

Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory

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ABSTRACT. The Hudson's Bay Company's claim to Rupert's Land is compared to an aboriginal claim based on Indian title. The compensation that the two claims received is considered. Term 14 of the Deed of Surrender acknowledged Indian claims for compensation for the lands required for settlement. A recognition of Indian title in the documents affecting the transfer of Rupert's Land and the North-Western Territory to the Dominion of Canada is approached from a political-economy perspective. The negotiations leading up to the transfer documented the principles for compensation involved in the Company's surrender of its territorial claims. Archival information is combined with published documents to reconstruct the legal and legislative process which led to the surrender and transfer of Rupert's Land. An analysis of the documentation, including term 14, identifies the interests and bargaining positions of the Hudson's Bay Company, the Dominion of Canada, and the Colonial Office. An understanding of the fur trade provides a means for interpreting the legal and legislative processes that preceded the western treaties.

SOMMAIRE. Dans cet article, on compare la revendication de la Compagnie de la Baie d'Hudson sur la Terre de Rupert à une revendication autochtone basée sur un droit indien. On étudie la compensation reçue dans les deux cas. Le paragraphe 14 du "Deed of Surrender" (acte de cession) reconnaissait les droits des Indiens à être compensés pour les terres requises pour la colonisation. On adopte une perspective politico-économique pour reconnaître le droit indien dans les documents affectant le transfert de la Terre de Rupert et du Territoire du nord-ouest au Dominion du Canada. Les négociations menant au transfert documentent les principes de compensation qui sont entrés en jeu lorsque la Compagnie de la Baie d'Hudson a abandonné ses revendications territoriales. On combine l'information archivale à celle fournie par des documents publiés pour reconstituer la procédure juridique et législative qui a abouti à l'abandon et au transfert de la Terre de Rupert. Une analyse de la documentation, y compris le paragraphe 14, identifie les intérêts et les positions de négociation de la Compagnie de la Baie d'Hudson, du Dominion du Canada et du bureau colonial. Si on comprend la traite de la fourrure, cela permet d'interpréter les procédures légales et juridiques qui existaient avant que les traités ne soient signés dans l'Ouest.

Introduction

On 23 June 1870, some 2.9 million square miles of British North America — Rupert's Land and the North-Western Territory — were incorporated into the Dominion of Canada.¹ This vast area, composed largely of boreal forest, tundra and prairie, now amounts to nearly 75 percent of Canada's land mass (Figure 1). Despite the geographical magnitude of this event in the history of nation building, Canada's acquisition of this territory from the Hudson's Bay Company (HBC) has been left unexamined. Traditional constitutional history has focussed on political evolution in those areas of British North America settled by Europeans.² The transfer agreement or Deed of Surrender has been used by conventional fur-trade historians merely as a means to conclude accounts of 200 years of Company history.³ The more recent work on Native-white relationships has largely excluded the post-1870 fur trade.⁴ Again, the Deed of Surrender is seen as an insignificant event in Native history. Because the question of Indian title enters into the transfer, legal scholarship has examined the published documents associated with the surrender of the HBC territory and the subsequent union with Canada.⁵ These specialized approaches have not led to a general view of the long-



Figure 1. The Hudson's Bay Company Territory: Rupert's Land and the North-Western Territory.

term importance of the Rupert's Land transfer to the history of Native people. An analysis of the events surrounding the transfer of Rupert's Land will provide insights about Indian title.

Brian Slattery provides useful direction for pursuing research on Native legal issues: "yet if the historical role of Native peoples is now widely recognized, it has not yet been accommodated by the standard intellectual framework that influences legal thinking."⁶ This problem is evident in the discussion on Indian title and the surrender of Rupert's Land. Most published research looks for meaning in the "Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada," 16 and 17 December 1867 (hereafter Address of 1867); the "Address from the Senate and House of Commons," 29 and 31 May 1869 (hereafter Address of 1869); term 14 of the draft of surrender, which is synonymous with the HBC's Deed of Surrender; and term 8 of the "Memorandum of the Details of Agreement between the Delegates of the Government of the Dominion and the Directors of the Hudson's Bay Company," 22 March 1869 (hereafter Memorandum of 22 March 1869). These documents are reproduced in the "Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union," 23 June 1870 (hereafter the Rupert's Land Order).⁷ In the Rupert's Land Order the Crown accepted the surrender of Rupert's Land from the HBC and then transferred Rupert's Land and the North-Western Territory to the Dominion of Canada. Term 8 of the Memorandum of 22 March 1869 provides the original source for the aboriginal-title concept which emerged during the negotiations of 1868-69.⁸ It states:

8. It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them.⁹

Term 14 of the Deed of Surrender states:

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.¹⁰

On the surface, this is a clear recognition of Indian title, but since Indians were not party to the surrender talks, it is not immediately clear which of the parties — the HBC, the Canadian government or the Colonial Office — sponsored this term concerning Indian title. Interpretations of the meaning of the particular conceptualization of aboriginal title, which emerged during the surrender negotiations, can be better appreciated by considering the political and economic context of the events which led up to Canada's annexation of the region.

By discussing the leading Canadian court cases in an historical context, Slattery has outlined a general theory of aboriginal rights.¹¹ The transfer of Rupert's Land merits specific attention. An historical analysis of the Rupert's Land Order contributes to an understanding of the legal principles

surrounding the extension of Canadian sovereignty into Indian lands under the control of the HBC. For some Indians, the terms by which the HBC surrendered its claim to Rupert's Land were a contentious issue during the western or numbered treaty negotiations.¹² Thus, research on the aboriginal-title concept embodied in term 14 of the Rupert's Land Order has implications for ongoing comprehensive and specific Native land claims. Given the importance of the Rupert's Land Order to the Constitution Act 1982 (more specifically, the British North America Act 1867, the Manitoba Act 1870, and the BNA Act 1871), the meaning of term 14 has a bearing on comprehending section 35 of the Constitution Act 1982, which recognizes and affirms the existing aboriginal and treaty rights.

A broader interpretation of Indian title as conceived by the Rupert's Land Order has not developed for several reasons. By and large, legal research has focussed on term 14 and has excluded an examination of the other terms of the surrender agreement. In specific terms, we do not know exactly why and how the HBC ended up with one-twentieth of the surveyed lands of the Prairies. An examination of the terms of surrender might cause one to ponder the legal implications of the Crown granting lands to the HBC prior to treaty making between the Canadian state and the Indians. Does the inclusion of a recognition of Indian claims make the surrender consistent with the Royal Proclamation of 1763, or could other terms, such as the HBC land grants, actually make sections of the Rupert's Land Order repugnant to the Royal Proclamation of 1763? The history of the development of the aboriginal-rights doctrine¹³ should consider the Rupert's Land Order by evaluating the terms of surrender as a package. McNeil has shown that the Canadian government in the Address of 1867 was supposed to deal with Indians on the basis of "equitable principles."¹⁴ The meaning of the expression "equitable principles" can be considered by comparing the compensation that the HBC received for its claims to Rupert's Land to the compensation that Native people obtained for their interest in Indian title. Methodological biases are responsible for some of the limitations on our knowledge of the aboriginal-rights concept which emerged during the transfer. Generally, the existing legal research has focussed on printed documentation, in particular, "The Report of Delegates appointed to negotiate for the acquisition of Rupert's Land and the North-West Territory."¹⁵ Although the Delegates' Report contains a sizable selection of correspondence between 8 August 1868 and 10 April 1869, it mainly represents the Canadian position. Manuscript sources from the Hudson's Bay Company Archives (HBCA) not only present the HBC's viewpoint, but also provide some vital documentary evidence. In *R. v. Sioui*, extrinsic historical evidence was vital to the judgement.¹⁶ New archival evidence which reflects on the meaning of term 14 is presented in this article.

Finally, a close look at the negotiations leading to the HBC's surrender of Rupert's Land, and a brief summary of Native reactions to this, will provide insights about the formulation of Indian policy. Purely legalistic approaches cannot evaluate Mr. Justice Mahoney's decision in the Baker Lake case that term 14 "merely transferred existing obligations from the Company to

Canada."¹⁷ What were the HBC's obligations to Indians prior to the cession of Rupert's Land to Canada in 1870? Certain obligations were embodied in the practices of two centuries of trade relations between the HBC and the Natives.¹⁸ Does term 14 create a fiduciary obligation? For some, a political-economy approach is too unorthodox and unnecessary. However, and by analogy, what sort of understanding of any of the aboriginal-rights sections of Constitution Act 1982 would exist without some awareness of the positions of various federal and provincial governments and the state of land claims in their respective jurisdictions?

