uppon the Sea in goeing and coming to and from the said Colonye or Collonyes as they in their good discretions shall thinke to be fitt for the good of the Adventurers and Inhabiters there.[60]

Not only did the charter grant jurisdiction to the Newfoundland Company over settlements and maritime matters, but over both "[a]dventurers" and "[in]habiters". In other words, the Newfoundland Company could, at least notionally, make laws applicable to both its "residents" as well as seasonal

55 1610 Charter, 1701.
56 Pope (2004) 73–75.
57 The Beothuk actually extended their territory in Newfoundland through the 1600s, until the friendly relations ended, and were all but exterminated by the English by 1680. Pope (2004).
58 1610 Charter, 1701.
59 See e.g. MBC Charter; and Virginia Charter.
60 1610 Charter, 1705.

"adventurers". The references to "government" and "magistracy" also appertain to the following provisions of the charter, which create a governorship for Newfoundland to be appointed by the company.[61]

This wide grant of power is reiterated later in the charter, affirming the company's jurisdiction to make and enforce civil, maritime, and criminal law, including capital offences. Specifically, the company shall

> [w]ithin [...] Newfound lande or in the waye by the Seas thither and from thence have full and absolute power, and authoritie to correct punishe p'don governe and rule all Subiectes of [u]s [...] as shall from tyme to tyme adventure themselves in any voyage thither or that shall att any tyme hereafter inhabite [...] Newfound lande [...] according to such Orders Ordinances constituccons direccons and instruccons as by the saide Councell as aforesaide shall be established, and in defecte thereof in cause of necessitie according to the good discretions of the said Governors and Officers respectivelie as well in cases Capitall and Crimynall as Civill both marine and other.[62]

More curious, however, is in how consistent the company's ordinances must be to English law. The MBC, HBC, and other contemporary charters contained the limitation on law-making that such ordinances "be not contrarie or repugnant to the Lawes and Statuts of this our Realme of England".[63] By contrast, the Newfoundland Company's charter provides that laws be "as neere as conveniently may be agreeable to the lawes statutes goumentes and policie of this our Realme of England".[64] The wording, and its contrast to the text of other grants of power suggests a somewhat more permissive environment for the company to make and enforce its rules.[65]

61 Ibid.

62 1610 Charter, 1708.

63 MBC Charter; HBC Charter, 3.

64 1610 Charter, 1708. The HBC Charter combines some of the language of both clauses: "the said Laws, Constitutions, Orders and Ordinances, Fines and Amerciaments, be reasonable, and not contrary or repugnant, but as near as may be agreeable to the Laws, Statutes or Customs of this our Realm."

65 Interestingly, the distinction between repugnant or inconsistent law to "near as may be convenient" mirrors modern Canadian doctrine concerning the reception of English (or British) law to Canada. The modern standard is that English law predating the date of reception (or introduction of law to a place) may be applicable to the extent it is "suitable to the conditions existing in the [jurisdiction]". *Re Simpson Estate*, 23 Alta LR 374 at 383, [1927] 4 DLR 817 (SC AD). See also Ziff (2005). Modern courts in Newfoundland have used these principles to establish that certain medieval property rights do not, nor ever could, exist there. *Franklin v St. John's (City)*, 2012 NLCA 48 at para 33.

Lastly, while the Newfoundland Company was not authorized by its charter to make war or conquer territory, it was permitted to defend itself with force and take action against other Europeans for "unjust or unlawfull hostilitye".[66]

Thus, the Newfoundland Company had all the trappings of legal power associated with other early modern Company-States. Economically, the charter gave the company a monopoly in agriculture, mining, fishing, and hunting over the area of Newfoundland that would later become known as the Avalon peninsula.[67] For all its theoretical power, however, the Newfoundland Company was a financial flop. The company initially backed John Guy, an experienced merchant, as the would-be colony's first governor who, in 1610, founded "Cupids" or "Cupers" Cove with 39 colonists. The colony's first couple of years had middling success; but, in 1613 it was extorted by pirates, and in 1615 Guy quit the venture over a wages and property dispute with the company.[68] Guy was replaced by John Mason, who Peter Pope suggests was chosen for a perceived ability to deal with pirates, but notes Mason was not adept at managing the fishery – the primary purpose behind the settlement – which further undercut the company's profits. Mason withdrew to New England in 1621,[69] but by then, most of the Newfoundland Company's investors had cut their losses, and their grant had been largely sold to William Vaughn by 1616.[70]

As will be shown in the remainder of this section, the breadth of the Newfoundland Company's charter was never replicated in subsequent grants for the island. By the 1620s, it was likely clear that a resident fishery, even if established, would not be able to outcompete, let alone monopolize, the seasonal fishery, even with extraordinary legal power over the latter. Unlike

66 1610 Charter, 1709.

