

NATIVE CLAIMS IN RUPERT'S LAND
AND THE NORTH-WESTERN TERRITORY:
CANADA'S CONSTITUTIONAL OBLIGATIONS

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I. INTRODUCTION

The final step in the evolution of Canada from colony to sovereign and independent state was taken on April 17, 1982, with the signing of the *Constitution Act, 1982*.¹ While the consequences for Canadian society generally of patriation of the Constitution and inclusion of a *Charter of Rights and Freedoms* are not to be underestimated, the effect on the aboriginal peoples of Canada could be much greater. This is because these peoples are the original inhabitants of this country and as such they have special rights in Canadian law.² These rights originate in the common law doctrine of aboriginal title. They have been recognized by a variety of documents, including the *Royal Proclamation of 1763*,³ the treaties and the Natural Resources Transfer Agreements.⁴ One such document is the *Rupert's Land and North-Western Territory Order*⁵ (hereinafter referred to as the *Rupert's Land Order*), an Imperial Order in Council dated June 23, 1870, which transferred the two territories in question to Canada. That Order recognized the existence of aboriginal land claims in Rupert's Land and the North-Western Territory, and placed a constitutional obligation on the Canadian government to settle those claims. The purpose of this monograph is to examine the nature and extent of that obligation, and the potential effect on it of the *Constitution Act, 1982*.

¹ *Canada Act 1982*, c.11 (U.K.), Schedule B.

² See Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 *C.B.R.* 513.

³ R.S.C. 1970, App.II, No.1.

⁴ Between the government of Canada and the governments of Manitoba, Alberta and Saskatchewan. The three agreements were approved by the *Constitution Act, 1930* (formerly the *British North America Act, 1930*), 20 & 21 Geo. V, c.26 (U.K.) (R.S.C. 1970, App.II, No.25), and are contained in the schedule of that Act.

⁵ R.S.C. 1970, App.II, No.9.

II. HISTORICAL BACKGROUND

“Rupert’s Land” was the name given to the vast territory granted to the Hudson’s Bay Company by the Royal Charter of May 2, 1670.⁶ The Charter gave the Company proprietary rights, exclusive trading privileges, and limited governmental powers over

... all the Landes and Territoryes upon the Countryes Coastes and con-fynes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid [that is, “that lye within the entrance of the Streightes commonly called Hud-sons Streightes”] that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State. . . .⁷

Doubts have been raised with respect to the validity of this grant. For instance, the authority of Charles II to confer such extensive rights on a private trading company has been questioned. Furthermore, the extent of the territory covered by the vague wording of the Charter has never been determined. The Hudson’s Bay Company claimed in the nineteenth century that Rupert’s Land included the entire Hudson drainage basin, but this claim was never accepted by the Company’s rivals in the region. In a monograph entitled *Native Rights and the Boundaries of Rupert’s Land and the North-Western Territory*,⁸ the writer suggests a possible solution to this unresolved question. Briefly, that study concludes that any territory within the Hudson watershed that was possessed by France prior to the ces-sion of Canada to Great Britain in 1763 must be excluded from Rupert’s Land. Before the cession the Hudson’s Bay Company’s occupation of the territory had been largely confined to the coastline of Hudson Bay. The French, on the other hand, had penetrated the interior and established a number of fur-trading posts in what is now Western Canada, stretching from Lake Superior at least to the junction of the North and South Saskat-chewan rivers. An approach to the boundary question which takes French possession prior to 1763 into account would therefore eliminate a large area

⁶ The Charter is reproduced in E.E. Rich, ed., *Minutes of the Hudson’s Bay Com-pany 1671-1674*, vol.V of *Hudson’s Bay Company Series* (Toronto: The Champlain Society, 1942), pp.131-48, and Brian Slattery, *The Land Rights of In-digenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), pp.371-88.

⁷ Rich, *supra*, n.6, p.139; Slattery, *supra*, n.6, p.379.

⁸ Kent McNeil (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

of the Hudson watershed from Rupert’s Land. The remaining territory would nonetheless be extensive, embracing portions of present-day Quebec, Ontario, Manitoba, Saskatchewan, and possibly Alberta, as well as the eastern Northwest Territories.

After 1763 the Hudson’s Bay Company’s claim to the entire Hudson watershed was challenged vigorously by rival traders from Montreal, who combined in the 1780s to form the North-West Company. The violent com-petition ended in 1821 when the two companies settled their differences and were granted a joint trading license by the Imperial Crown embracing

... all such parts of North America to the northward and the westward of the lands and territories belonging to the United States of America as shall not form part of any of our provinces in North America, or of any lands or territories belonging to the said United States of America, or to any European government, state or power.⁹

This license apparently covered the British territory adjacent to Rupert’s Land which came to be known as the North-Western Territory.

In 1838 a new 21-year license¹⁰ covering the same territory was issued to the Hudson’s Bay Company, which in the meantime had acquired all the rights and interests of the North-West Company. When this license expired on May 30, 1859, the Hudson’s Bay Company continued to exercise jurisdiction in the North-West under the purported authority of the Charter up to 1869-70, at which time it surrendered its rights and privileges in Rupert’s Land back to the Crown. During the period from 1821 to 1870, challenges to the validity of the Charter and the Company’s interpretation of the extent of the grant nonetheless continued to be mounted, first by the Métis people of the Red River Settlement¹¹ and then by the province of Canada.¹² These issues remained unsettled in 1867 when the creation of the

⁹ *Parliamentary Papers, House of Commons* (U.K.), No.547 of 1842, p.22 (hereinafter cited as *P.P., H.C.*). The license was issued under the authority of *An Act for regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within certain Parts of North America* (1821), 1 & 2 Geo. IV, c.66 (U.K.).

¹⁰ Printed in *P.P., H.C.*, No.547 of 1842, p.9.

¹¹ Notably at the time of the trial of Pierre Guillaume Sayer by the Hudson’s Bay Company’s General Quarterly Court on a charge of trading furs without a license: see D. Gibson and L. Gibson, *Substantial Justice* (Winnipeg: Peguis Publishers, 1972), pp.115-7 and R.S.G. Stubbs, *Four Recorders of Rupert’s Land* (Winnipeg: Peguis Publishers, 1967), pp.26-30.

¹² At the time of and following the 1857 inquiry of the Select Committee of the House of Commons (U.K.) into the affairs of the Hudson’s Bay Company: see a May 6, 1857, letter and enclosed memorandum from Chief Justice Draper to Col-onial Secretary Labouchere, a paper relative to the Canadian Boundaries delivered to the British Select Committee by the Chief Justice on behalf of Canada on May 28, 1857, and the First Report of the Select Committee of the Canadian Legislature on the Rights of the Hudson’s Bay Company, dated June 8, 1857, reproduced as appendices 5, 6 and 8 of the British Select Committee’s Report (at pp.374, 378 and 385 respectively). The Report may be found in *P.P., H.C.*, Nos. 224, 260 of 1857, Sess. 2.

Dominion of Canada added a new dimension to the controversy.

Adjoining Rupert's Land is the equally ill-defined North-Western Territory.¹³ As far as can be determined, the term was officially employed for the first time, in pluralized form, in *An Act to make further Provision for the Regulation of the Trade with the Indians, and for the Administration of Justice in the North-Western Territories of America*,¹⁴ enacted by the British Parliament in 1859 on the expiry of the Hudson's Bay Company's exclusive trading license. The term "North-Western Territories" is not expressly defined in the Act. However, the preamble states that "it is expedient to make further Provision for the Administration of Justice in Criminal Cases in the said *Indian Territories*, and such other Parts as aforesaid of *America*." The phrases "said *Indian Territories*" and "other Parts as aforesaid of *America*" refer back to "the *Indian Territories* or Parts of *America* not within the Limits of either of the Provinces of *Lower* or *Upper Canada*, or of any Civil Government of the United States of *America*", which were affirmed by the preamble to be the territories included under the *Canada Jurisdiction Act* of 1803.¹⁵

If the matter rested there, the North-Western Territories (or Territory) would appear to embrace all of British North America to the north and west of the province of Canada, including Rupert's Land.¹⁶ However, section IV of the 1859 Act provides:

IV. Nothing herein contained shall extend to the Territories heretofore granted to the Company of Adventurers trading to *Hudson's Bay*; and nothing herein contained shall extend to the Colony of *British Columbia*, save as herein expressly provided, or to the Colony of *Vancouver's Island*.¹⁷

The North-Western Territories (or Territory) were therefore defined by exclusion — they embraced all British territory north of the United States and

¹³ Not to be confused with "The North-West Territories", the name which Canada gave to the combined territories of Rupert's Land and the North-Western Territory (minus the newly-created province of Manitoba) at the time of their admission into Canada in 1870: see *An Act for the Temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, S.C. 1869, c.3, s.1 (R.S.C. 1970, App.II, No.7).

¹⁴ 22 & 23 Vic., c.26 (U.K.)

¹⁵ *An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces*, 43 Geo. III, c.138 (U.K.). In 1821 a second *Jurisdiction Act* was passed, entitled *An Act for regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within certain Parts of North America*: *supra*, n.9. Section V of the 1821 Act provided that the *Jurisdiction Act* of 1803 "shall be deemed and construed, and it is . . . hereby respectively declared, to extend to and over, and to be in full force in and through all the Territories heretofore granted to the Company of Adventurers of *England* trading to *Hudson's Bay*."

¹⁶ See n.15, *supra*.

¹⁷ *Supra*, n.14.

north and west of Canada which was not part of Rupert's Land, British Columbia or Vancouver Island. This would appear to be the same territory over which the Hudson's Bay Company held its trading license from 1821 to 1859.