Dual Claims to Rupert's Land: Mercantile and Aboriginal

The HBC's Royal Charter of 1670 not only incorporated the HBC but also established this mercantile firm on a monopoly basis. Of importance to Native people, the charter granted monopoly trading rights on the "whole and entire trade and traffic."¹⁹ Also, the HBC was given possessory rights. This 1670 document stated:

and grant unto them and their successors the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits, commonly called Hudson's Straits, together with all the lands, countries and territories upon the coasts and confines of the seas, straits, bays, lakes, rivers, creeks and sounds aforesaid, which are not now actually possessed by any of our subjects, or by the subjects of any other Christian Prince or State...²⁰

In effect, title was granted at the pleasure of the Crown. The all-encompassing territorial claims were stressed because the Company

at all times hereafter shall be, personable and capable in law to have, purchase, receive, possess, enjoy and retain lands, rents, privileges, liberties, jurisdictions, franchises and hereditaments, of what kind, nature or quality soever they be, to them and their successors; and also to give, grant, demise, alien, assign and dispose lands, tenements and hereditaments...²¹

The Charter granted a variety of proprietary rights and benefits to the HBC and its successors; as well, the capacity to give up its proprietary rights was granted. The Charter made several references to the HBC's proprietary rights to the lands in the Hudson Bay basin.²² In practice, the HBC was not in the habit of making territorial claims to the exclusion of aboriginal land tenure.²³ The Charter also granted the HBC judicial authority, and the HBC thus had the status of a proprietary government. The authority of the HBC in Rupert's Land, with its governing powers, possessing land entitlements and monopoly trade rights, generated political opposition; nonetheless, the Charter was never challenged in court by the HBC's opponents.²⁴ In 1857, a legal opinion for the HBC tended to reinforce early European concepts of possession:

I am of the opinion that the Grant of soil of the Territory embraced within the limits mentioned in the Charter of Incorporation of the Hudson's Bay Company is in itself good newly discovered and unoccupied lands taken possession of by British subjects in the name of the Crown of Great Britain became the property of the Crown and therefore may be granted by it to anybody it pleases. The Territory

of Hudson Bay was unoccupied by Christians until it was taken possession of by the English and was first settled by the Company and their Servants.²⁵

Such arguments and the unchallenged Charter of 1670 provided the basis for a longstanding mercantile claim to Rupert's Land. The HBC's territorial claims were advanced in the European sphere of diplomacy, and were based on "discovery." Because the HBC's relationship with Natives emphasized trade, there was little effort in the first 200 years of its operations to challenge Native use and occupancy of land.

The doctrine of aboriginal title substantiates a claim to Rupert's Land by Native people.²⁶ The basic concept of aboriginal title, that Indians had a valid title that could only be surrendered by proper legal procedures, arose out of some of the earliest interactions between Europeans and Indians. In Canada, a legal foundation for the acknowledgment of aboriginal rights is found in the Royal Proclamation of 1763. This constitutional document indicated and summarized the preexisting British policies on aboriginal rights. The proclamation restricted European encroachment on Indian lands by closing off a large area (designated as the Indian Territory) to settlement and by establishing a means for surrendering Indian title. Brian Slattery argued that the Proclamation "is one of those legal instruments that does simple things in complicated ways." He simplified the Proclamation's means for defining aboriginal title by stating "colonial governments are forbidden to grant any unceded Indian lands, British subjects to settle on them and private individuals to purchase them."²⁷ But the Royal Proclamation outlined a system of public purchases "as the official mode of extinguishing Indian title."²⁸ Indians could surrender their lands only to the Crown. Slattery concluded, "In technical terms, the Indian interest constitutes a legal burden on the Crown's ultimate title until surrendered."²⁹ Significantly, the Proclamation also declared that "the Trade with the said Indians shall be free and open to all our Subjects whatever."³⁰

One of the complexities of the Proclamation pertains to an ambiguous geographical designation of limits of the Indian Territory; this in turn obscures the status of Indian title in those areas excluded from the Indian Territory. In its definition of the Indian Territory, the Proclamation excluded Rupert's Land by stating the Crown did "reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all Lands and Territories not included ... within the Limits of the Territory granted to the Hudson's Bay Company..."³¹ Under the terms of its Charter of 1670, the HBC was, in effect, a proprietary government and notwithstanding the exclusion of Rupert's Land from the area designated as the Indian Territory, there is an implicit recognition of Indian title in the HBC Territory. The Proclamation also provided:

that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians ... and in the case they [Indian Lands] shall lie within the limits of any Proprietary Government [HBC's Rupert's Land], they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for the Purpose...³²

Thus the Proclamation laid down a means for surrendering title in areas such as Rupert's Land. Legal scholarship has shown that the Proclamation applies to Rupert's Land; Slattery stated "the document's main measures are not confined to the Indian Territory; they apply throughout British North America."³³ The Royal Proclamation's provision to open up trade was not consistent with the monopoly terms granted by the Charter of 1670. The exclusion of Rupert's Land from the designated Indian Territory must be seen as an effort to accommodate the Proclamation's open trade provision with the existing HBC monopoly in Rupert's Land.

Aboriginal title as a legal doctrine means that Native people's rights have survived the advent of the Crown's sovereignty, but such rights may be limited, as Slattery noted, "insofar as these [rights] were incompatible with the Crown's ultimate title, or were subsequently modified by statute or other lawful acts."³⁴ The original customs and practices of aboriginal people have been enmeshed in the politics and law of European sovereignty. Slattery has provided a lucid explanation for the reasoning behind the Crown's involvement in the surrender of Indian title:

Even if we suppose that a discovering state gained an exclusive right against other European states to appropriate the region discovered and thereby gain territorial title, it does not necessarily follow that a subject of the discovering sovereign could not purchase private title from the native peoples and hold it under the sovereignty of the incoming monarch. Clearly a subject could not, under the principle, obtain international title to any portion of the discovered territory and set himself up as an independent potentate. But why could he not secure a private title? The answer must lie, not in the principle of discovery, but in the domestic law of the European state concerned. If that law stipulates that the sovereign is the sole source of private title for subjects settling in colonial acquisitions, then private purchases from native peoples are ruled out.³⁵

Moreover, the concept of aboriginal rights is not restricted to land rights but also includes aboriginal "customary laws and governmental institutions."³⁶ The HBC territorial claims cannot be easily reconciled with Slattery's definition that aboriginal title "imported full rights of possession and use."³⁷ For analytical purposes, the negotiations and legislative steps leading up to surrender of the HBC's Charter and the transfer of Rupert's Land to Canada should be considered by examining both the mercantile and the aboriginal claims to the region. Such an approach does not concede the validity of claims made on the principle of discovery or argue that Rupert's Land was "legally vacant."³⁸

Political and Economic Erosion of Hudson's Bay Company Rule

The fate of the Native inhabitants of Rupert's Land was closely tied in with proposals and schemes of railroad financiers. Even the geographical isolation of Rupert's Land could not protect the HBC's mercantile rights from *laissez-faire* thought and the export of British capital. In the 1840s people of mixed blood (both French- and English-speaking) challenged the HBC monopoly in Rupert's Land. By 1849, the HBC's monopoly in the Red River district had effectively ended. In the 1850s, English-speaking mixed bloods opposed the HBC's political rule, advocated Crown colony status for the Red

River Settlement and made common cause with Canadian expansionists. The 1857 British parliamentary Select Committee on the HBC, established because of pressure from English-speaking mixed bloods and Canadian expansionists, and the need to consider the extension of the HBC's exclusive license to trade, provided no clear political direction for the region. The monopoly license to trade in those areas outside of Rupert's Land controlled by the HBC was not renewed. However, the HBC Charter remained a barrier for Canada's westward expansion, and a self-governing mixed-blood Crown colony was not realized.³⁹