67 Naylor (2006) 56.

68 Pope (2004) 50–51.

69 Interestingly, Mason became a central figure in the *Quo Warranto* against the MBC. Mason had acquired a land grant near Salem by the time he left Newfoundland, which had been dubiously expropriated by the MBC under a conflicting grant. He and his partner in New England, Sir Ferdinando Gorges, petitioned the Privy Council for assistance in the matter, beginning the investigations that would result in the *Quo Warranto*. See Bowie (2019) 1413–1414, 1421–1422.

70 Pope (2004) 51–52.

the fur trade in what would become Rupert's Land, the cod fishery was firmly established in Newfoundland at the time of the grant, and the interests of the West Country merchants who dominated the seasonal fishery were firmly entrenched. That is, the commercial environmental that had to that point developed was not amenable, or practicable, to sole control by a singular entity.[71] Thus, future grants began to distinguish in law jurisdiction over the island and its inhabitants and jurisdiction over the fishery and its transient workforce. So, while later grants would actually maintain much of the Newfoundland Company's broad authority over "planters" and local enterprise, they would lack the economic clout of a legally-sanctioned monopoly over the fishery.

b) The Calvert and Kirke proprietorships

Much of Vaughn's interest was later acquired by Sir George Calvert by 1621, the future Lord Baltimore (and future founder of the Maryland colony whose principal city still bears that name). Calvert had been James I's secretary of state, who would also create him the first Baron Baltimore of the Irish peerage; he was wealthy and influential. He seems to have conceived of a colony as a refuge for English Catholics to escape persecution – having declared his own reversion to Catholicism by 1625 – supported commercially, of course, by the cod fishery.

James I granted Calvert a charter in 1623. The grant recognized Calvert's acquisition from Vaughn, but unlike the Newfoundland Company's charter, Calvert's grant only covered the Avalon peninsula (the name given to the region by Calvert which still exists today);[72] and his colony, based in a settlement at Ferryland, was styled the "Province of Avalon".[73]

Calvert's grant differed substantively from the Newfoundland Company's – as well as the HBC's and MBC's. Rather than being granted in "free and common socage" of the manor of East Greenwich, Calvert's title was "in

71 The same was true with respect to competition by other Europeans. However, while later grant-holders would lack the economic power of a monopoly from the Crown, they were empowered to collect a tax on foreign fishers operating in English-controlled waters. See section 3. b).

72 Girard (2017) 44.

73 Browne (1890) 17.

Capite by Knights service", a feudal tenure in the form of the palatine jurisdiction of the Bishop of Durham.[74] Similar to the Newfoundland Company, Calvert was empowered to appoint judges and magistrates. He also had the authority to enact laws, although with the more familiar proviso they not be contrary or repugnant to the laws of England – as well as a more unusual stipulation. These laws were to be made, "with the Advice, assent and approbacon of the Freeholders of the said Province or the greater part of them", whom Calvert was to "Assemble in such sort, and forme as to him shall seeme best".[75] Calvert could, however, make laws unilaterally in the case of urgent necessity if they were published. These limitations notwithstanding, Calvert's office of proprietor included "[t]akeing away Member or Life" if the "quality of the Offence" required it.[76]

Calvert's efforts at "plantation" were of mixed success. The early years of the Ferryland settlement proved successful enough that, upon his resignation as secretary of state in 1625, Calvert personally visited the Avalon colony and overwintered in 1628–29. He remarked in his letters of Newfoundland, "this wofull country"[77] … "[t]is not terra Christianorum".[78] Discovering that winter lasted well into May, he quit Newfoundland for Chesapeake Bay. Upon his death in 1632, his son, Cecilius, appointed a resident governor to oversee the remaining colonists.