Interest in the annexation of the North-Western Territory and Rupert's Land by Canada, aroused in the 1850s, remained active as the British provinces in North America moved towards Confederation.¹⁸ The Quebec Resolutions, adopted by delegates from the provinces of Canada, Nova Scotia and New Brunswick, and the colonies of Newfoundland and Prince Edward Island, in October, 1864, made provision for admission of the "North-West Territory" into the Union.¹⁹ This provision was incorporated into section 146 of the *Constitution Act, 1867*²⁰ (formerly *The British North America Act, 1867*) which reads:

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

With the westward and northward pressure of American settlers creating a danger of the region being drawn into the United States, the transfer of Rupert's Land and the North-Western Territory to Canada was regarded as a top priority by the new Canadian government after Confederation.²¹

¹⁸ See A.S. Morton, *A History of the Canadian West to 1870-71*, 2nd ed. (Toronto: University of Toronto Press, 1973), pp.825-46.

¹⁹ Resolution 10, printed in Sir Joseph Pope, ed., *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Co. Ltd., 1895), p.40, and G.P. Browne, ed., *Documents on the Confederation of British North America* (Toronto/Montreal: McClelland and Stewart Ltd., 1969), p.155.

²⁰ 30 & 31 Vic., c.3 (U.K.) (R.S.C. 1970, App.II, No.5).

²¹ See a speech by Sir John A. Macdonald, *House of Commons Debates*, Dec. 9, 1867, pp.224-6.

III. EVENTS LEADING UP TO THE ADMISSION OF RUPERT'S LAND AND THE NORTH-WESTERN TERRITORY INTO CANADA

A number of resolutions forming the basis for an Address to Her Majesty were introduced into the House of Commons by William McDougall, Minister of Public Works, during the first session of the Canadian Parliament. On December 16 and 17, 1867, the House of Commons and Senate adopted an Address praying Her Majesty "to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government."²²

The Address was duly transmitted to Britain by the Governor General of Canada, Viscount Monck. The Colonial Secretary, the Duke of Buckingham and Chandos, replied as follows on April 23, 1868:

Her Majesty's Government will be willing to recommend a compliance with the prayer of the Address so soon as they shall be empowered to do so with a just regard to the rights and interests of Her Majesty's subjects interested in those territories. They are advised, however, that the requisite powers of Government and legislation cannot, consistently with the existing Charter of the *Hudson's Bay Company*, be transferred to *Canada* without an Act of Parliament.²³

Accordingly, the British Parliament enacted the *Rupert's Land Act, 1868*.²⁴ Section 3 of that Act empowered the Hudson's Bay Company to make, and Her Majesty to accept,

. . . a Surrender of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities whatsoever granted or purported to be granted by the said Letters Patent [the Charter of 1670] to the said Governor and Company within Rupert's Land, upon such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company. . . .

Section 5 of the Act empowered Her Majesty to admit Rupert's Land into Canada "by any such Order or Orders in Council as aforesaid, on Address

from the Houses of the Parliament of Canada", thus affirming the authority contained in section 146 of the *Constitution Act, 1867*.

By a despatch dated August 8, 1869, the Colonial Secretary informed the Governor General of Canada of his intention "to enter into negotiations with the Hudson's Bay Company as to the terms on which they will surrender their rights."²⁵ Canada appointed Sir George-Etienne Cartier and William McDougall as delegates to participate in the negotiation of the terms for the acquisition of Rupert's Land and also to arrange for the admission of the North-Western Territory into Canada.²⁶

Negotiations between the Canadian delegates and the Hudson's Bay Company failed to produce an agreement on the terms of the transfer of Rupert's Land.²⁷ Realizing that the two sides were unlikely to arrive at an amicable compromise on their own, Lord Granville, who had replaced the Duke of Buckingham and Chandos as Colonial Secretary, decided to impose a settlement.²⁸ If either party refused to accept his terms, Lord Granville warned that he would recommend that Her Majesty refer the question of their respective rights to the Judicial Committee of the Privy Council.²⁹

Lord Granville's terms, as modified by two subsequent memoranda dated March 22 and 29, 1869, respectively,³⁰ were conditionally accepted by Canada³¹ and the Hudson's Bay Company.³² On May 28, 1869, the House of Commons and Senate of Canada passed a series of resolutions relating to the admission of Rupert's Land and the North-Western Territory into the Dominion.³³ The terms for the transfer of Rupert's Land which had been agreed to were contained in the resolutions.

²⁵ Printed in *Sessional Papers* (Can.), No.25 of 1869, p.1, and *P.P., H.C.*, No.440 of 1868-9, p.13.

²⁶ By two orders in council dated October 1, 1868.

²⁷ The record of the negotiations is contained in the correspondence between the Colonial Office and the Canadian delegates and the Company, printed in *Sessional Papers* (Can.), No.25 of 1869, and *P.P., H.C.*, No.440 of 1868-9.

²⁸ In a March 9, 1869, letter from Sir Frederic Rogers, writing on behalf of Lord Granville, to Sir Stafford H. Northcote, Governor of the Hudson's Bay Company. Printed in *Sessional Papers* (Can.), No.25 of 1869, p.31, and *P.P., H.C.*, No.440 of 1868-9, p.40. The terms proposed by Lord Granville are reproduced in resolutions and an Address of the Canadian Parliament, dated May 28 and May 29 and 31, 1869, respectively (see text accompanying nn.33 and 34), which form Schedule B of the *Rupert's Land Order*, *supra*, n.5, pp.10-1, 14.

²⁹ In the same March 9, 1869, letter, *supra*, n.28.

³⁰ The memoranda are reproduced in the 1869 resolutions and Address (see n.28, *supra*): *Rupert's Land Order*, *supra*, n.5, pp.11-2, 14.

³¹ The report on the negotiations submitted by Cartier and McDougall on May 8, 1869, was approved by the Governor General in Council on May 14, 1869: *Sessional Papers* (Can.), No.25 of 1869, p.i.

³² The approval of the shareholders was communicated to Lord Granville in an April 10, 1869, letter from Sir Northcote, printed in *Sessional Papers* (Can.), No.25 of 1869, p.38, and *P.P., H.C.*, No.440 of 1868-9, p.47.

³³ Contained in Schedule B of the *Rupert's Land Order*, *supra*, n.5, pp.9-12.

²² The Address is annexed to the *Rupert's Land Order* as Schedule A: *supra*, n.5, pp.8-9.

²³ Printed in *Journals, House of Commons* (Can.), vol.I, 1867-8, p.367, and *P.P., H.C.*, No.440 of 1868-9, p.12.

²⁴ 31 & 32 Vic., c.105. (U.K.) (R.S.C. 1970, App.II, No.6).

On May 29 and 31, 1869, the House of Commons and Senate of Canada adopted a second Address to Her Majesty.³⁴ That Address asked Her Majesty

. . . to unite Rupert's Land on the terms and conditions expressed in the foregoing resolutions [of May 28, 1869], and also to unite the North-Western Territory with the Dominion of Canada as prayed for by and on the terms and conditions contained in our joint Address adopted during the first session of the first Parliament of this dominion [on December 16 and 17, 1867].

The Hudson's Bay Company executed a deed of surrender on November 19, 1869, relinquishing to Her Majesty "all the rights of Government, and other rights, privileges, liberties, franchises, powers, and authorities, granted or purported to be granted" to the Company under the 1670 Charter, and "all similar rights which may have been exercised or assumed by the . . . Company in any parts of British North America, not forming part of Rupert's Land or of Canada, or of British Columbia", as well as "all the lands and territories within Rupert's Land", on the agreed terms and conditions.³⁵ However, the transfer itself was delayed by the Riel Rebellion in the Red River Settlement. The deed of surrender was therefore not accepted by the Queen until June 22, 1870.³⁶ The following day the *Rupert's Land and North-Western Territory Order* was signed admitting the two territories into Canada as of July 15, 1870.

IV. TERMS AND CONDITIONS OF THE TRANSFER

It will be remembered that section 146 of the *Constitution Act, 1867*³⁷ provided for the admission of Rupert's Land and the North-Western Territory into Canada on such terms and conditions as might be expressed in an Address from the Houses of Parliament of Canada and as the Queen might think fit to approve. The Address adopted by the Parliament of Canada on December 16 and 17, 1867 (hereinafter referred to as the 1867 Address), set out a number of conditions for the transfer of the two territories, including the following:

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.³⁸

The Address adopted on May 29 and 31, 1869 (hereinafter referred to as the 1869 Address), repeated the request for the admission of the North-Western Territory on the terms and conditions contained in the 1867 Address.³⁹ Those terms and conditions were approved by Her Majesty,⁴⁰ and the request was granted by the *Rupert's Land Order* in the following terms:

[F]rom and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address [the 1867 Address]. . . .⁴¹

With regard to Rupert's Land, the 1869 Address requested its admission "on the terms and conditions expressed in the foregoing resolutions [of May 28, 1869]."⁴² Those resolutions⁴³ provided that Canada would accept the transfer of Rupert's Land on the terms agreed to by Canada and the Hudson's Bay Company. The memorandum of March 22, 1869, which

³⁴ *Ibid.* (Schedule B), pp.13-5.

³⁵ The deed of surrender is reproduced as Schedule C of the *Rupert's Land Order, ibid.*, pp.15-21.

³⁶ Her Majesty's acceptance of the surrender is noted in the preamble of the *Rupert's Land Order, ibid.*, p.4.

³⁷ *Supra*, n.20.

³⁸ *Rupert's Land Order* (Schedule A), *supra*, n.5, p.8.

³⁹ *Ibid.* (Schedule B), pp.14-5.

⁴⁰ Her Majesty's approval is indicated in the preamble of the *Rupert's Land Order, ibid.*, pp.2-3.

⁴¹ *Ibid.*, p.4.

⁴² *Ibid.* (Schedule B), p.14.