By 1863, a coalescing of various political and financial interests led to a buyout of the HBC. This put the HBC's Charter rights into the hands of those interested in colonizing the fertile belt.⁴⁰ Edward Watkin was the key player in promoting transcontinental railway and telegraph schemes, which required the acquisition of Rupert's Land. Watkin was heavily involved in the management of the Grand Trunk Railway, and was closely allied with the Duke of Newcastle, the influential colonial secretary. Rich outlined the interlocking nature of their political and economic objectives by 1861: "the statesmen and the railway magnate were of one mind on the need to complete the Intercolonial line and to reach out towards the Pacific with railways which would be a preliminary necessity to the union of all provinces and territories into 'one Great British America'."⁴¹ A great deal of financial and political interest was generated by Watkin's plans to alleviate the existing railway financial problems by extending railways, telegraphs, or even wagon roads across the HBC's territory, thereby connecting British Columbia with the pre-Confederation Canadian provinces. A variety of commercial and political concerns, backed by influential individuals, supported Watkin's proposals: the North West Transportation Company, Grand Trunk Railway, Atlantic and Pacific Transit and Telegraph Company, and the London lobby of the British North American Association.⁴²

From 1859 the HBC held the position that its monopoly could be bought out, but the imperial government would not purchase the HBC; mercantile interests were more than willing to give railway financiers access to Rupert's Land. Concerning a proposal for a partial surrender of the fertile land and a right of way, HBC governor Berens responded: "If these gentlemen are so patriotic, why don't they buy us out?"⁴⁴ Watkin eventually agreed to Berens's price of £1.5 million for the HBC, although HBC stock was valued at £500,000. The real assets of the HBC were worth £1,081,000, but another £1 million was added to the actual worth of the HBC in order to account for its lands. The market price of a £100 share was £190, but annual profits were only £35,000 and the undervalued stock would make the dividend rate appear good. The buyout arrangement settled on the selling of the £100 old stock for £300, thereby raising the Company's stock to £1.5 million. The buyout also meant that the control of the HBC would pass to Watkin and his backers. Watkin managed the buyout of the HBC through the newly established International Financial Society (IFS). The old stock of £500,000 was raised to £1.2 million, and new stock was raised to £2 million through a public issue.⁴⁵ The details of this stock watering have never been clear, and

in 1869 Canadian government representatives described the situation with obvious frustration: "The stock of the old Company, worth in the market about £1,100,000, was bought up, and by some process which we are unable to describe, became £2,000,000."⁴⁶ Mitchell notes that IFS made a profit, and Watkin recalled that the IFS took "a profit to themselves and their friends who had taken the risk of so new and onerous an engagement."⁴⁷

The IFS buyout of the HBC forebode a changing political economy for Rupert's Land. The takeover of the HBC had a furtive quality, and as Rich noted, Berens "did not even know distinctively who the parties were with whom he was negotiating."⁴⁸ Apparently, when the Duke of Newcastle learned of the takeover of the HBC he had "believed that a new era was about to open in the north-west, and the wild animals and fur traders [would] retreat before the march of 'European' settlers."⁴⁹ The new stockholders that bought into the reconstructed HBC were investing in land; the prospectus stressed that the Company lands would be opened up for European colonization and mining grants would be available.⁵⁰ Moreover, as a result of the IFS takeover, the HBC was now under the control of men whose priority was "to realize the values of the southern parts Rupert's Land rather than to manage a trade to the north."⁵¹ The objectives of the IFS suggest the reasons for a financial interest in Rupert's Land: "undertaking, assisting, and participating in financial, commercial, and industrial operations, both in England and abroad, and both singly and in connection with other persons, firms, companies and corporations."⁵² The directors of the IFS included directors of important English and European merchant banks. The IFS's first purchase was the HBC, but it also financed railways, land companies, foreign banks and trading companies; indicative of this era of British capital exports, the IFS converted the public debt of Mexico.⁵³ At Red River the buyout, which occurred without consultation with the residents, created the belief among the fur-trade elite that "they had all been sold 'like dumb driven cattle'."⁵⁴ Nonetheless, the acquisition of the HBC by a modern financial enterprise did not result in either the expeditious transfer of Rupert's Land to Canada or the sudden displacement of fur trader by settler. A period of difficult negotiations followed.

Negotiating and Legislating the Transfer

Despite the fact that the new owners of the HBC wanted to realize a value on their assets through colonization and that Canadians wanted to annex the fertile belt, there was no quick resolution to the Company's territorial claims. The legal status of the Charter was still a block: the HBC could not promote colonization of land with unclear title, the imperial government could not initiate litigation against its own Charter, and the Canadians were unwilling to test in court their position that the Charter was invalid. Consequently, neither the HBC nor the Canadians could proceed with colonization plans. The opening up of western Canada required a negotiated agreement. The Colonial Office acted as an intermediary, but the imperial government would not assume any of the costs of compensating the Canadians for a buyout of HBC claims or assume the burden of administrative costs of a

Crown colony at Red River. Negotiations dragged out between 1863 and 1868. The period between October 1868 and the end of March 1869 was crucial for affecting the transfer.

The HBC wanted a large cash payment, a large grant of land, and royalties from mineral wealth. The Company claimed that the land was worth a shilling per acre. Eventually the principle developed that the HBC interest in Rupert's Land would be accommodated by future revenues from land sales. By May 1868, the Company was holding out for one shilling per acre from land sold by the government and one-quarter of all gold and silver revenues, although these revenues would cease once £1 million had been paid out. The HBC wanted an ongoing stake in land, asking for 6,000 acres around each post and 5,000 acres for each 50,000 acres disposed of by the government. The HBC also sought confirmation of land titles it had issued at the Red River Settlement, and it wanted no exceptional taxation of the fur trade. Before surrendering Rupert's Land, the HBC wanted to ensure a large cash payment, ongoing revenues from future development, and protection of its fur-trade operations. The Company's bargaining position was constrained by the new speculative shareholders. This group had bought in after the HBC was reconstructed and had expected £5 million for Rupert's Land.⁵⁵

The imperial government, through the Colonial Office, favoured political union of British North America, but the Royal Charter of 1670 had to be respected. Newcastle's position only admitted that the HBC could expect compensation for its claim to Rupert's Land. He agreed with the appraisal of one shilling per acre but opposed the granting of large blocks of land; a negotiated settlement awaited Confederation. Confederation was not just a political idea, it sponsored a new economic strategy which sought a western hinterland for Ontario and a transcontinental railway. Certain legislative steps reflected the urgency to acquire Rupert's Land. The westward expansion of Canada was provided for in section 146 of the British North America Act 1867, since an address from the Canadian Parliament would "admit Rupert's Land and the North-western Territory, or either of them, in the Union, on such Terms ... as the Queen thinks fit to approve..."⁵⁶ Canada followed up on section 146 with the Address of 1867, which argued that the transfer of the HBC territory "would promote the prosperity of the Canadian people, and induce to the advantage of the whole Empire."⁵⁷ Furthermore, the Address of 1867 outlined the economic objective of union:

That the colonization of the fertile lands of the Saskatchewan, the Assiniboine and the Red River districts; the development of the mineral wealth which abounds in the region of the North-west; and the extension of commercial intercourse through the British possession in America from the Atlantic to the Pacific, are alike dependent on the establishment of a stable government for the maintenance of law and order in the North-western Territories.⁵⁸

The Canadian position argued that section 146 and the Address of 1867 were all that was required to bring about the transfer, after which the dominion government could legislate in both areas and the HBC's territorial claims to Rupert's Land could be decided in a Canadian court. This

bargaining strategy was partially undermined when the British Parliament enacted the Rupert's Land Act of 1868. This act facilitated the transfer of Rupert's Land, but it also acknowledged that the Charter of 1670 had "granted or purported to be granted" land and rights to the HBC.⁵⁹ This act, upon reaching agreed terms, permitted the surrender of the HBC's Charter to the queen, and with an address from the Canadian Parliament, the queen would admit Rupert's Land into the Dominion. With the passage of the Rupert's Land Act, the problem was reduced to arriving at terms of surrender acceptable to the HBC.