However, in 1637, the Privy Council declared that Calvert had "abandoned" Avalon and granted a new patent to Sir David Kirke, an adventurer and veteran of the expedition that captured Quebec in 1629.[79] The Kirkes would make further moves to expropriate the Calverts' title; the Calverts resisted, and the ensuing legal battle carried on for generations, fluctuating with the ebbs and flows of English politics.[80] The Kirkes, who had just the

74 See Ziff (2018) 73–74. Calvert's palatine authority in theory segmented his province from the rest of the English state, making him responsible for all sovereign responsibilities subject only to the King's will as well as implicitly making the grant hereditary.

75 Matthews (ed.) (1975) 46.

76 Matthews (ed.) (1975) 47.

77 Browne (1890) 19–20; Codignola (1988) 53.

78 Krugler (2004) 102.

79 Nicholls (2010).

80 Kirke also took several actions that angered resident planters and migratory fishers and arguably transgressed his charter, for example by opening taverns (see sections 3. c) and 4. a), below). Before he could be investigated for charges brought against him on these matters, the English Civil War broke out in 1642. The Kirkes were Royalists, and when

right cultural background and court connections to exploit Newfoundland commerce,[81] would come out on top and come to dominate the island until the end of the 17th century.[82]

Kirke's patent, the "Grant of Newfoundland", expanded Calvert's territorial authority from Avalon to "that whole continent Island and Region […] commonly known by the name of Newfoundland".[83] It granted "the sole trade of the Newfoundland, the fishing excepted". It made him the "true and absolute Lord and Proprietor" of it. Kirke's grant was also made in knight's service, though without palatine authority. Regardless, Kirke's jurisdiction was broad, able to make laws with the assent of the freeholders and to appoint magistrates. However, while Kirke's grant expanded dominion over the whole of the island and its *inhabitants*, he was forbidden from exercising any authority over the migrant fishers. Moreover, his patent prohibited Newfoundland's inhabitants taking up the best fishing places in advance of the arrival of the migrant ships.[84] Settlement was barred within six miles of the shore, fishing rooms were not to be occupied before the arrival of the summer fishing crews, and a 5% tax was to be collected on all fish products taken by foreigners.[85]

The Grant of Newfoundland essentially made Kirke a monopolist. Pope notes that his "Newfoundland Plantation" was run less like a corporate

the war concluded with a Parliamentary victory, the complaints against Kirke were revived. In 1651, a panel of commissioners was sent to Ferryland to seize Kirke and bring him to England to stand trial. His lands were acquired by the Commonwealth of England, but Kirke repurchased them after being found not guilty in 1653. His wife, Dame Sara Kirke, returned to Newfoundland to oversee the Kirke holdings, but Cecil Calvert, George Calvert's son and the second Lord Baltimore, brought new charges against Kirke over the title of the lands around Ferryland. Kirke likely died sometime in 1654 awaiting trial in the Southwark jail. Kirke's sons had regained control of the colony by 1660, when the Stuart Restoration reopened consideration of the Avalon's, and Newfoundland's, ownership (or overlordship). Charles II restored Calvert as proprietor, but he never took up residence, content to merely collect rents and providing no government to resident planters. This *status quo* would remain until the gradual establishment of naval government in the closing decades of the 17th century. Moir (1979); Pope (2004) 256–257.

81 Girard (2017) 45.
82 Pope (2004) 57–59.
83 Matthews (1975) 85–86.
84 Matthews (1975) 88, 93.
85 Newfoundland and Labrador Heritage (2000).

colony, and more of a node in a wider trade network. Kirke's vision was sophisticated; he dominated the local markets and diversified the economy to servicing the fishing fleets and resident boat-keeping.[86] In short, Kirke profited from his charter, and from Newfoundland, unlike the Newfoundland Company and Calvert before him. Kirke, however, lost the governorship of Newfoundland in 1653, when Cecil Calvert launched new legal actions against him. Charles II "restored" the Proprietorship of Newfoundland to Calvert in 1661, who never took up residence, and governance of the island, such as it was, withered until the gradual establishment of naval government at the conclusion of the 17th century.[87]

c) The 'Western Charter' of 1634

The Western Charter of 1634 was promulgated after Calvert's exit from Newfoundland and before Kirke's grant was made. West Country merchants, who dominated the migratory fishery had lobbied the Privy Council to protect their interests in light of the apparently growing power of the resident proprietorships.[88] In this way, the Western Charter is not a charter or grant in the same way as this article has so far discussed, but rather created – or supplemented – Newfoundland's juridical environment.