⁴³ See n.33, *supra*, and accompanying text.

forms part of the agreement reproduced in the resolutions, includes the following term:

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.⁴⁴

The resolutions also contain an undertaking

[t]hat upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.⁴⁵

Both this undertaking and term 8 of the March 22 memorandum are repeated in the 1869 Address.⁴⁶

The preamble to the *Rupert's Land Order* states that the terms and conditions expressed in the resolutions have been "approved of by Her Majesty."⁴⁷ The Order goes on to provide that

Rupert's Land shall from and after the said date [July 15, 1870] be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second Address [the 1869 Address] of the Parliament of Canada, and approved of by Her Majesty as aforesaid. . . .⁴⁸

The first 14 of the 15 terms which follow embody the agreement reached by Canada and the Hudson's Bay Company for the transfer of the territory.⁴⁹

⁴⁴ *Rupert's Land Order* (Schedule B), *supra*, n.5, p.11. This term also appears as clause 14 of the Hudson's Bay Company's deed of surrender: *Rupert's Land Order* (Schedule C), *supra*, n.5, p.18.

⁴⁵ *Ibid.* (Schedule B), p.12.

⁴⁶ *Ibid.* (Schedule B), p.14.

⁴⁷ *Ibid.*, p.2. According to section 3 of the *Rupert's Land Act*, *supra*, n.24, the surrender of the Hudson's Bay Company's rights "shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty." Since the surrender was accepted on June 22, 1870, the approval of the terms and conditions must have been given prior to that time.

⁴⁸ *Ibid.*, p.4. It will be observed that the *Rupert's Land Order* is somewhat inconsistent with regard to what Her Majesty approved. The preamble states that the terms and conditions expressed in the resolutions were "approved of by Her Majesty", whereas the order paragraph itself states that the terms and conditions embodied in the 1869 Address were "approved of by Her Majesty as aforesaid". However, since the terms and conditions in both the resolutions and the Address are the same, this discrepancy is probably of no significance.

⁴⁹ Term 15 is discussed *infra*: see n.54 and accompanying text.

Term 14 affirms Canada's obligation to settle Indian claims. It reads:

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.⁵⁰

On its face, then, the *Rupert's Land Order* is clear — the North-Western Territory was to be admitted on the terms and conditions expressed in the 1867 Address, and Rupert's Land was to be admitted on the terms and conditions enumerated in the Order itself. Although the 1867 Address was expressed as applying to both territories, it is suggested that it must be read subject to the 1869 Address and the Order in Council. On such an approach it would only apply to the North-Western Territory. It might nonetheless be argued that, since the terms and conditions in the 1867 Address were approved of by Her Majesty and were expressed as applying to both territories, there is at least a moral obligation on Canada to settle any Indian claims in Rupert's Land "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

Term 14 of the *Rupert's Land Order*, on the other hand, probably applies only to Rupert's Land. This term first appeared in the March 22, 1869, memorandum⁵¹ signed by the Canadian delegates to London and the Governor of the Hudson's Bay Company as part of the agreement for the transfer of Rupert's Land. The Company was obviously aware that the Indians inhabiting the territory could make claims and it wanted to be certain that it would be the responsibility of the Canadian government rather than the Company to settle those claims. It might be argued that, since the Company also surrendered any rights it may have exercised or assumed "in any parts of British North America, not forming part of Rupert's Land or of Canada, or of British Columbia",⁵² term 14 applies as well to those parts of the North-Western Territory where the Company had exercised jurisdiction. However, such an argument is difficult to support in view of the fact that the enumerated terms of the Order of Council, including term 14, are expressed as applying to Rupert's Land, and not to both territories.

A further question arises with regard to Canada's undertaking "to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."⁵³ This undertaking appears in both the resolutions (of May 28, 1869) and the 1869 Address immediately prior to a request that the Governor in Council be empowered to arrange any details that may be necessary to carry out the terms and conditions of the agreement with the Hudson's Bay Company. That request was

⁵⁰ *Rupert's Land Order*, *supra*, n.5, pp.6-7.

⁵¹ *Supra*, n.30.

⁵² *Rupert's Land Order* (Schedule C), *supra*, n.5, p.18.

⁵³ *Ibid.* (Schedule B), pp.12, 14.

granted by Her Majesty as term 15 of the terms and conditions enumerated in the Order in Council.⁵⁴ The undertaking to protect the Indian tribes, on the other hand, is not contained in the Order. It is therefore possible that Her Majesty did not think fit to approve the undertaking under the discretionary power granted to Her by section 146 of the *Constitution Act, 1867*.

It has already been pointed out, on the other hand, that the preamble of the *Rupert's Land Order* states that the terms and conditions expressed in the resolutions (and therefore in the 1869 Address) were approved of by Her Majesty. If there were exceptions, it is odd that no mention was made of that fact. It cannot be contended that only the terms and conditions enumerated in the Order were approved because the first term embodied in the 1869 Address, requiring that the Hudson's Bay Company surrender all its rights in Rupert's Land, is not enumerated in the Order. The omission of that term, however, is obviously due to the fact that it had already been performed. The failure to include the protection clause cannot be explained in the same way.

What effect would the undertaking to protect the Indian tribes have if it had in fact been approved by Her Majesty, although omitted, for whatever reason, from the Order in Council? There is no requirement in section 146 that the terms and conditions be actually contained in the Order. If the undertaking was approved, as the Order seems to suggest, then arguably it is binding regardless of its omission from the enumerated terms and conditions. That omission might be explained by the fact that the enumerated terms apply only to the admission of Rupert's Land. In effect, they embody the agreement with the Hudson's Bay Company and empower the Governor in Council to carry out that agreement, and nothing more. It would therefore have been inappropriate, on this argument, to include the protection clause, which was to apply to both territories, in the enumerated terms.

If, on the other hand, the undertaking to make adequate provision for the protection of the Indian tribes was not approved, and therefore not a term or condition of the transfer of the two territories, it has no legal effect. As a resolution of the Senate and House of Commons, the undertaking is no more than an expression of opinion by Parliament.⁵⁵ It might nonetheless be argued that the resolution did create a moral obligation. At the very least, it is evidence of Parliament's view of the extent of its responsibility to the Indian tribes inhabiting the two territories.

⁵⁴ *Ibid.*, p.7. Term 15 is the only enumerated term which does not appear in the agreement with the Hudson's Bay Company.

⁵⁵ John B. Stewart, *The Canadian House of Commons* (Montreal and London: McGill-Queen's University Press, 1977), p.36. See also *Beauchesne's Rules and Forms of the House of Commons of Canada*, 5th ed. (Toronto: Carswell Company Limited, 1978), p.150.

V. INTERPRETATION OF THE TERMS AND CONDITIONS

A. The 1867 Address and the "Equitable Principles" Condition

We have seen that the North-Western Territory, if not Rupert's Land, was admitted into Canada on the condition that, among other things,

... 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.⁵⁶

Since this condition was to come into effect upon the transfer of the territory "to the Canadian Government", it is probable that the obligation to settle Indian claims was placed on the executive branch of the federal government, acting for and in the name of the Queen.⁵⁷ What, then, is the extent of the obligation?

In the first place, the government is to consider and settle the claims "of the Indian tribes". The term "Indian tribes" is not defined, but since the Address was adopted in 1867, the same year the *Constitution Act, 1867* was enacted, it is probably safe to assume that the term was employed in the same sense as the term "Indians", which appears in section 91(24) of that Act.⁵⁸ The word "tribes" was likely included to indicate that the claims were to be presented on a collective rather than on an individual basis. It is therefore suggested that the use of this word should not be regarded as excluding Indian groups which were not organized in tribal societies.

⁵⁶ *Rupert's Land Order* (Schedule A), *supra*, n.5, p.8.

⁵⁷ In *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 the English Court of Appeal held (*per* Lords Denning and May) that the development of the Commonwealth led to a division of the once indivisible Crown. As a result, any obligations to the Indian peoples are now the responsibility of the Crown in the right of Canada rather than the Crown in the right of the United Kingdom. Thus, although the original obligation to settle Indian claims may have been placed on the Canadian government acting on behalf of the *Imperial* Crown, that obligation is now an entirely Canadian affair. (On March 11, 1982, the House of Lords refused to hear an appeal from this decision.)

⁵⁸ Section 91(24) gives Parliament jurisdiction over "Indians, and Lands reserved for the Indians": *supra*, n.20.

The question of whether the term "Indians", as used in section 91(24), includes the Inuit people was considered by the Supreme Court of Canada in *Reference Re Term "Indians"*.⁵⁹ Referring to the appendices of the 1857 Report of the Select Committee of the British House of Commons on the Affairs of the Hudson's Bay Company,⁶⁰ where a census and map of the Indian populations, prepared by the Company, appears, Chief Justice Duff stated:

It is indisputable that in the census and in the map the "esquimaux" fall under the general designation "Indians" and that, indeed, in these documents, "Indians" is used as synonymous with "aborigines".⁶¹

He went on to observe:

It appears to me to be a consideration of great weight in determining the meaning of the word "Indians" in the *British North America Act* [now the *Constitution Act, 1867*] that, as we have seen, the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Company.⁶²

It is suggested that these statements, and the Supreme Court's conclusion that the term "Indians" includes "Eskimos", apply equally to the term "Indian tribes" as used in the 1867 Address.⁶³

Whether the term "Indian tribes" also includes the Métis people is a more difficult question.⁶⁴ The right of the Métis to a share of the Indian title to lands in the original province of Manitoba, which was created out of Rupert's Land and the North-Western Territory in 1870,⁶⁵ was expressly recognized by the *Manitoba Act, 1870*,⁶⁶ enacted by the Parliament of Canada and confirmed by the Imperial Parliament in the *Constitution Act, 1871*⁶⁷ (formerly *The British North America Act, 1871*). Section 31 of the *Manitoba Act* provides that, "towards the extinguishment of the Indian Title to the lands in the Province", 1,400,000 acres of land in Manitoba shall be set aside "for the benefit of the families of the half-breed residents". In

⁵⁹ [1939] S.C.R. 104 (*sub nom. Re Eskimos*).

⁶⁰ See n.12, *supra*.

⁶¹ *Supra*, n.59, p.107.