The period between 1 October 1868, when George E. Cartier and William MacDougall were delegated to represent Canada at the negotiations, until the end of March 1869, entailed complicated, three-way negotiations. In the end, one of the largest real-estate deals in history was concluded. Colonial secretary Granville and his undersecretary, Sir Frederick Rogers, acted as intermediaries between the Canadian delegates and governor of the HBC, the Earl of Kimberley (during this period, Northcote replaced Kimberley as governor). The HBC directors and the Canadian delegates negotiated from separate rooms but the purpose, unencumbered by politics, was clear. Rogers stated: "It is of course obvious that this negotiation for the purchase of the Hudson's Bay Company Territory is really between the seller and buyer, the Company and the Colony [Canada]...⁶⁰ Little progress had been made by the close of 1868. The HBC's claim on a share of future revenues from land sales would have financially deprived the future government of the territory. The Colonial Office suggested that the HBC might receive the following terms: land around posts (between 500 and 6,000 acres, but only 3,000 acres in the fertile belt), one-quarter of land receipts and one-quarter of various gold and silver revenue up to £1 million, all previous land titles alienated by the HBC confirmed by the imperial government, grants of lots of not less than 200 acres in each township, no exceptional taxes on the HBC, liberty to carry on the trade, similar land grants for the posts in the North-Western Territory, the boundary between Canada and the HBC Territory to be defined once £1 million had been paid over, the selection of lots and payment of royalties and land receipts cease, and finally, lands set aside for Native Indians were not included in the payment of receipts from land sales.⁶¹ At this point in the negotiations, the most significant suggestion, with long-term implications, was the granting of lots to the HBC in each township. With no large, up-front cash payment, this offer was unacceptable to the speculative stockholders.

The Canadian position was articulated in a letter from Cartier and MacDougall to Rogers in early February 1869. A long argument was made to support Canada's claim that the Charter did not cover the fertile belt and that the Charter itself was not valid, but they left it for the Colonial Office to determine "whether this Company is entitled to demand any payment whatever, for surrendering to the Crown that which already belong[ed] to it."⁶² The Canadians suggested that the HBC's claim amounted to a "nuisance suit," but the HBC occupation of Rupert's Land obstructed "the progress of Imperial and Colonial policy, and put in jeopardy the sovereign

rights of the Crown.⁶³ The principle of compensating the Company through future revenues was unacceptable.⁶⁴ Cartier and MacDougall provided calculations for fixing a monetary value to the territorial claims of the HBC. They argued that the HBC's assets had been worth £1,393,569 and that the buyout of the old company in 1863 had cost £1.5 million; thus "£106,431 was the amount which the new purchasers actually paid for the 'Landed Territory'".⁶⁵ This the Canadians were willing to concede, and they once again asked that the Address of 1867 be acted upon and that, at the very least, the North-Western Territory be transferred to Canada.

Clearly all three parties were far apart: the Canadian delegates offered a fixed payment of £100,000, the Company and the Colonial Office were considering various forms of ongoing compensation, and as well, the HBC shareholders wanted a large cash payment. To resolve the years of dispute, Lord Granville proposed a series of terms to the HBC and the Canadians on an accept or reject basis. The essential terms provided the following: the HBC would surrender rights to Rupert's Land and other areas of British North America as directed by the Rupert's Land Act, Canada would pay the HBC £300,000 when Rupert's Land was transferred to the Dominion, the HBC would select blocks of land around posts, up to 50,000 acres (the number of acres selected at Red River was left blank), and would select, within fifty years, one-twentieth of the land set out for settlement in the area defined as the fertile belt, all land titles of land conferred by the HBC before 8 March 1869 would be confirmed, and the HBC would be free to carry on trade without exceptional taxation.⁶⁶ These terms were not proposed as a basis of negotiations, and a rejection by either party would lead Granville to recommend that the Judicial Committee of the Privy Council examine the rights of the Crown and the HBC.

Although the HBC attempted to effect some substantive changes, the governor and committee had displayed enough interest in the terms that a deal could be fashioned through face-to-face negotiations between the Canadians and the HBC. At this point the Colonial Office pulled out of the negotiations and the HBC and Canadian delegates effected an agreement, specifying more detailed terms in memoranda of 22 and 29 March 1869. The Memorandum of 22 March provided that the HBC would retain posts in the North-Western Territory, made a number of provisions for the HBC land around its posts, allowed the HBC to defer selected land in townships, established a charge for surveying HBC land, and held the Canadian government responsible for Indian claims. The Memorandum of 29 March allowed the HBC to select lots in townships adjacent to the north bank of the North Saskatchewan River and made it possible for the Canadian government to expropriate for public purposes land allocated to the HBC.⁶⁷

The correspondence after Granville laid down the terms on 9 March 1869 elucidates some aspects of the HBC's strategy for dealing with the changes that would follow the transfer of Rupert's Land. Most of the points raised by Northcote were discussed in great length, and many became terms in the memoranda of 22 and 29 March. The HBC attempted to increase its

allocation of land from one-twentieth to one-tenth of the fertile belt but the Canadian delegates rejected this proposal. In keeping with a desire to be rid of its long-established social obligations to fur-trade society, the HBC unsuccessfully attempted to get the Canadian government to pay the salary of the bishop of Rupert's Land. Northcote also alluded to the HBC's desire for usufructuary rights:

Regarding the Country lying outside the Fertile Belt as a hunting ground alone, we presume 1st that we shall be at liberty to hunt over it freely, and without being subject to any licenses[,] tax or other similar import [duties] — 2nd That we shall be granted a title to our posts and to such joining land as may be necessary for their maintenance and for supplying pasture and wood — 3rd That we shall be allowed to cut wood as we may require in any part of the Territory.⁶⁸

Clearly, the HBC was attempting to protect the established land-use patterns following a change in political jurisdiction. The allusion to the idea that the area outside of the fertile belt would remain as a "hunting ground alone" is relevant to understanding the aboriginal-title concept that developed during the transfer arrangements. Northcote also suggested that

it would be for the interest of the Company and still more for that of Canada, that Canada should give us for a limited period some special control over the importations made into the hunting Country so as to enable us to keep spirits from the Indians.⁶⁹

Again there is a reference to the idea of a hunting country. With this proposal the Company was intending to maintain its control over the fur-trade country.

By the end of March, a deal had been arranged which was acceptable to the parties responsible for negotiating the terms. Nonetheless, a number of legislative steps, some of which got bogged down, had to be taken, which, along with unexpected political activity by the population of Red River, meant that no quick transfer of Rupert's Land occurred. On 9 April 1869, a meeting of the HBC resolved "to surrender to Her Majesty's Government all this Company's territorial rights in Rupert's Land, and in any other part of British North America not comprised in Rupert's Land, Canada or British Columbia."⁷⁰ There was considerable opposition from shareholders who had invested £2 million to a deal that returned only £300,000 and some vague prospects about potential returns from future land sales.⁷¹ On 20 May 1869 the Company's solicitors prepared a Deed of Surrender. Canadian acceptance of the transfer arrangements were indicated by resolutions and an Address to the Queen on 29 and 31 May 1869. Some differences in wording between the HBC's Deed of Surrender and the terms listed in the Canadian 1869 Address to the Queen, the need for imperial legislation guaranteeing the loan for £300,000, and Canadian difficulties in arranging the financing delayed the planned date of transfer from 1 October to 1 December 1869.⁷² Even still, the Rupert's Land Order was further delayed until 23 June 1870, since it had to wait for the provisional government of Louis Riel to accept the terms of union which had been negotiated with the Canadian government. The outcome of these negotiations was the Manitoba Act, section 34 of which acknowledged the deal made for

transferring the HBC territorial claims, stating: "Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that Company surrendered Rupert's Land to Her Majesty."⁷³ Thus, the arrangements made with the HBC were enclosed within the Canadian Constitution, beginning with section 146 of the British North America Act 1867 and closing with section 34 of the Manitoba Act, which was validated by the British North America Act 1871.