The primary legal effect was to declare that migrant fishers were generally not subject to the authority of the local "governor", but rather the King himself. The Western Charter provided a series of prohibitions directed at the seasonal fishery: it prohibited the casting out of ballast into the harbours, the overuse of wood, interfering with the nets, flakes or fishing gear of others, and the setting up of taverns.[89] This charter also split the criminal jurisdiction of the island in several ways, but without creating any local enforcement capabilities. Murder and theft over fifty shillings committed in Newfoundland were to be tried by the Earl Marshal in England; other

86 Pope (2004) 55, 134–36.

87 See note 80. Pope (2004) 256–257.

88 Girard (2017) 46.

89 Matthews (ed.) (1975) 71–75. The Western Charter also affirmed the "auncient" custom of the first captain to arrive at a harbour for the season being appointed the "admiral" of the harbour and given access to the best fishing infrastructure. These "fishing admirals" would become the focal point of the legislative intervention of King Williams's Act. See generally Bannister (2003).

offences committed on land in Newfoundland could only be brought before the mayors of Plymouth and various West Country ports, while those committed on sea had to be brought before the vice-admiralty courts in Southampton, Dorset, Devon or Cornwall.[90]

The Western Charter essentially set up a parallel jurisdiction operating in and around Newfoundland alongside the proprietorships – Kirke's in particular. The "division" that the charter created, between residents and transients, as well as the source and enforcement of laws that applied to those groups, would set up much of the legalistic conflict that would dog the island's denizens through the 17th century – and beyond.

4. Charter legalism in Newfoundland

Newfoundland's early modern charters formed the basis for the (positive) law on the island in the 17th century. Philip Girard convincingly argues that these legal sources generated important ideas and practices in Newfoundland that would come to outlast these documents.[91] But within the 17th century, these texts informed critical relationships among Newfoundland's colonial players, guided by a legalistic understanding of their terms and meaning. The cod fishery loomed large in these interpretations as the lodestar for colonial activity in Newfoundland. Commercial interests tended to set the battle lines; but law was the weapon the parties employed and law set the terms of how Newfoundland's stakeholders would interact.

a) Government and people, a Newfoundland Company-State?

Newfoundland and its charters present a unique model of early modern corporate governance, especially in light of the island's peers to the north and south. The Newfoundland Company and the proprietorships that followed possessed the essential trappings of Company Statehood. They were empowered to treat with Indigenous nations, defend themselves from attack, and make laws for the benefit of the King's subjects there as well as appoint officials to carry out their will. They were thus *de jure* governments at least, capable of establishing systems and institutions for the island.

90 Matthews (ed.) (1975) 71–75.
91 Girard (2017).

However, these provisional Company-States left little in the way of institutions.[92] No assembly of freeholders was ever established, and no magistrates or other "law enforcement" officers were ever appointed in this period. For Girard, much of this institutional absence is explained by Newfoundland's relatively slow population growth in the 17th century.[93] It is certainly true that Newfoundland's population growth was uneven as between the resident and migratory populations; by 1680, seasonal populations were between six thousand and ten thousand, whereas the permanent population was around 1,700.[94]

It would be incorrect, though, to suggest that with such a small population, there was no need or desire for some government. During his administration, Kirke did exercise his authority: he held courts, and was generally able to enforce his decisions – at least over the south Avalon from Ferryland.[95] After Kirke lost the "governorship" in 1653, local government, such as it was, weakened substantially. And, when the Calverts were restored to the proprietorship, the semblance of any government largely disappeared apart from the collection of rents – to the chagrin of the planters.[96]

However, even without a "charter" assembly, the planters still used the law to check the power of their local magnates, including Kirke himself. It was the planters under Kirke's proprietary jurisdiction who, in concert with West Country merchants, charged that Kirke and his associates were acting contrary to his charter, reserving to himself the best fishing rooms, and opening taverns – a direct contravention of the Western Charter.[97] While these complaints, made around 1638, were sustained through the English Civil War, they were resurrected in 1651, and led to Kirke's custody and eventual death in England.[98]

A notable juristic gap was the lack of a local magistracy, or other means of law enforcement. As highlighted in section 3, the various iterations of New-

92 Girard (2017) 41.

93 Girard (2017) 48.

94 Pope (2004) 62–64. Pope notes that the "overwintering" population fluctuated with catches as well as the threat of war; many fishers would opt to stay in Newfoundland over the winter to avoid impressment into naval service.