⁶² *Ibid.*, p.109.

⁶³ See also *Sigereak E1-53 v. The Queen* (1966), 57 D.L.R. (2d) 536, where the Supreme Court, on the basis of *Reference Re Term "Indians"*, *supra*, n.59, held that the term "Indians" as used in the *Royal Proclamation of 1763*, *supra*, n.3, includes "Eskimos".

⁶⁴ It should be noted that the Métis were listed separately from the Indians in the census referred to by the Supreme Court in *Reference Re Term "Indians"*, *supra*, n.59. In that document they were included under the heading "Whites and Half-breeds in the Hudson's Bay Territory".

⁶⁵ *Manitoba Act, 1870*, S.C. 1870, c.3, s.1 (R.S.C. 1970, App.II, No.8). For a discussion of the issue of the location of the boundary between Rupert's Land and the North-Western Territory in the original province of Manitoba see McNeil, *supra*, n.8.

⁶⁶ *Supra*, n.65.

⁶⁷ 34 & 35 Vic., c.28 (U.K.) (R.S.C. 1970, App.II, No.11).

the remaining portions of Rupert's Land and the North-Western Territory, which were organized as the North-West Territories after the transfer,⁶⁸ Métis claims were recognized by the Canadian Parliament in section 125.e of the *Dominion Lands Act, 1879*,⁶⁹ which provides:

125. The following powers are hereby delegated to the Governor in Council:—

e. To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions, as may be deemed expedient.

It is highly debatable whether section 31 of the *Manitoba Act* and section 125.e of the *Dominion Lands Act*, as implemented, extinguished Métis land claims in the transferred territories. It is well known that the scrip system, adopted by the Canadian government to facilitate the distribution of Métis lands, was abused and that only a small percentage of the Métis ended up with the land to which they were entitled. An examination of this complex question is well beyond the scope of this paper. The provisions are nonetheless significant for our purpose in that they recognized the existence of Métis claims on the basis of Indian title. With regard to the *Manitoba Act*, this recognition came just six weeks before the issuance of the *Rupert's Land Order* imposing the "equitable principles" condition on the Canadian government. Arguably, therefore, the phrase "claims of the Indian tribes" in that condition includes Métis claims. As suggested above, the fact that many Métis were not organized as "tribes" should not prevent the condition from applying to their claims.

Additional support for including Métis claims under the "equitable principles" condition may be found by once again drawing a parallel between the "Indian tribes" mentioned in that condition and the "Indians" referred to in section 91(24) of the *Constitution Act, 1867*.⁷⁰ It is suggested that the term "Indians" in section 91(24) must include Métis because in Western Canada some persons of Métis ancestry who were living with the Indians were brought under the treaties.⁷¹ Those people thereby became

⁶⁸ See n.13, *supra*.

⁶⁹ S.C. 1879, c.31.

⁷⁰ *Supra*, n.58.

⁷¹ See the report of Indian Commissioner Wemyss M. Simpson on Treaties 1 and 2, dated Nov. 3, 1871, reproduced in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clark & Co., 1880), pp.37-43, at p.41 (see also pp.222, 228, 294-5). Some Métis were apparently included in the Robinson Treaties (1850) as well: see the report of W.B. Robinson, dated Sept. 24, 1850, reproduced in Morris, pp.17-21, at p.19. See also D.E. Sanders, "The Bill of Rights and Indian Status" (1972), 7 *U.B.C. Law Rev.* No.1, 81, at p.87.

“treaty Indians”, and were included in the definition of “Indians” in the various Indian Acts passed by the Parliament of Canada. In *Regina v. Mellon*⁷² Mr. Justice Rouleau held that a “half-breed” who “took treaty” was an “Indian” within the meaning of the *Indian Act*, 1886.⁷³ His judgment was based on the decision of the North-West Territories Supreme Court *en banc* in *The Queen v. Howson*,⁷⁴ where it was held that a “half-breed” whose mother was Indian and whose father was non-Indian was an “Indian” within the definition of that term in section 2(h) of the 1886 *Indian Act*.⁷⁵ Since the *Mellon* and *Howson* cases were both decided in the North-West Territories, which were under the exclusive legislative jurisdiction of Parliament, no question could have arisen with regard to the competence of Parliament to enact special laws for “half-breeds”. This constitutional issue was not even mentioned in those cases. However, in delivering the judgment of the Court in *Howson* Mr. Justice Wetmore stated:

It is to be borne in mind that this Act is not only applicable to the Indians in the North-West, but it is also applicable to Indians throughout the whole of Canada.⁷⁶

The decision therefore does not appear to have been based on the fact that the case arose in the Territories. The competence of Parliament to legislate for persons of Métis ancestry throughout Canada was not questioned.

The view that section 91(24) of the *Constitution Act, 1867* empowers Parliament to legislate for persons of Métis ancestry is supported by *R. v. Verdi*,⁷⁷ a decision of the Nova Scotia Country Court. As in the *Mellon* and *Howson* cases, a question arose as to whether a “half-breed” is an “Indian” within the meaning of the *Indian Act*, in this case the *Indian Act* of 1906.⁷⁸ Unlike those cases, however, *R. v. Verdi* arose within the territorial jurisdiction of a province. Mr. Justice Wallace concluded that “to be within the terms of the statute [the *Indian Act*] it is not necessary that the person should be of full Indian blood.”⁷⁹ Although the constitutional question of whether Parliament has the authority to make Métis persons subject to the *Indian Act* was not discussed, the clear implication of the decision is that the term “Indians”, as used in section 91(24) of the *Constitution Act, 1867*, includes at least some persons of Métis ancestry. This is because the

1906 *Indian Act*, like its predecessors, was enacted under the authority of section 91(24). If the term “Indians”, as used in that section, does not include persons of Métis ancestry, then the 1906 *Indian Act* would have been unconstitutional to the extent that it purported to apply to such persons.⁸⁰ The same reasoning would apply to the preceding and succeeding Indian Acts, including the Act presently in force.⁸¹ If we assume that the various Indian Acts are constitutional to the extent that they include Métis persons,⁸² then the term “Indians” as used in section 91(24) of the *Constitutional Act, 1867* must also include Métis.

The interpretation of the term “Indians” in section 91(24) was dealt with directly in a recent judgment of Mr. Justice Ayotte in *R. v. Rocher*.⁸³ With respect to the validity of a regulation made pursuant to the federal *Fisheries Act*⁸⁴ exempting Indians, Inuit and persons of mixed blood (defined as persons having at least one-quarter Indian or Inuk blood) from a requirement to obtain a licence to fish for food, Ayotte, J., held that the regulation is legislation in respect of “Indians”, as that term is used in section 91(24) of the *British North America Act, 1867* (now the *Constitution Act, 1867*), and therefore constitutionally valid. His decision was based on the conclusion that “the term ‘Indian’ [in section 91(24)] does include those

⁷² (1900), 5 Terr. L.R. 301.

⁷³ R.S.C. 1886, c.43.

⁷⁴ (1894), 1 Terr.L.R. 492.

⁷⁵ *Supra*, n.73. Section 2(h) provides: “The expression ‘Indian’ means — *First*. Any male person of Indian blood reputed to belong to a particular band; *Secondly*. Any child of such person; *Thirdly*. Any woman who is or was lawfully married to such person.”

⁷⁶ *Supra*, n.74, at p.494.

⁷⁷ (1914), 23 C.C.C. 47.

⁷⁸ R.S.C. 1906, c.81. The definition of “Indian” contained in section 2(f) is identical to the definition of that term in the 1886 *Indian Act*, *supra*, n.75.

⁷⁹ *Supra*, n.77, p.49.

⁸⁰ Kenneth Lysyk, in “The Unique Constitutional Position of the Canadian Indian”, *supra*, n.2, wrote at p.515, n.5, in reference to the term “Indians” in section 91(24): “It is clearly not open either to Parliament or to a Legislature to control the definition of terms in *The British North America Act* . . . by defining the same term in a particular way in a particular statute.” However, Ritchie, J., speaking for four out of nine Supreme Court of Canada justices (Pigeon, J., agreed “in the result” with Ritchie, J.) in *Attorney-General of Canada v. Lavell* (1973), 38 D.L.R. (3d) 481, stated at p.496: “It was, of course, necessary for Parliament, in the exercise of s.91(24) authority, to first define what Indian meant . . .” (see also p.490). With respect, it is suggested that Parliament, for the purposes of its legislation, can define Indians in a manner which is more restrictive than section 91(24), as illustrated by the exclusion of Inuit from the application of the *Indian Act*, R.S.C. 1970, c.I-6; however, it would be unconstitutional for Parliament to attempt to extend its jurisdiction by giving the term “Indians” a more expansive definition than can reasonably be assigned to it under section 91(24).

⁸¹ R.S.C. 1970, c.I-6. Although section 12(1)(a)(i) and (ii) exclude persons who have received “half-breed lands or money scrip” and their descendants from registration as Indians, persons of Métis ancestry who are not excluded by those subsections or the other provisions of section 12 and who fall within the section 11 definition of persons entitled to be registered are Indians under the Act: see *In re Wilson* (1954), 12 W.W.R. (N.S.) 676 (Alta. D.C.); *Re Joseph Poitras* (1956), 20 W.W.R. (N.S.) 545 (Sask. D.C.); *Re Samson Indian Band* (1959), 21 W.W.R. (N.S.) 455 (Alta. D.C.).

⁸² See Sanders, *supra*, n.71, pp.96-7.

⁸³ March, 1982, N.W.T.T.C., as yet unreported.

⁸⁴ R.S.C. 1970, c.F-14.

people encompassed by the definition ‘persons of mixed blood’ as it appears in these Regulations.”⁸⁵

It is therefore concluded that the term “Indians” as used in section 91(24) of the *Constitution Act, 1867* includes persons of Métis ancestry. This conclusion, if correct, strengthens the argument that the term “Indian tribes” in the “equitable principles” condition also includes Métis.