Traditionally, it has been assumed that tension existed between the HBC and Canadian expansionists, and that the transfer arrangements were hindered by the legacy of fur trader/settler conflict. From a political-economy perspective, the Deed of Surrender resolved the transfer of Rupert's Land harmoniously. In April 1869 Rogers wrote Northcote, conveying Granville's sentiment

that no long period may elapse before the conditions of settlement thus accepted by the Company will be adopted by the Parliament of Canada, and that the transfer which Her Majesty will then be authorized to effect will prove a source of increasing prosperity both to the inhabitants of that Dominion and to the proprietors of the Hudson's Bay Company.⁷⁴

The Rupert's Land Order stipulated a list of terms which were based on the terms laid out by Granville on 9 March 1869 and agreements made in the memoranda of 22 and 29 March. As far as understanding the long-term situation of Natives and the prosperity of the HBC were concerned, the most crucial terms provided the following: a payment of £300,000 to the HBC, along with 50,000 acres of land around the its posts, and over a fifty-year period selection of one-twentieth of the lands of the townships surveyed in the fertile belt, titles conferred by the HBC before 8 March 1869 to be confirmed, and Indian claims for compensation for lands required for settlement were to be disposed of by the Canadian government.⁷⁵ Despite the protracted bargaining, the complementary backgrounds of some of the key decision makers contributed to a resolution of the difficult political and economic problems that the transfer of Rupert's Land required. In the early 1860s, Watkin and Newcastle worked closely together and pulled off a deal which Rich referred to as "machinations on behalf of the Grand Trunk, the Intercolonial and Transcontinental Railway."⁷⁶ The governors of the HBC between 1863 and 1874 had careers which included important positions with the state: Sir Edmund Walker Head had been governor general of Canada before taking over as governor of the HBC; the Earl of Kimberley (governor of the HBC from 1868 to 1869) had had a career in the Foreign Office and had been a member of the cabinet as Lord Privy Seal; and Sir Stafford H. Northcote, the Earl of Iddesleigh (governor from 1869 to 1874), had also been in the cabinet as president of the board of trade and secretary of state for India. Nor was the movement between the state and the HBC one way — after the transfer, Sir John A. Macdonald's government would look to the Company's experience for assistance in developing an Indian policy in the North-West.⁷⁷

Indian Title and the Transfer of Rupert's Land

For the negotiators, the question of aboriginal rights was never central to the surrender agreement, but Indian title entered the talks in several curious ways. For example, the Canadian delegates refer to the North-Western Territory as the Indian Territory.⁷⁸ This acknowledgment of Indian title is relevant to the problem of the geographical ambiguity of the Royal Proclamation of 1763. An aspect of Indian title was raised when proposals were made to appraise the Company's claim. Kimberley informed the Colonial Office that HBC officials

also admit that it is proper that a similar exception [as with the lands for schools, roads or churches] should apply to land set apart as Indian reserves, on the understanding that these reserves will be made by Her Majesty's Government, as they are reinforced it is Its Graces' intentions they shall be, and that, if at any time before the million sterling is paid to the Company, such lands shall be used or granted for other purposes, it shall be liable to the payment of a shilling an acre in common with other land.⁷⁹

The reference to Indian reserves indicates that the London committee of the HBC had anticipated the future direction of Indian policy. The fact that the HBC willingly offered to exempt Indian reserves from the estimates of its claim to Rupert's Land indicates that mercantile interests were attempting to stay well clear of any complications from Indian title. The Colonial Office agreed to this separation of lands from which the HBC could and could not obtain compensation:

Such lands as Her Majesty's Government shall deem necessary to be set-aside for the use of Native Indian population shall be reserved altogether from this arrangement, and the Company shall not be entitled to the payment of any share of receipts thereof, under previous Articles [stipulating compensation schemes], unless for such part, if any, of these lands as may be appropriated with the consent of the Crown to any other purposes, than that of benefit of the Indian Native.⁸⁰

Indian lands were a unique category during the discussions of the principles and terms of compensation for the HBC claim.

Overall, the negotiations for the transfer did not take a hard look at Indian title or demonstrate much interest in Indian policy. On 10 April 1869, Granville notified the governor general that the proprietors of the HBC had accepted the terms of surrender, but most of this communiqué was directed at Indian policy and the expectations of Her Majesty's government. He urged the Canadian government to consider the HBC's relationship with Indians because "the Indian Tribes who form the existing population of this part of America have profited by the Company's rule."⁸¹ He stated:

They have been protected from some of the vices of civilization, they have been taught to some appreciable extent, to respect the laws and rely on the justice of the white man, and they do not appear to have suffered from any causes of extinction beyond those which are inseparable from their habits and their climate. I am sure that your Government will not forget the care which is due to those who must soon be exposed to new dangers, and in the course of settlement be dispossessed of the lands which they are used to enjoy as their own, or be confined within unwontedly narrow limits.⁸²

Clearly, the colonial secretary had anticipated that the transfer of Rupert's Land would affect Indians, and foresaw the dispossession of their lands.

Granville did not let his concern for Indian interests distract from the negotiations. On 10 April 1869 he wrote:

This question had not escaped my notice while framing the proposals which I laid before the Canadian Delegates and the Governor of the Hudson's Bay Company. I did not however even then allude to it because I felt the difficulty of insisting on any definite conditions without the possibility of foreseeing the circumstances under which those conditions would be applied, and because it appeared to me wiser and more expedient to rely on the sense of duty and responsibility belonging to the Government and people of such a Country as Canada.⁸³

By reducing Indian title to a sense of duty, the negotiations did not have to reconcile the two differing claims to Rupert's Land. During the negotiations, serious consideration of Indian title would have led to a comparison of the HBC claim to Rupert's Land and Indian entitlement. Clearly, the question of Indian title was not a mere oversight; there was a deliberate effort by the imperial government to confine Indian entitlement to a policy status.

With the transfer of Rupert's Land, the aboriginal-title concept can be traced back to the Address of 1867. It called for the annexation of the territories and the resolution of the HBC claims in court. The question of Indian title was raised in the third term of the Address of 1867:

And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.⁸⁴

The Canadian delegates reiterated the terms of the Address of 1867 during the negotiations and added that these three points "were the only terms and conditions which, in the opinion of the Canadian Parliament, it was expedient to insert in the Order in Council, authorized by the 146th section."⁸⁵ Clearly, the Canadian position acknowledged compensation for Indian title. Later the address of 29 and 31 May 1869 stated Canadian intentions:

That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...⁸⁶

Although this second address acknowledged the importance of the transfer to Indians, its definition of Indian interests really reflects Granville's policy recommendations of 10 April 1869 and not the commitment of the Address of 1867. In fact, this later address did not indicate the aboriginal-title concept expressed by term 14 of the Deed of Surrender. A shift in emphasis from Indian legal claims to a protectionist policy occurred. The notion of compensation for a property right gave way to "care which is due."

Term 14 of the Deed of Surrender is often cited as recognition of aboriginal rights. It stated:

14. Any claims of Indians to compensation for lands required for purposes of

settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.⁸⁷

McNeil has considered some of the legal questions this provision entertains, such as what territory the term applies to, whether only land required for settlement could be traded for, and whether communication with the imperial government was required.⁸⁸ It is a difficult problem.

A deeper understanding of the intent of term 14 can be developed by considering its meaning within the context of the transfer negotiations; on its own, textual exegesis is insufficient. An interpretation of term 14 requires the use of extrinsic records. What is the origin of term 14? What party sponsored it? A consultation of extrinsic records is aided by an understanding of the fur trade. Clearly the term relieves the Company of any costs associated with Indian title, for there is no direct burden of Indian title on lands granted as HBC lands.⁸⁹ This concept of aboriginal title did not enter into the talks until the face-to-face negotiations between the HBC and the Canadian delegates, appearing only after the Colonial Office ceased to participate actively as an intermediary. Moreover, Granville clearly stated that he decided not to raise Indian claims in the 9 March list of terms, and he did not raise the issue of Indian interests until 10 April 1869. Since the imperial government was not directly responsible for term 14, either the Canadians or the HBC sponsored it — possibly both parties initiated different aspects of it. As far as Native interests were affected directly by the transfer negotiations, the imperial government had abjured its responsibilities for the Indian peoples.

Other documents elucidate the concept of aboriginal title that emerged during the transfer talks. Drafts of the Memorandum of 22 March 1869 were found in the HBC London correspondence with Her Majesty's government (see Figure 2). The correspondence leading up to the memoranda of 22 and 29 March contains considerable discussion about the details of various terms. Term 14 is not expanded upon in this record; apparently, neither party committed to paper an argument on the issue of Indian claims.

However, the draft of term 14 (term 8 of the Memorandum of 22 March 1869) indicates that it went through two stages before the final wording was set down (Figure 2). The first version reads:

It is understood that any arrangements which should be made for the satisfaction of Indian claims on the land shall be made by the Canadian Govt. in communication with the Colonial Office, and that the Company shall not be considered to be responsible for them.