95 Pope (2004) 255.

96 Pope (2004) 256.

97 Moir (1979).

98 See note 80.

foundland's Company-States had the power to create local law enforcement as well as mete out punishment. Local punishment became somewhat circumscribed by the Western Charter, which provided for extradition to England for severe offences, even when committed on the island. Girard observes that Newfoundland's decentralized pattern of settlement made *de facto* control by *de jure* authorities difficult, if not impossible,[99] which makes the lack of delegated legal authority curious, especially in light of concerns from planters and residents noted into the 18th century with the formalization of the naval government that began at the end of the 17th century.[100] Jerry Bannister also notes that the island did not have any programme of jail construction until the 1720s, when the matter was taken up by the naval commodore, who assumed the "gubernatorial" mantle around that time.[101] Moreover, the Western Charter did not furnish the fishing fleet with any powers for law enforcement on the island.

In this domain then, it cannot be said that Newfoundland's Company-States lacked sufficient jurisdiction to govern according to the needs and wishes of its "citizenry". Rather, they – particularly the Kirkes and Calverts – exhibited an unwillingness to exercise legal authority in a way that would dilute their personal power, wealth, and influence. The proprietorship structure, combined with a smaller population, permitted this sort of personal fiefdom, in contrast to the contemporary MBC, with its experiments in democratic governance. In this way, Newfoundland's government tracked the "arbitrary government" reviled by the New Englanders. But, like the New Englanders, Newfoundland's planters found ways to use the extant charter law to their advantage, just as their colonial overlords did.

b) Residents and transients, parallel or limited jurisdiction?

As noted, the logic behind some form of settlement in Newfoundland – and necessitating the legal powers for successive sovereign charters – was to preempt the migratory cod fishery sailing each spring from England (and elsewhere in Europe). Notwithstanding the commercial failures of the New-

99 Girard (2017) 52.
100 Bannister (2003) 72.
101 Bannister (2003) 70–76. Bannister also notes that King William's Act exempted the fishing authorities from statutes concerning the construction of jails.

foundland Company and George Calvert, the migratory fishery, based in the West Country remained cautiously concerned by the presence of a growing permanent population on the island and its potential to cut into their lucrative trade. The West Country merchants then turned to the law as an instrument of protecting their interests, which came in the form of the Western Charter. As noted in section 3, the Western Charter of 1634 prohibited planters from living closer than six miles from the shore.

A theory behind this provision was to reduce conflict between the local and migratory fishery.[102] It is true that it reinforced in law the fact that Kirke's grant (made three years after the Western Charter) was not backed by a monopoly or other special privilege in the cod fishery, thus providing West Country merchants some legal leverage over the "Governor". It also effectively barred planters from participating in the migratory fishery at all, given the obvious utility of lands adjacent to the shore for the island's main industry. Pope observes that this provision was near-universally ignored, with no planters living more than a short walk from the ocean.[103] Here, formal limits of law were in place concerning the primary industry for which settlement was intended to serve, just as in Rupert's Land and the HBC. However, whereas in Rupert's Land, protection of the HBC's economic interest through keeping good relations with Indigenous groups depended (in part) on a restrictive interpretation of its charter jurisdiction, the practicalities of settlement and making a living in Newfoundland forced the planters to ignore the charter law.

The provision was amended several times in the 17th century. In 1653, the Council of State (which had replaced the Privy Council during the English Commonwealth) modified the Western Charter to recognize planters' rights to waterfront property.[104] A second Western Charter was promulgated in 1661 that affirmed the 1653 amendment,[105] but the "six mile rule" was brought back in 1671 when Charles II amended the 1661 text.[106] This back and forth in policy meant that planters had no means to effectively protect their title as a matter of law, and periodically making squatters of freehold-

102 Pope (2004) 132–133.

103 Pope (2004) 194.

104 Council of State (1653), Laws, Rules, and Ordinances Whereby the Affairs and Fishery of the Newfoundland Are to Be Governed, CO 1/38 (33iii) 74–75, in: Matthews (ed.) (1975).