The claims of Indian tribes to be considered and settled by the Canadian government are “to compensation for lands required for purposes of settlement.” One definition of the term “settlement” given by *The Oxford English Dictionary* is as follows:

The act of settling as colonists or new-comers; the act of peopling or colonizing a new country, or of planting a colony.⁸⁶

The same dictionary defines “settle”, in one sense, as:

To cause to take up one’s residence in a place; *esp.* to establish (a body of persons) as residents in a town or country; to plant (a colony . . .). . . . To furnish (a place) with inhabitants or settlers.⁸⁷

The use of the term “settlement” therefore implies that the lands would have to be actually required for the purpose of inhabitation by settlers. Apparently no claims to compensation for lands not required for settlement were envisaged because it must have been assumed that those lands would be left in the possession of the Indian tribes. It might even be contended that the condition limited the Canadian government’s authority to negotiate surrenders of Indian lands to lands actually required for settlement.

An examination of the terms of the eleven “numbered” treaties which were signed in Rupert’s Land and the North-Western Territory after 1870 throws some light on the Canadian government’s interpretation of the term “settlement”. Treaties No.1 and No.2, signed in 1871, state that “it is the desire of Her Majesty to open up to settlement and immigration” the tracts of country which the Indians agreed to surrender.⁸⁸ The government’s purpose in entering into these treaties would therefore appear to be consistent

with our interpretation of the term “settlement” in the 1867 Address. The stated purpose for negotiating Treaty No.3 (1873), however, was to open up the country “for settlement, immigration, *and such other purposes as to her Majesty may seem meet*” (emphasis added).⁸⁹ Treaty No.4 (1874) added “trade” to this list.⁹⁰ Treaties No.8 to No.11 include “travel, mining, [and] lumbering” as well among Her Majesty’s reasons for desiring a treaty.⁹¹ Furthermore, starting with Treaty No.3 the right of the Indian signatories to hunt and fish throughout the surrendered lands was guaranteed,

. . . saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.⁹²

It is apparent that from 1873 on the government regarded the need for lands for the purposes of settlement as only one reason for considering and settling Indian claims. Furthermore, the manner in which the term “settlement” was used in the treaties indicates that the government did not view the term as including lumbering, mining, trade, travel and other purposes beyond that of simply populating the country with settlers. It is suggested that the government’s restricted use of the term in the treaties supports a narrow interpretation of the term as used in the “equitable principles” condition of the 1867 Address. If that condition limits the Canadian government’s authority to negotiating surrenders of Indian lands actually required for settlement, then the validity of surrenders for other purposes may be open to question.

In addition to placing an obligation on the Canadian government to settle Indian claims, the 1867 Address also lays down a standard which the government must adhere to. It requires that those claims “be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.”

The first matter to be considered in this respect is whether the term “aborigines” was meant to include aboriginal peoples throughout the British Empire or solely in North America. It will be remembered that Chief

⁸⁵ *Supra*, n.83, p.13. Ayotte, J., relied on an article by Clem Chartier, “‘Indian’: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867” (1978-79), 43 *Sask. Law Rev.* 37, where, after a lengthy examination of the issue, the author concluded that the term “Indians” in section 91(24) includes Métis. Ayotte, J., also considered *R. v. Laprise*, [1978] 6 W.W.R. 85, [1978] 4 C.N.L.B. 118 (Sask. C.A.), and *R. v. Budd*; *R. v. Crane*, [1979] 6 W.W.R. 450, [1981] 4 C.N.L.R. 120 (Sask. Q.B.), which both held that the term “Indians” as used in paragraph 12 of the Natural Resources Transfer Agreement with Saskatchewan, confirmed by the *Constitution Act, 1930*, *supra*, n.4, does not include persons of Indian or Métis ancestry who are not entitled to be registered under the *Indian Act*. (For a case comment on the Sask. Q.B. decision in *R. v. Laprise*, which was upheld by the Sask. C.A., see A.J. Jordan, “Who is an Indian?”, [1977] 1 C.N.L.B. 22).

⁸⁶ (Oxford University Press, 1933), vol.IX, p.560.

⁸⁷ *Ibid.*, p.556.

⁸⁸ Morris, *supra*, n.71, pp.313, 317.

⁸⁹ *Ibid.*, p.321.

⁹⁰ *Ibid.*, p.330.

⁹¹ Treaty No.8, 1899 (1966 reprint, p.11); Treaty No.9, 1905-6 (1964 reprint, p.19); Treaty No.10, 1906-7 (1966 reprint, p.10); Treaty No.11, 1921 (1957 reprint, p.5): (Ottawa: Queen’s Printer).

⁹² Treaty No.3 (Morris, *supra*, n.71, p.323). Treaties No.4 to 11 contain a similar provision (Nos.4 and 7 omit tracts taken up for lumbering from the excepted lands; Nos.7 to 11 add tracts taken up for trading). In *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.) Turgeon, J.A., in considering this provision in Treaty No.6 (which is identical to the quoted provision from Treaty No.3), refused to apply the *ejusdem generis* rule to the words “settlement, mining, lumbering or other purposes”. Since the meaning of the words “other purposes” is not restricted by the words “settlement, mining, [and] lumbering”, he held that other purposes include game preserves.

Justice Duff pointed out in *Reference Re Term "Indians"*⁹³ that the Hudson's Bay Company's census and map of the Indian populations used the terms "Indians" and "aborigines" synonymously.⁹⁴ It is therefore suggested that the term be interpreted as applying only to North American Indians. This interpretation is supported by the use of the article "the" before "aborigines", which suggests a particular group rather than aborigines in general. Furthermore, since the Address was drafted and adopted in Canada, it is probable that the intention was to abide by the principles which had been applied in the North American colonies.

What then is the standard to be followed in settling Indian claims? In referring to "the equitable principles which have uniformly governed the British Crown", it is submitted that the condition imposes a two-fold standard — first, the principles must have "uniformly" governed past dealings, and second, they must be "equitable".

It is beyond the scope of this paper to undertake a historical examination of British dealings with the Indians to determine what principles were uniformly applied.⁹⁵ Mention should be made, however, of the *Royal Proclamation of 1763*⁹⁶ which, among other things, reserved certain lands for the Indians and prohibited private purchases of Indian lands. Purchases of such lands could only be made by the Crown "at some public Meeting or Assembly of the . . . Indians." It is suggested that the Proclamation, which is an express and unrepudiated statement of the policy of the British Crown,⁹⁷ may be regarded as establishing principles which were to uniformly govern the Crown's dealings with the Indians. Arguably, therefore, the requirement in the 1867 Address that Indian claims be settled in accordance with the equitable principles which have uniformly governed the British Crown

⁹³ *Supra*, n.59.

⁹⁴ See text accompanying n.61, *supra*.

⁹⁵ British dealings with the Indians prior to 1763 are examined in Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Indian and Northern Affairs, Research Branch, 1981). See also Slattery, *supra*, n.6.

⁹⁶ *Supra*, n.3. Consideration might also be given to pre-confederation treaties and the policies adopted with regard to Indian affairs in the Maritimes and Upper and Lower Canada prior to 1867. Instructions from the Imperial government to the Hudson's Bay Company concerning relations with the Indians would also be relevant.

⁹⁷ The *Royal Proclamation* has been held to have the force of an Imperial statute: *The King v. Lady McMaster*, [1926] Ex.C.R. 68 at p.72; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 *per* Hall, J., at p.394; *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.S.C., App. Div.) *per* MacKeigan, C.J.N.S., at p.478. See also *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, *supra*, n.57, where Lord Denning held at p.93 that the Proclamation was "an unwritten provision" of *The British North America Act, 1867* (now the *Constitution Act, 1867*). It should also be noted that the Proclamation is expressly mentioned in section 25 of the *Constitution Act, 1982* as having recognized rights and freedoms of the aboriginal peoples of Canada (see part VII of this monograph).

would cause the procedure outlined in the *Royal Proclamation* for the surrender of Indian lands to apply to the North-Western Territory, whether or not that territory fell within the geographical scope of the Proclamation.⁹⁸

Since the principles which the Canadian government is required to follow in settling Indian claims must also be "equitable", that term requires interpretation. The *Oxford English Dictionary* defines "equitable" as follows:

1. Characterized by equity or fairness. a. of actions, arrangements, decisions, etc.: That is in accordance with equity: fair, just, reasonable. . . .
2. Pertaining to the department of jurisprudence called EQUITY. Of rights, claims, etc.: Valid in "equity" as distinguished from "law".⁹⁹

It cannot have been the intention that Indian claims be settled in accordance with the legal principles of equity. Those principles, developed as they were to correct some of the injustice which could result from a rigid application of the common law, do not provide any guidelines for dealing with claims of this kind. It is therefore suggested that the term "equitable" must have been used in a non-legal sense to mean "fair, just, reasonable".

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. In determining whether the condition was met when the treaties with the Indians in the North-Western Territory were made, it is therefore appropriate to examine not only the process whereby the treaties were negotiated and signed, but also the terms of the treaties themselves for justice and fairness. Such an examination, while beyond the scope of this paper, may serve as a basis for questioning the validity of particular treaties, either in whole or in part.

B. Term 14 of the Rupert's Land Order

It will be remembered that the 1870 Order in Council, among other things, admitted Rupert's Land into Canada on the following condition:

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.¹⁰⁰

⁹⁸ With regard to the territorial application of the Proclamation, see Slattery, *supra*, n.6, pp.221-7, 244-60, 268-82; Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1973-74), 38 *Sask. Law Rev.* 123; Jack Stagg, *supra*, n.95, pp.382-91. See also *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, *supra*, n.57, *per* Lords Denning and May at pp.92 and 116 respectively.

⁹⁹ *Supra*, n.86, vol.III, p.261.

¹⁰⁰ *Rupert's Land Order*, *supra*, n.5, pp.6-7.