In this version the Canadian government acknowledged sole responsibility for Indian title. Only one change is made between the first and second version. The second version reduces the commitment to Indian title; "may be necessary" is substituted for "should be made." Between these drafts (Figure 2) and the final version used in the Memorandum of 22 March 1869 some important rewording occurred. The idea of Indian title is tied to the concept of compensation; thus, "satisfaction of Indian claims on the land" is substituted

It is understood that any arrangements which ^{may} be ^{necessary} made for the satisfaction of Indian claims on the land shall be made by the Canadian Govt. in communication with the Colonial Office, and that the Company shall not be considered to be responsible for them.

207

It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Govt. in communication with the Imperial Govt., and that the Company shall be relieved of all responsibility in respect of them.

MM
March 22. 1869

G. P. [Signature]

for "claims of Indians ... for lands required for the purposes of settlement." This change in wording indicates there was a conscious effort to link Indian compensation to a specific change in land use. Another change in wording substituted the imperial government for the Colonial Office. The final change broadened the Company's expectations in the post-1870 period. The use of "them" is ambiguous, possibly meaning "compensation" or "Indians" — or both. The indirect expression "shall not be considered" is replaced with the more direct "shall be relieved." The term "all responsibility" broadens the disengagement of the HBC from any obligations to Indians.

These drafts of term 14 provide no direct indication of which party desired a term on aboriginal title in the Memorandum of 22 March. Clearly the HBC gained, and in the post-1870 period it reduced its social obligations to Natives, which it subsequently argued were a government responsibility.⁹⁰ It seems unlikely that the Canadians felt a need to indicate their intentions towards Indian claims. Their intentions were already outlined in the Address of 1867, and certainly the imperial government did not force the Canadians to commit to Indian claims. In fact, Granville's correspondence of 10 April 1869 makes an argument for a protectionist Indian policy, and he does not seem to be aware of term 14. While it is not entirely clear how this term was arrived at, the HBC benefited. Ultimately, term 14 may have had the effect of reconciling the ambiguous HBC claim to Rupert's Land with Indian title. The text of this term in itself does not provide an obvious meaning.

Conclusion and Retrospect

The transfer of Rupert's Land in 1870 marked a fundamental shift in the nature of Indian/white relations. Under HBC rule, the relationship between Indians and whites was primarily economic. The relationship became largely political with the decline of the fur trade and because the recognition of aboriginal title resulted in treaties between Indians and the Canadian state. In April 1869, colonial secretary Granville had communicated the "expectations of Her Majesty's Government," not the least of which was that the responsibilities for the Indian population were to shift from the HBC to the Canadian government. On the question of responsibility, Kent McNeil has considered the difficulty of a legal interpretation of the expression "equitable principles," wording used in the Address of 1867. He suggests that "although the requirement is that the principles rather than the settlements be equitable, it is suggested that an application of equitable principles should lead to an equitable result."⁹¹ The outcome of the settlement of HBC claims could provide a comparative reference for determining whether Indians received "equitable results." How does the compensation that was paid to the HBC compare with the compensation negotiated for Natives?

The IFS takeover of the HBC in 1863 fundamentally changed the society that had existed in the fur-trade country. The Rupert's Land Order was the first step towards dispossession of Native people's lands. In a laconic fashion, the Deed of Surrender acknowledged Indian title, but the two claims to Rupert's Land were not given equal consideration. In 1869 and 1870, the

HBC's claim to territorial rights was given priority, and the compensation that the HBC received was significant. Whether term 14 of the Deed of Surrender is a weak recognition of a property right or whether the wording should have reflected inherent rights has not been an historical debate during the last 120 years. The legal strength of the aboriginal title acknowledged by term 14 was not significant in determining the extent of compensation. In reality, the HBC had more economic power, and it was therefore able to extract greater compensation for its claim. Yet term 14 and the Address of 1867 are a significant counterbalance to the protectionist policy thrusts of the Address of 1869.

Native peoples never gave much credence to the Company's claim to Rupert's Land. When the state eventually dealt with aboriginal title, knowledge of the deal made between Canada and the HBC complicated the efforts to establish the Canadian state in the North-West. Louis Riel, president of a provisional government that represented the general interests of the Red River population, and more particularly the mixed-blood middle class, stated: "Again, on a late occasion they tried to sell us. There never was a parallel case. A Company of strangers, living beyond the ocean, had the audacity to attempt to sell the people of the soil."⁹² Riel specifically objected to the term which granted one-twentieth of the lands of the surveyed townships and he argued that "We in this settlement must get control of all the lands in the North-West."⁹³ Essentially, he objected to the basis of the surrender: "the transfer of country should be carried on between Canada and the people of Red River and not between Canada and the Company."⁹⁴ Opposition to the terms of the surrender were not confined to the mixed bloods at Red River. During treaty talks, Indians made government treaty negotiators aware of the fact that they disputed the HBC's claim to Rupert's Land and that they wanted the £300,000 that had been paid to the HBC. The HBC's claim to Rupert's Land was a major issue at the Treaty Four talks in 1874; an Indian by the name of The Gambler stated "The Company have stolen our land. ... I hear it is true."⁹⁵ Moreover, he wanted to restrict the Company's position: "I want them to remain here to have nothing but the trade ... The Indians want the Company to keep at their post and nothing beyond."⁹⁶ The Native perspective of their rights did not allow for HBC claims to territory.

Indian title was not ignored. After recognizing the HBC claims, the Canadian state turned its attention to Native claims. Those known as Métis or "halfbreeds" were dealt with by issuing land and money scrip on an individual basis. Métis scrip quickly passed into the domain of land speculators, and thus public or Crown lands which still had the burden of a Métis claim to Indian title passed into the hands of a commercial elite. This approach to the Métis neither satisfied the legal aspects of aboriginal title nor provided them with the means to adjust to a changing economy. Treaties with Indian tribes were the most important mechanism for dealing with aboriginal title. The terms of these treaties varied, but the essential compensation provided by them included land for reserves, subsistence rights, annuities amounting to five dollars per person, treaty supplies to support

subsistence activities, and relief during deprivation. Yet Granville's expectation that Indian land interests would not "be confined within unwontedly narrow limits" was not borne out. Small reserves, unfulfilled treaty land entitlements, reserve surrenders, pass laws and the imposition of game and fish protection legislation in opposition to treaty and aboriginal rights had the effect of confining Indians. They were prevented from exercising some of their rights. Unlike the HBC, Indian claims were not compensated by future revenues from land sales. Basically, the terms of the treaties allowed only a bare survival for Indians. Retrospective views by Native leaders indicate that the surrender was a turning point in the history of western Canada. In their submission to the Ewing Commission of 1935, Malcolm Norris and James Brady began by stating: "we will undertake to show the depths of poverty to which the Metis people have been reduced since the surrender of Rupert's Land."⁹⁷

During the transfer arrangements between 1863 and 1870, two interrelated processes were at work. The legal and legislative processes permitted a reorientation of the political economy of Rupert's Land, but they were preceded by a change in the ownership of the HBC. Hence the importance of railroad financiers to the Rupert's Land transfer. Eventually, the settler replaced the fur trader, but the owners of the HBC realized their interest in the fertile belt. Between 1905 and 1922, the Company's dividend rate ranged from 20 to 50 percent.⁹⁸ These large dividends were supported by land sales. Although Native peoples were kept at a subsistence level, the HBC accumulated capital. Between 1891 and 1930 the HBC's land earnings netted profits of \$96,366,021, a far cry from the £2 million invested in 1863.⁹⁹ Ultimately, HBC land sales were greater than the £1 million that the Colonial Office had agreed in 1869 as the value of the HBC's claim to Rupert's Land. The actual amount of land granted is another measure of the compensation due to these two claims to Rupert's Land. In the case of Manitoba, the Department of the Interior calculated that by 1930, some 559,301 acres had been set aside for Indians (2.6 percent of the land that had passed from the Crown), but 1,279,965 acres had been granted to the HBC (6.1 percent of the land that had passed from the Crown).¹⁰⁰ The outcome of these very different claims was not equitable.