105 Charles II in Council (1661), Western Charter, CO 1/15(3), in: Matthews (ed.) (1975).

106 Charles II (1671), Order, CO 1/26 20–26, in: Matthews (ed.) (1975).

ers. Indeed, there was no formalization or regularization of title in Newfoundland until well into the naval administration in the 18th century. Bannister highlights, for example, a customary form of title that arose out of this system known as a "grant" whereby the governor or his surrogate would issue a written grant acknowledging an estate in land. This prerogative title worked in tandem with other property forms such as occupancy and those derived from statute, augmenting and complementing English law to suit the needs of Newfoundland.[107] While King William's Act would later recognize a form of property in coastal parcels known as "ship's rooms" that were occupied prior to 1685, Girard notes that this property was treated as chattel, not realty, and was not codified until the Chattels Real Act of 1834.[108] Regardless, this system of "customary title" accords with the social practices the 17th century planters developed as a response to the impracticality of the "six mile rule" made for the benefit of the transient fishing industry of the West Country.

In addition to these property complications, the interaction between the Western Charters and the proprietorship (i. e., the Company-State) effectively divided criminal jurisdiction and enforcement as between the local and the transient fishing populations. By setting out that the migrant fishers were subject to the Western Charter's provisions alone, it created parallel jurisdictions, one for the planters under the proprietorship, and another for the fishery.[109] But while the Western Charter carved out serious crimes from adjudication in Newfoundland, it made no provision for enforcement;[110] the power to appoint judges and magistrates rested with the terms of the proprietorship, although as noted above, no such officials were ever appointed in the 17th century. This state of affairs stands in contrast to the

107 Bannister (2003) 123–24. See also English (1995) 74. English notes that land tenure would remain an issue for governance on the island, with little attention paid to the extensive coastal lands that were beyond the reach of the governor and his courts until title recognition was formalized in the early 19th century.

108 Girard (2017) 53.

109 Girard (2017) 46.

110 It is arguable, however, that Kirke's criminal jurisdiction extended to the capital matters separated by the Western Charter: his grant came after the Western Charter, and still permitted the taking of life if circumstances warranted.

HBC Charter, which empowered its governors to "judge all persons belonging to the said Governor and Company that shall live under them".[111]

5. Conclusions

In early modern Newfoundland, law mattered. Law – in particular sovereign grants either brought or exercised from across the Atlantic – was the basis for the entities purporting to populate, govern, and exploit the island. Importantly, it was also the basis of official, and unofficial relationships between the groups that were to live and visit there. And, while unique in their approach to the exercise of legal power, Newfoundland's 17th century Company-States – as well as their subjects – deployed legal power with a degree of sophistication that was both novel, and yet typical, of Newfoundland's colonial peers. And similar to these peers, this sophistication was, all times, informed by the economic considerations of the cod fishery. This extraordinary transfer of positive law and conceptions of its interpretation left an indelible impression on the legal character and culture of the island in the 17th century and beyond.

Newfoundland's 17th century Company-States, which generally took the form of (essentially medieval) proprietorships in the hands of individuals, exercised their broad powers judiciously. The choice of how – or even whether – to exercise or enforce the full ambit of the available law was aligned with the chooser's interests in the cod fishery. For Kirke, his gubernatorial authority was a means to establishing Newfoundland as a trade hub, with him at the centre; he chose not to dilute his power through officials, or summon his fellow planters to check his laws. For the West Country merchants, the reality of the cod fishery meant that enforcement of the "six-mile rule" would be practically impossible.

Law was also how people and groups in Newfoundland struck back against authority. The advent of the Western Charter was designed as a juridical tool for cabining the authority of Newfoundland's local government, such as it was, and stymying the commercial influence the planters could hope for regarding the fishery. And the planters, left without an

111 HBC Charter 5. Although the charter also provides for extradition to England, Girard notes this provision was not used until the 18th century. Girard (2017) 46.

assembly to air their concerns, turned to the charters' text to impugn the actions of their authorities.

These conceptions of jurisdiction and the deployment of law as a tool of power in the context of Atlantic Company-States was consistent with the HBC and MBC in Rupert's Land and New England respectively. In other words, a consistent juridical model of how charter law, initiated in the metropole, came to apply on the edges of England's domains. Together, these examples demonstrate that the colonial project, at least in the 17th century, was tenuous, and rested more on the paper held by its players, than the "glory" of empire.

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