Whereas the “equitable principles” condition contained in the 1867 Address provides that Indian claims be “considered and settled”, term 14 requires that those claims be “disposed of” by the Canadian government. While these words might be interpreted as empowering the government to deal with Indian claims in any way it saw fit, it is suggested that a more restrictive interpretation is appropriate. The *Oxford English Dictionary* defines “dispose of” in part as:

. . . to deal with (a thing) definitely; to get rid of; to get done with, *settle*, finish. . . .¹⁰¹ (emphasis added)

It is therefore possible to interpret the words “shall be disposed of” as imposing an obligation on the Canadian government to negotiate a settlement of Indian claims. We have seen that the policy of the British Crown, as set out in the *Royal Proclamation of 1763*, was to recognize and respect Indian title in the absence of a voluntary surrender of that title to the Crown. It is unlikely that, by employing the words “shall be disposed of” in term 14, the Crown intended to abandon that policy and empower the Canadian government to deal with Indian claims in Rupert's Land in any way it saw fit.¹⁰² It is therefore concluded that the obligation placed on the Canadian government by term 14 was to settle Indian claims in consultation with the Indian claimants.

As in the case of the “equitable principles” condition, the obligation imposed by term 14 is to settle claims “for lands required for purposes of settlement.” The above analysis of that phrase¹⁰³ therefore applies equally to term 14. It is noteworthy, however, that term 14 refers to “claims of Indians”, whereas the “equitable principles” condition refers to “claims of the Indian tribes”. It is suggested that the two phrases were used synonymously and that both should be broadly interpreted, as discussed above. In fact, the use of the word “Indians” in term 14 makes a broad interpretation based on the parallel with section 91(24) of the *Constitution Act, 1867* even more compelling.¹⁰⁴

The major difference between the “equitable principles” condition and term 14 is that the former lays down a standard for settling Indian claims whereas the latter includes a requirement that claims be disposed of “in communication with the Imperial Government”. The degree of participation required of the Imperial government by term 14 is left uncertain. It may have been necessary for that government to actually take part in the

¹⁰¹ *Supra*, n.86, vol.III, p.492.

¹⁰² Although the Supreme Court of Canada held in *Sigereak EI-53 v. The Queen*, *supra*, n.63, that the *Royal Proclamation* does not apply to Rupert's Land, some legal scholars question that sweeping conclusion: see Slattery, *supra*, n.6, esp. pp.210-2, and Narvey, *supra*, n.98, esp. pp.228-31. See also *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, *supra*, n.57, per Lord Denning at p.92.

¹⁰³ See part V.A of this monograph.

¹⁰⁴ See n.58, *supra*, and accompanying text.

negotiations. On the other hand, Imperial ratification of an agreement which had already been reached may have been sufficient. In any case, it is submitted that some form of communication with the Imperial government was a condition precedent to the final disposition of any claim. The requirement would have been of no value whatever if nothing more than informing Britain of land claims settlements after the fact were involved.

The requirement of communication with the Imperial government must have been included to provide a degree of protection to the Indians whose claims were to be settled. Some indication of the expectations of that government with respect to Canada's obligations to the Indian tribes may be found in an April 10, 1869, despatch from Lord Granville, the Colonial Secretary, informing the Governor General of Canada of the Hudson's Bay Company's acceptance of the agreement for the transfer of Rupert's Land. After referring to the relations between the Company and the Indians, Lord Granville states:

I am sure that your Government will not forget the care which is due to those [the Indian tribes] 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.¹⁰⁵

Although this question was in his mind at the time he proposed his terms of agreement to the Hudson's Bay Company and the Canadian delegates,¹⁰⁶ he writes, he did not allude to it at that time

. . . because I felt the difficulty of insisting on any definite conditions without the possibility of foreseeing the circumstances under which these 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. 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 civilised man. I am sure that they will not do 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.¹⁰⁷

It will be remembered that the requirement that Indian claims be settled in communication with the Imperial government was added to Lord Granville's terms by the memorandum signed by the Canadian delegates to London and the Governor of the Hudson's Bay Company on March 22, 1869.¹⁰⁸ Although that requirement is not referred to in the April 10, 1869, despatch,

¹⁰⁵ *P.P., H.C.*, No.440 of 1868-9, p.14; *Sessional Papers* (Can.), No.25 of 1869, p.38.

¹⁰⁶ In Sir Frederic Rogers' letter of March 9, 1869, *supra*, n.28.

¹⁰⁷ *Supra*, n.105.

¹⁰⁸ See n.44, *supra*, and accompanying text.

it is suggested that its inclusion in the agreement provided a means for ensuring that the expectations of the Imperial government would be met.

An argument can be made that failure to comply with the requirement of communication with the Imperial government does not render land claim settlements made in the absence of such communication invalid. This argument is based on the distinction in law between imperative (or mandatory) and directory statutory provisions. Although both are obligatory, only non-compliance with the former results in invalidity. Classifying a given provision as either imperative or directory, however, is no easy matter. In this regard, the following approach was suggested by Lord Penzance in *Howard v. Bodington*:¹⁰⁹

I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.¹¹⁰

Other cases emphasize the necessity of “weighing the consequences of holding a statute to be directory or imperative”¹¹¹ and of considering the “general inconvenience, or injustice”¹¹² that would result if acts done in breach of a provision were held to be invalid.¹¹³ Practical considerations of this kind, however, appear to be applied more readily to statutes creating public duties than to statutes conferring private rights.¹¹⁴ Statutory provisions of the latter category, including, it may be argued, the requirement that Indian claims be settled in communication with the Imperial government, tend to be imperative.¹¹⁵

In spite of the difficulties presented by classification, it appears certain that a statutory provision which imposes a condition precedent must be categorized as imperative. In *Border Cities Press Club v. Attorney-General of Ontario*,¹¹⁶ Chief Justice Pickup of the Ontario Court of Appeal stated that

. . . a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.¹¹⁷

¹⁰⁹ (1877), 1 P.D. 203.

¹¹⁰ *Ibid.*, p.211.

¹¹¹ *Caldow v. Pixell* (1877), 2 C.P.D. 562, at p.566.

¹¹² *Montreal Street Railway Company v. Normandin*, [1971] A.C. 170, at p.175.

¹¹³ See also *Bilodeau v. Attorney General of Manitoba*, [1981] 5 W.W.R. 393, where the Manitoba C.A. held that the provision in section 23 of the *Manitoba Act, 1870*, *supra*, n.65, that the statutes of the Manitoba legislature be printed in both English and French is directory rather than imperative.

¹¹⁴ *Montreal Street Railway Company v. Normandin*, *supra*, n.112, p.175.

¹¹⁵ *Caldow v. Pixell*, *supra*, n.111, p.566.

¹¹⁶ [1955] 1 D.L.R. 404.

¹¹⁷ *Ibid.*, p.412.

That statement was quoted with approval by Mr. Justice Estey in delivering the judgment of the Supreme Court of Canada in *The Inuit Tapirisat of Canada and National Anti-Poverty Organization v. Attorney-General of Canada*.¹¹⁸ On this issue Mr. Justice Estey observed:

[T]he mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity.¹¹⁹

If we are correct in concluding that some form of communication with the Imperial government was a condition precedent to the settlement of Indian claims in Rupert's Land, then the validity of treaties that were signed in that territory in the absence of such communication would be open to challenge.

C. Canada's Duty to Protect the Indian Tribes

The resolutions of May 28, 1869, and the 1869 Address, as we have seen,¹²⁰ also contain an undertaking that

. . . upon the transference of the territories in question to the Canadian Government it will be our duty [or “the duty of the Government”, according to the resolutions] to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer. . . .¹²¹ (Quoted from the Address)

Although this duty may not be enforceable in law, at the very least it is a moral commitment by Canada to the Indian inhabitants of Rupert's Land and the North-Western Territory.

What then is the meaning of the term “protection”? It is suggested that a broad interpretation is appropriate in view of the reference to the “interests and well-being” of the Indian tribes. Those terms envisage something more than mere physical protection. Furthermore, it is significant that Canada's intention at the time was to populate the arable regions of the transferred territories with non-Indian settlers as quickly as possible. The history of Western Canada in the second half of the nineteenth century shows that settlement created a real threat to the Indians inhabiting those regions. Their livelihood, lands, culture and health were all placed in

¹¹⁸ (1980), 33 N.R. 304, at p.318.

¹¹⁹ *Ibid.*, p.316; see also p.320. For an example of the exercise of this judicial power see *New Brunswick Broiler Growers-Marketing Board v. Sussex Poultry Ltd.* (1970), 17 D.L.R. (3d) 459, where the N.B.S.C., App. Div., held that regulations which by the provisions of the authorizing statute were “subject to the approval of the Board and of the registered producers” were invalid without the producers' approval.

¹²⁰ See nn.45 and 46, *supra*, and accompanying text.

¹²¹ *Rupert's Land Order* (Schedule B), *supra*, n.5, pp.12, 14.

jeopardy. It is therefore suggested that the resolutions and 1869 Address placed an obligation on the Canadian government to make adequate provision for the protection of each of these aspects of the Indians' existence.

VI. STATUS OF THE RUPERT'S LAND ORDER PRIOR TO THE ENACTMENT OF THE CONSTITUTION ACT, 1982

It will be remembered that section 146 of the *Constitution Act, 1867* provides that the provisions of any Order in Council admitting Rupert's Land and the North-Western Territory into Canada shall have the same effect as if they had been enacted by the Imperial Parliament.¹²² To date, the provisions of the *Rupert's Land Order* relating to Indian claims have not been amended or repealed.¹²³ The question presented is whether, prior to the enactment of the *Constitution Act, 1867*, those provisions were entrenched in the sense that they could not be altered by the Parliament or provincial legislatures of Canada.