The complexity of Canada's acquisition of the HBC territory reflected the interplay of political economy and law. As the history of the Rupert's Land transfer demonstrates, aboriginal title is not only a relevant approach to understand pressing legal issues, it also provides new avenues to interpret Canadian history.

NOTES

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1. This calculation includes the Arctic islands, which were transferred officially in 1880. Arctic islands outside of the Hudson Bay drainage were not part of the HBC territory. Rupert's Land, which corresponded to the drainage of the Hudson Bay basin, amounts to 1,490,000 square miles. The Arctic and Pacific drainage referred to as the North-West Territory (including the Arctic islands) totals 1,406,255 square miles. These data were derived from Canada, *The National Atlas of Canada* (Ottawa: Department of Energy, Mines and Resources, Information Canada and Macmillan Company, 1974).
2. For example, Trotter did not consider the HBC's negotiations with Canada and he made no reference to Indian title in the transfer. Reginald George Trotter, *Canadian Federation: Its Origins and Achievement: A Study in Nation Building* (London: J.M. Dent and Sons, 1924).
3. On the term "aboriginal title," Rich simply stated "and the Canadians agreed that the Company should be exempt from responsibilities for claims by Indians who alleged that they owned the lands." E.E. Rich, *The History of the Hudson's Bay Company* (London: The Hudson's Bay Record Society, 1959), 888-89. Morton's treatment of the terms of the transfer are also cursory, see Arthur S. Morton, *A History of the Canadian West to 1870-71*, 2nd ed., ed. Lewis G. Thomas (Toronto: University of Toronto Press and University of Saskatchewan, 1973). Giraud's encyclopedic study of the Métis paid little attention to the surrender. See Marcel Giraud, *The Métis in the Canadian West*, trans. George Woodcock (Edmonton: University of Alberta Press, 1986).
4. An important exception is Arthur J. Ray, *The Canadian Fur Trade In The Industrial Age* (Toronto: University of Toronto Press, 1990). Ray's research on the business strategies of the HBC in 1871, relations between the state and HBC in the immediate post-treaty period, and Native and HBC relations are relevant to any appreciation of Native history following the transfer of Rupert's Land.
5. Although Narvey's research is a major study on aboriginal title in Rupert's Land, his discussion of the terms of surrender is laconic, see Kenneth M. Narvey, "The Royal Proclamation Of 7 October 1763, the Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company," *Saskatchewan Law Review* 38, no. 1 (1973-74): 123-233. See also Kent McNeil, "Native Rights and the Boundaries of Rupert's Land and the North-Western Territory," *Studies in Aboriginal Rights* No. 4 (Saskatoon: University of Saskatchewan Native Law Centre, 1982) and Kent McNeil "Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations," *Studies in Aboriginal Rights* No. 5 (Saskatoon: University of Saskatchewan Native Law Centre, 1982).
6. Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," *American Journal of Comparative Law* 32 (1984): 363.
7. The "Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union," 23 June 1870, is printed in E.H. Oliver, *The Canadian North-West: Its Early Development and Legislative Records*, 2 vols. (Ottawa: Government Printing Bureau, 1914 and 1915), 939-63. A handwritten manuscript of the Rupert's Land Order can be found in the Provincial Archives of Manitoba, Hudson's Bay Company Archives (hereafter HBCA), A.13/16/5. A galley proof of this address can be found in A.13/16/5, and a printed copy of this address in A.12/L 121/1.
8. The term "aboriginal-title concept" used in this article refers to an interpretation deriving explicitly from the documents transferring Rupert's Land. Hence the published and unpublished documents from the negotiations which transferred Rupert's Land to Canada are necessary sources.
9. Memorandum, "Details of Agreement between Delegates of the Government of the

- Dominion, and the Directors of the Hudson's Bay Company," 22 March 1869, Oliver, *Canadian North-West*, 950.
10. Found in Rupert's Land Order, *ibid.*, 959.
 11. Brian Slattery, "Understanding Aboriginal Rights," *Canadian Bar Review* 66 (1987): 727-83.
 12. During Treaty Three and Four talks, Indian opposition to the terms of the transfer were expressed. See Alexander Morris, *The Treaties of Canada* (1880; Toronto: Coles Publishing, 1979), 73, 99-106.
 13. Brian Slattery, "Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title," *Studies in Aboriginal Rights* No. 2 (Saskatoon: University of Saskatchewan Native Law Centre, 1983).
 14. McNeil, "Native Claims," 13-21.
 15. Canada, *Sessional Papers*, 1869, no. 25, Report of Delegates appointed to negotiate for the acquisition of Rupert's Land and the North-West Territory, pp. i-ii, 1-39 (hereafter Delegates' Report).
 16. *R. v. Sioui*, [1990] 1 S.C.R. at 1049-50. This judgement is also published in *Native Studies Review* 6, no. 2 (1990): 151-93. On the question of extrinsic evidence see Franklin S. Gertler and Peter W. Hutchins, "Introduction: The Marriage of History and Law in *R. v. Sioui*," *Native Studies Review* 6, no. 2 (1990): 115-30.
 17. McNeil, "Native Claims," 31, citing *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*.
 18. For an important discussion of the HBC's social and economic obligations to Natives see, Arthur J. Ray, "Periodic Shortage, Native Welfare, and the Hudson's Bay Company, 1670-1930," in Shepard Krech III, ed., *The Subarctic Fur Trade: Native Social And Economic Adaptations* (Vancouver: University of British Columbia Press, 1984), 1-20. For a sense of change following the transfer of Rupert's Land see, Arthur J. Ray, "The Decline of Paternalism in the Hudson's Bay Company Fur Trade, 1870-1945," in Rosemary E. Ommer, ed., *Merchant Credit and Labour Strategies in Historical Perspective* (Fredericton: Acadiensis Press, 1990), 188-202; and Ray, *The Canadian Fur Trade*, 30-49, 199-221.
 19. "The Royal Charter Incorporating the Hudson's Bay Company, 1670," Oliver, *Canadian North-West*, 146.
 20. *Ibid.*, 136.
 21. *Ibid.*, 137.
 22. The Charter was repetitious on this point, stating "WE HAVE given ... together with all the lands and territories upon" the basin and made the HBC "the true and absolute lords and proprietors of the same territory..." and again "TO HAVE, HOLD, possess and enjoy the said territory..." It granted resource rights, such as "the fishing of all sorts of fish, whales, sturgeons, and all the other royal fishes in the seas, bays, inlets and rivers within the premises, and the fish therein taken, together with the royalty of the sea upon the coasts within the limits aforesaid, and all mines royal, as well discovered as not discovered, of gold, silver, gems and precious stones..." Furthermore, the Charter granted to the HBC "all lands, islands, territories, plantations, forts, fortifications, factories or colonies, where the said Company's factories and trade are or shall be..." *Ibid.*, 143-44, 149.
 23. The clearest example of this is the Selkirk Treaty of 1817, which acknowledged Indian title so that agricultural settlement of Assiniboia could proceed.
 24. To the extent that Métis free traders were prosecuted in courts in Assiniboia, some legal consideration of the Charter rights occurred. The trial of Guillaume Sayer in 1849 was something of a legal victory for the Métis, because no penalty was imposed.

25. HBCA, A.39/7, fo. 310.
26. Cumming and Mickenberg provided a limited definition of aboriginal rights stating: "are those property rights which inure to Native people by virtue of their occupation upon certain lands from time immemorial." See Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: The Indian-Eskimo Association of Canada and General Publishing Co., 1972), 13. Increasingly, aboriginal rights are defined as inherent rights.
27. Slattery, "Hidden Constitution," 369.
28. *Ibid.*
29. *Ibid.*, 370.
30. Royal Proclamation 7th of October 1763 (hereafter, Royal Proclamation), excerpted in Cumming and Mickenberg, *Native Rights in Canada*, 292.
31. *Ibid.*, 291.
32. *Ibid.*, 291-92.
33. Slattery, "Hidden Constitution," 370. For a very detailed account of Rupert's Land and the Royal Proclamation, see Narvey, "Royal Proclamation and Common Law."
34. Slattery, "Hidden Constitution," 387.
35. Slattery, "Ancestral Lands," 37.
36. Slattery, "Hidden Constitution," 373.
37. *Ibid.*
38. Changes in international law, which have a bearing on aboriginal title, are beyond the scope of this article. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims," in Frank Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, and Halifax: Institute for Research on Public Policy, 1991): 197-217. On the question of inherent aboriginal rights, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*," *Alberta Law Review* 29, no. 2 (1991): 498-517.
39. For background on this period of instability see Morton, *A History of the Canadian West*, 802-69; John S. Galbraith, "The Hudson's Bay Company Under Fire, 1847-62," *Canadian Historical Review* 30, no. 4 (1949): 322-35; and Elaine Allan Mitchell, "Edward Watkin and the Buying-Out of the Hudson's Bay Company," *Canadian Historical Review* 34, no. 3 (1953): 219-44.
40. This was a prairie/parkland belt which was deemed to have adequate moisture for agriculture. The area south of the fertile belt was thought to be too arid.
41. Rich, *History of the Hudson's Bay Company*, 826.
42. A number of individuals had overlapping interests. Some of the colonial and imperial connections to Watkin included: Thomas Barring (banker), Robert Benson (London investment house and North-West Transportation Co.), Viscount Bury (North-West Transportation Co.), R.W. Crawford (Crawford, Colvin and Co.), George Carr Glyn (Glyn Mills and Co.), George Grenfall Glyn (North West Transit Co.). The British North American Association included: Howe, Tilley, Barring, Crawford and Benson. For details, see Rich, *History of the Hudson's Bay Company*; and Mitchell, "Edward Watkin."
43. Galbraith, "Hudson's Bay Company Under Fire," 333.
44. Rich, *History of the Hudson's Bay Company*, 832.
45. For details see, Mitchell, "Edward Watkin"; and Rich, *History of the Hudson's Bay Company*, 816-49.
46. Delegates' Report (Cartier and MacDougall to Rogers, 8 February 1869), p. 19.

47. Mitchell, "Edward Watkin," 241; and Trotter, *Canadian Federation*, 275.
48. Rich, *History of the Hudson's Bay Company*, 835.
49. Delegates' Report (Cartier and MacDougall to Rogers, 8 February 1869), p. 19.
50. Rich, *History of the Hudson's Bay Company*, 841.
51. *Ibid.*, 848.
52. *Ibid.*, 836.
53. *Ibid.*
54. Joseph James Hargrave, *Red River* (1877; np: 1971), 299.
55. For details of the negotiations, see Rich, *History of the Hudson's Bay Company*.
56. Section 146, British North America Act 1867, Oliver, *Canadian North-West*, 871.
57. "Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada," 16 and 17 December 1867, *ibid.*, 945.
58. *Ibid.*
59. Rupert's Land Act, 1868, 31-32 Victoria, Chapter 105, *ibid.*, 937.
60. HBCA, A.13/16/2, Rogers to Northcote, 7 February 1869, fo. 90.
61. HBCA, A.8/12, Adderley to Kimberley, 1 December 1868, ff. 38-40.
62. Delegates' Report (Cartier and MacDougall to Rogers, 8 February 1869), p. 23.
63. *Ibid.*, p. 24.
64. *Ibid.*, p. 25. Cartier and MacDougall used the rate of investment in Upper Canada to assess the payout of £1 million and asked "What is the present value of an annuity of £3,575 per annum for 280 years?"
65. *Ibid.*, p. 26. In another calculation the Canadian delegates indicated that the market value of the stock had fallen to £1,350,000 which was "£43,569 less than the value ... in 1863, of the Company's assets, exclusive of the 'landed territory'."
66. Delegates' Report (Granville to Northcote, 9 March 1869), p. 32. The terms also defined the fertile belt and disposed some of the telegraph material the HBC had purchased.
67. Memorandum of 22 March 1869 and Memorandum of 29 March 1869, Oliver, *Canadian North-West*, 949-51.
68. HBCA, A.8/12, Northcote to Cartier, 22 March 1869, fo. 95.
69. *Ibid.*, fo. 69
70. HBCA, A.13/16/4, Northcote to Rogers, 10 April 1869, fo. 207.
71. Arthur J. Ray, "Adventures at the Crossroads," *The Beaver* 62, no. 2 (1986): 4-12.
72. HBCA, A.13/16/5; A.13/16/6.
73. The Manitoba Act, 1870, 33 Victoria, Chapter 3, Oliver, *Canadian North-West*, 970.
74. HBCA, A.13/16/4, Rogers to Northcote, 17 April 1869, fo. 292.
75. Rupert's Land Order, Oliver, *Canadian North-West*, 941-44.
76. Rich, *History of the Hudson's Bay Company*, 848.
77. See Ray, *The Canadian Fur Trade*, 4-5.
78. Delegates' Report (Cartier and MacDougall to Rogers, 8 February 1869), pp. 21, 23.
79. HBCA, A.8/12, Kimberley to Adderly, 27 October 1868, fo. 32.
80. *Ibid.*, Adderly to Kimberley, 1 December 1868, ff. 39-40.
81. Delegates' Report (Granville to Governor General of Canada, Sir John Young, 10 April 1869), p. 38.

82. Ibid. On the question of Indian policy, Granville stated: "That Government I believe has never sought to evade its obligations to those whose uncertain rights and rude means of living are contracted by the advance of civilized men. I am sure that they will not be so in the present case, but that the old inhabitants of the Country will be treated with such forethought and consideration as may preserve them from the dangers of the approaching change, and satisfy them of the friendly interest which their new Governors feel in their welfare."
83. Ibid. There is nothing in this letter to suggest that the colonial secretary was aware of term 8 of the Memorandum of 22 March 1869.
84. Address of 1867, Oliver, *Canadian North-West*, 946.
85. Delegates' Report, (Cartier and MacDougall to Rogers, 8 February 1869), p. 17.
86. Address of 1869, in Rupert's Land Order, Oliver, *Canadian North-West*, 954.
87. The Deed of Surrender, in Rupert's Land Order, *ibid.*, 958.
88. McNeil, "Native Claims," 21-25.
89. In a legal opinion for the HBC's land commissioner in 1917, S.J. Rothwell cited correspondence from Donald A. Smith in the 1870s which suggest that a retrospective viewpoint of the HBC's intentions were to safeguard its land grants from Indian title. But Rothwell also stated: "The correspondence between the Company and the Government leading up to the surrender indicates that at that time there were a great many Indians under the care of the Company and it was necessary that provision be made in the surrender for the compensation of the claims of the Indian to the lands required for settlement." Rothwell connected the HBC's social and economic responsibilities to the legal title of Indians. HBCA, RG2/2/109, fo. 14.
90. See the Company's position in National Archives of Canada (NAC), RG 10, vol. 3708, file 19,502 pt. 1. The shift in responsibility from the HBC to the Canadian government is discussed in Frank Tough, "Buying Out The Bay: Aboriginal Rights and the Economic Policies of the Department of Indian Affairs after 1870," in David R. Miller, Carl Beal, James Dempsey and R. Wesley Heber, eds., *The First Ones: Readings in Indian/Native Studies* (Piaapot Reserve #75, Saskatchewan: Saskatchewan Indian Federated College Press, 1992), 398-408.
91. McNeil, "Native Claims," 21.
92. Riel argued this position in "The Proceedings of the Convention, February 3 to February 5, 1870," in W.L. Morton, ed., *Manitoba: The Birth of a Province* (Winnipeg: Manitoba Record Society Publications, 1984), 20.
93. Ibid.
94. Ibid., 21.
95. Morris, *The Treaties of Canada*, 101.
96. Ibid., 110-11. A comparison of Morris's presentation of the terms of surrender of the HBC claim to Rupert's Land before the Indians assembled at Qu'Appelle in September 1874 with the documentary evidence indicates that either the lieutenant governor was unaware of the actual terms or he knowingly misled the Indians.
97. Cited by Murray Dobbin, *The One-And-A-Half Men* (Vancouver: New Star Books, 1981), 89.
98. Douglas MacKay, *The Honourable Company*, 2nd ed. (Toronto: McClelland and Stewart, 1949), 349.
99. HBCA, A.12/L 77; A.86/1-11; and RG1, series 1. This figure is derived at from annual data between 1891-92 and 1930-31. It is based on balance statements showing net revenue, deposits to the capital reserves, and net profits.
100. NAC, RG 33/52, vol. 1, file 7. In fact more land was set aside as road allowances (997,244 acres) than for Indians.