Up until 1931, it was beyond the competence of the Canadian Parliament and provincial legislatures to amend or repeal Imperial statutes which had been made applicable to Canada by "express Words or necessary Intendment."¹²⁴ That restriction on Canadian sovereignty was largely removed by the *Statute of Westminster, 1931*,¹²⁵ which, among other things, gave Parliament and the provincial legislatures the power to amend or repeal Imperial Acts, orders, rules and regulations to the extent that they

¹²² See, n.20, *supra*, and accompanying text.

¹²³ An agreement clarifying some of the provisions of the deed of surrender insofar as they relate to the rights of the Hudson's Bay Company was entered into by His Majesty, represented by the Minister of the Interior and Superintendent General of Indian Affairs, and the Company on Dec. 23, 1924. The Order in Council (P.C. 2158, Dec. 19, 1924) authorizing the Minister to sign the agreement is printed in the *Canada Gazette*, Jan. 17, 1925, at p.2097.

¹²⁴ *Colonial Laws Validity Act, 28 & 29 Vic., c.63* (U.K.). In *The Hudson Bay Co. v. The Attorney General of Manitoba* (1878), Man. R. Temp. Wood, 1875-83, 209 (Man. Co.Ct.) Woods, C.J., stated at p.214 that the *Rupert's Land Order* "subordinates, not only the legislation of the Legislature of the Province of Manitoba, but also the legislation of the Parliament of Canada, to its provisions." See also *Reference re B.C. Fisheries*, [1914] A.C. 153, 15 D.L.R. 388 where Viscount Haldane, L.C., stated at p.164 A.C. that neither the British Columbia legislature nor the Dominion Parliament has the legislative power to alter the Imperial Order in Council of May 16, 1871 (see. n.135, *infra*) which admitted British Columbia into Canada.

¹²⁵ 22 Geo. V, c.4 (U.K.) (R.S.C. 1970, App.II, No.26).

are part of the law of Canada. Section 7 of that Statute, however, contained the following proviso:

7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts [now the *Constitution Acts*], 1867 to 1930, or any order, rule or regulation made thereunder.¹²⁶

Since the *Rupert's Land Order* was expressly made under section 146 of the *Constitution Act, 1867*, it is clear that the power to amend or repeal that Order was not granted by the *Statute of Westminster*.

In 1949 the British Parliament amended section 91 of the *Constitution Act, 1867* to give the Parliament of Canada power to amend the "Constitution of Canada", with certain stated exceptions.¹²⁷ The new provision, which was numbered section 91(1), provided that the exclusive legislative authority of Parliament extended to

[t]he amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year; and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: Provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

In the *Senate Reference Case*¹²⁸ the Supreme Court of Canada considered the question of Parliament's legislative authority to alter or abolish the Senate. The Court rejected the submission of the Attorney General of Canada that the power conferred upon Parliament by the 1949 amendment was limited only by the specific exceptions contained in it. It held that "Constitution of Canada" means

. . . the constitution of the federal Government, as distinct from the provincial Governments. The power of amendment conferred by s.91(1) is limited to matters of interest only to the federal Government.¹²⁹

¹²⁶ Section 7(1) was repealed insofar as it applies to Canada by section 53(1) of the *Constitution Act, 1982*, *supra*, n.1.

¹²⁷ *British North America (No.2) Act, 1949*, 12, 13 & 14 Geo. VI, c.81 (U.K.) (R.S.C. 1970, App.II, No.31). This Act and section 91(1) of the *Constitution Act, 1867* were repealed by section 53(1) of the *Constitution Act, 1982*, *supra*, n.1.

¹²⁸ *Reference Re Legislative Authority of Parliament to Alter or Replace the Senate* (1979), 102 D.L.R. (3d) 1.

¹²⁹ *Ibid.*, p.12.

Readjustment of representation in the House of Commons and the imposition of compulsory retirement on senators were given as examples of Parliament's power to amend the Constitution under section 91(1). The Court concluded that it is beyond the power of Parliament to abolish the Senate or

. . . to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process.¹³⁰

In light of the narrow interpretation given to section 91(1) by the Supreme Court, it is suggested that Parliament was not thereby empowered to alter the terms and conditions relating to Indian claims imposed on Canada by the *Rupert's Land Order*. Admittedly, alteration of those terms and conditions would not have the same potential effect on provincial interests as abolition of the Senate. It is nonetheless submitted that the interests of at least the prairie provinces would be involved because the Natural Resources Transfer Agreements impose constitutional obligations on those provinces with respect to Indian land claims.¹³¹ Thus, even though section 91(24) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians",¹³² the terms and conditions in the *Rupert's Land Order* which relate to Indian claims are not necessarily "matters of interest only to the federal Government." Furthermore, since term 14 of the Order required communication with the Imperial government, Britain as well had an interest in the settlement of Indian claims in Rupert's Land.¹³³

Further support for the exclusion of the provisions of the *Rupert's Land Order* from the section 91(1) amending power may be found in the judgment of Mr. Justice Dickson in *Jack v. The Queen*.¹³⁴ The appellants in that case raised article 13 of the *British Columbia Terms of Union*¹³⁵ as a defence to charges laid under the federal *Fisheries Act*.¹³⁶ That article provides in part:

13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

¹³⁰ *Ibid.*, p.18.

¹³¹ Paragraph 11 of the Manitoba Agreement; Paragraph 10 of the Alberta and Saskatchewan Agreements: *supra*, n.4.

¹³² *Supra*, n.20, s.91(24).

¹³³ It may be, however, that this requirement had lapsed prior to 1949: see text accompanying nn.150-3, *infra*.

¹³⁴ [1980] 1 S.C.R. 294, [1979] 2 C.N.L.R. 25.

¹³⁵ Schedule to Imperial Order in Council of May 16, 1871: R.S.C. 1970, App.II, No.10.

¹³⁶ R.S.C. 1970, c.F-14.

Mr. Justice Dickson stated:

The reference to "policy" in art.13 establishes a limitation upon the federal legislative power in relation to the Indian fishery and sets up a standard against which that federal legislation is to be tested.¹³⁷

Since one of the exceptions to the amending power granted to Parliament by section 91(1) of the *Constitution Act, 1867* related to "rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province", it might be contended that the constitutional status of an order in council admitting a province into Canada differed from that of an order in council admitting mere territories. However, article 13 of the *British Columbia Terms of Union* does not grant or secure rights to the province. Like the "equitable principles" condition and term 14 of the *Rupert's Land Order*, it relates to Indian rights. If article 13 imposed a limitation on federal legislative power, as Mr. Justice Dickson held, it is submitted that the terms and conditions relating to Indians made applicable to Rupert's Land and the North-Western Territory by the 1870 Order impose similar limitations.

The constitutional status of those terms and conditions was considered by Mr. Justice Morrow in *Re Paulette et al. and Registrar of Titles (No.2)*.¹³⁸ In reference to the undertaking to settle Indian claims contained in the 1867 and 1869 Addresses, Mr. Justice Morrow observed:

It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereto did by virtue of s.146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.¹³⁹

A contrary opinion was expressed in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*,¹⁴⁰ where Mr. Justice Mahoney made the following statement with respect to term 14 of the

Rupert's Land Order:

The provision neither created nor extinguished rights or obligations *vis-à-vis* the aborigines, nor did it, through section 146 of the *British North America Act, 1867*, limit the legislative competence of Parliament. It merely transferred existing obligations from the Company to Canada.¹⁴¹ (footnotes omitted)

Mr. Justice Mahoney gave no reasons for his conclusion that term 14 did not limit the legislative competence of Parliament. Nor did he refer to the observations of Mr. Justice Morrow in *Re Paulette* or the judgment of Mr. Justice Dickson in *Jack v. The Queen*. It is therefore respectfully submitted that Mr. Justice Mahoney's statement is of doubtful authority insofar as it relates to the legislative competence of Parliament in Rupert's Land. If Mr. Justice Mahoney was mistaken in this regard, his conclusion that the aboriginal title of the Inuit of Baker Lake has been diminished to the extent that it is inconsistent with the Canada Mining Regulations¹⁴² is also open to question. If the terms and conditions governing the admission of Rupert's Land into Canada were unalterable by Parliament, they should also have prevented the enactment in Canada of any legislation affecting unsettled aboriginal claims in that territory.

Our conclusion that the *Rupert's Land Order* was unalterable in Canada prior to the enactment of the *Constitution Act, 1982* means that, up to that time, only the British Parliament had the power to amend or repeal the Order.¹⁴³ Further, it is suggested that neither the Parliament nor the provincial legislatures of Canada could enact legislation which would in any way diminish unsettled aboriginal claims in Rupert's Land and the North-Western Territory.

¹³⁷ *Supra*, n.134, p.312 S.C.R., p.40 C.N.L.R. The judgment of the remaining members of the Court, delivered by Chief Justice Laskin, left the constitutional status of article 13 undecided. See also *R. v. Adolph*, [1982] 2 C.N.L.R. 149 (B.C. Prov.Ct.).

¹³⁸ (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.).

¹³⁹ *Ibid.*, p.29. Mr. Justice Morrow's decision was reversed by the N.W.T.C.A. (1975), 63 D.L.R. (3d) 1, on other grounds. That court held that a caveat cannot be filed respecting an interest in unpatented lands on the basis of aboriginal title. The Supreme Court of Canada upheld the decision of the N.W.T.C.A.: (1976), 72 D.L.R. (3d) 161.

¹⁴⁰ [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (Fed.Ct., T.D.).

¹⁴¹ *Ibid.*, p.566 F.C., p.52 C.N.L.R.

¹⁴² C.R.C. 1978, c.1516.

¹⁴³ The Order could not have been amended or repealed by subsequent order in council because it had the same effect as an Act of the British Parliament due to section 146 of the *Constitution Act, 1867*, *supra*, n.20.

VII. EFFECT OF THE CONSTITUTION ACT, 1982

Section 52(1) of the *Constitution Act, 1982*¹⁴⁴ provides:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52(2) of the Act defines the "Constitution of Canada" as including, in part, "the Acts and orders referred to in Schedule I". The *Rupert's Land and North-Western Territory Order* is contained in that schedule. The Order is thus entrenched in the Constitution, but not in the sense that it was entrenched prior to patriation. We concluded above that, prior to the enactment of the *Constitution Act, 1982*, the *Rupert's Land Order* could only be amended or repealed by the British Parliament. This meant that the protection granted to Indian claims by the Order could not be abrogated by the Canadian Parliament or the provincial legislatures. Since enactment of the *Constitution Act, 1982*, this is no longer the case. The *Rupert's Land Order*, like the rest of the Constitution, is now amendable in Canada in accordance with the amending formula set out in Part V of the Act. The Order can thus be amended under section 38(1) where authorized by resolutions of the Senate,¹⁴⁵ the House of Commons, and the legislative assemblies of at least two-thirds of the provinces having at least fifty per cent of the population of all the provinces. Furthermore, since the Order only applies to some provinces — Quebec, Ontario, Manitoba, Saskatchewan and Alberta (along with the Yukon and the Northwest Territories) — it would also appear to be amendable under section 43 which provides that an amendment to the Constitution in relation to any provision that applies to one or more, but not all, provinces need only be authorized by the Senate,¹⁴⁶ the House of Commons, and the legislative assembly of each province to which the amendment applies.

There is no requirement in the *Constitution Act, 1982* that the aboriginal peoples of Canada consent to amendments which may affect

¹⁴⁴ *Supra*, n.1.

¹⁴⁵ A resolution of the Senate is not necessary if, within 180 days after the adoption of a resolution by the House of Commons, the Senate has not adopted such a resolution, and if, at any time after the expiration of that period, the House of Commons again adopts the resolution: *Constitution Act, 1982, supra*, n.1, s.47.

¹⁴⁶ See n.145, *supra*.

their rights. The only provision for participation by the aboriginal peoples in the constitutional amendment process is contained in section 37, which provides that representatives of those peoples shall be invited to a constitutional conference of first ministers, to be convened within one year of the proclamation of the Act, to discuss the identification and definition of the rights of the aboriginal peoples to be included in the Constitution. This provision provides a means for the aboriginal peoples to put political pressure on the first ministers, but it does not provide additional legal protection for their constitutional rights. Those rights, including the guarantees in the *Rupert's Land Order*, can be taken away at any time by constitutional amendment authorized by Parliament and the requisite number of provincial legislatures.

The effect on the *Rupert's Land Order* of two other provisions of the *Constitution Act, 1982* remains to be considered. The first, section 25, provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

It is suggested that the requirement that the Canadian government settle Indian land claims, contained in the *Rupert's Land Order*, amounts to a right or freedom that pertains to the aboriginal peoples of Canada. If this conclusion is correct, section 25 should prevent the protection afforded to native rights by the Order from being abridged by the *Canadian Charter of Rights and Freedoms*.

The other provision of the *Constitution Act, 1982* relating to aboriginal claims is section 35, which reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Since the *Rupert's Land Order* is included in the definition of the Constitution of Canada, it is unnecessary to rely on section 35 for recognition and affirmation of the rights guaranteed by the Order. On the other hand, the Order may affect the content of the rights guaranteed by section 35. It will be remembered, for example, that Mr. Justice Mahoney held in the *Baker Lake* case that the aboriginal rights of the Inuit of Baker Lake have been diminished to the extent that they are inconsistent with the Canada Mining Regulations.¹⁴⁷ It might be argued that the term "existing" in section 35(1)

¹⁴⁷ *Supra*, n.142, and accompanying text.

limits the aboriginal rights of the Inuit to rights which had not been diminished or extinguished prior to the proclamation of the *Constitution Act, 1982*. In the absence of the *Rupert's Land Order* it might therefore be concluded that, on the basis of the *Baker Lake* judgment, the aboriginal rights of the Inuit which are recognized and affirmed do not include any rights that may have been taken away by the Mining Regulations. However, if our conclusion that Mahoney, J., was mistaken when he concluded that the *Rupert's Land Order* did not limit the legislative competence of Parliament is correct, then the aboriginal rights of the Inuit could not have been diminished by the Mining Regulations. On the basis of this approach, the "existing" aboriginal rights of the Inuit under section 35 would have to be determined without reference to those regulations.

Another example of the effect of the *Rupert's Land Order* on section 35 rights may be given. It was suggested above that the validity of treaties covering parts of Rupert's Land and the North-Western Territory might be challenged on the basis that the requirements set out in the *Rupert's Land Order* for settling Indian claims were not adhered to.¹⁴⁸ If a treaty were held to be invalid for this reason, then the aboriginal rights of the Indian signatories and their descendants would remain unsurrendered. In other words, those rights would still be in existence at the time the *Constitution Act, 1982* was proclaimed, and they would therefore be recognized and affirmed by section 35.¹⁴⁹

It will be remembered that term 14 of the *Rupert's Land Order* provides that Indian claims be disposed of by the Canadian government "in communication with the Imperial Government". Although this requirement has not been repealed, it might be argued that it is inconsistent with Canada's status as a sovereign state and for this reason has lapsed. This argument is supported by the recent decision of the English Court of Appeal in *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*,¹⁵⁰ where it was held that any treaty or other obligations which the Crown owes to the Indian peoples of Canada became the responsibility of the government of Canada with the attainment of independence, at the latest with the *Statute of Westminster, 1931*.¹⁵¹ On the basis of that decision, which was delivered before the *Constitution Act, 1982* became law, it would appear that the requirement of communication with the Imperial government had already lapsed by 1931. In any case, it seems certain that this requirement could not have survived the removal of the last vestige of Canada's colonial status with patriation of the Constitution. The lapse of this requirement, however, probably does not affect the obligation of the

Canadian government to settle Indian claims in Rupert's Land because term 14 is severable, that is, the obligation to settle claims can still be met without communication with the Imperial government. Further, even if the requirement did lapse when Canada achieved independent status as a Dominion,¹⁵² this fact would not prevent the validity of treaties signed prior to that time from being challenged on the grounds that there was no communication with the Imperial government.¹⁵³

¹⁴⁸ See part V, A and B, of this monograph.

¹⁴⁹ The protection afforded to those rights by section 35 would thus supplement the protection already provided by the *Rupert's Land Order* itself.

¹⁵⁰ *Supra*, n.57.

¹⁵¹ *Supra*, n.125.

¹⁵² The independence of the dominions, while confirmed by the *Statute of Westminster, 1931*, *supra*, n.125, was officially recognized at the Imperial Conference of 1926: see Robert MacGregor Dawson, ed., *The Development of Dominion Status, 1900-1936* (Toronto: Oxford University Press, 1937), esp. pp.331-2.

¹⁵³ The eleven "numbered" treaties, which cover a large part of Rupert's Land and the North-Western Territory, were all signed prior to the Imperial Conference of 1926: see n.152, *supra*.

VIII. CONCLUSION

The terms and conditions contained in the *Rupert's Land and North-Western Territory Order* place an obligation on the Canadian government to settle Indian claims to compensation for lands required for purposes of settlement in the two territories. Claims arising in Rupert's Land were to be "disposed of . . . in communication with the Imperial Government". Although the requirement of communication has probably lapsed as a result of Canada's emergence as a sovereign and independent state, the obligation to settle Indian claims in Rupert's Land nonetheless remains. In the case of the North-Western Territory, Indian claims are to be "considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines." While it appears reasonably certain that the requirement of communication applied only to Rupert's Land, it may be that the "equitable principles" condition applies to both territories. An additional requirement that the government make "adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer", contained in the 1869 Address requesting the admission of Rupert's Land and the North-Western Territory into Canada, clearly applies to both territories. However, since that requirement was not incorporated into the *Rupert's Land Order*, it may be no more than a moral obligation, unenforceable at law.

Since the *Rupert's Land Order* was made pursuant to section 146 of the *Constitution Act, 1867*, it had the effect of an Act of the British Parliament. It was constitutionally entrenched in the sense that it could not be amended or repealed in Canada by either Parliament or the provincial legislatures. Since the Order imposed a constitutional obligation on Canada to settle Indian, and probably Inuit and Métis, claims, it follows that it would be beyond the competence of Parliament and the provincial legislatures to abrogate or derogate from the rights on which those claims were based without first reaching a settlement with the aboriginal peoples involved. On the basis of this approach, federal laws such as the Canada Mining Regulations would be inoperative to the extent that they are inconsistent with surrendered aboriginal rights in Rupert's Land and the North-Western Territory.

In those parts of the two territories where aboriginal claims have been settled by means of treaty, it is appropriate to look at the treaty-making process and the terms of the treaties themselves to determine whether the terms and conditions imposed by the *Rupert's Land Order* were respected. With regard to Rupert's Land, for example, failure by the Canadian

government to settle claims in communication with the Imperial government may be a sufficient reason for challenging the validity of a treaty. In the North-Western Territory (and perhaps Rupert's Land as well), the treaties may be questioned if it can be shown that they were not made in accordance with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. Where a treaty area includes lands from both Rupert's Land and the North-Western Territory, arguably the validity of the treaty would be open to challenge if the terms and conditions applicable to each territory were not met.

The *Rupert's Land Order* is included in the definition of the Constitution of Canada contained in the *Constitution Act, 1982*. Any law that is inconsistent with the provisions of the Order is therefore of no force or effect to the extent of the inconsistency. However, patriation of the Constitution has had the effect of exposing the Order to repeal or amendment in Canada in accordance with the amending formula set out in Part V of the *Constitution Act, 1982*. That formula makes no provision for consent by the aboriginal peoples to any alteration of their constitutional rights. Patriation has thus placed the rights protected by the *Rupert's Land Order* in a more vulnerable position. Obtaining firmer guarantees for those and other rights of the aboriginal peoples of Canada should be a major concern of the Indian, Inuit and Métis representatives at the upcoming constitutional conference.