

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

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The Transfers of Arctic Territories from Great Britain to Canada, 1870-80

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Canada's official responsibility for what is now familiarly called "the Canadian Arctic" or "the Canadian North" began with the transfers of northern territories in 1870 and 1880.¹ Confederation in 1867 had united only the small province of Canada, comprising Canada East and Canada West in the St. Lawrence River Valley, with the still smaller Atlantic provinces of Nova Scotia and New Brunswick. The neighbouring island colonies of Prince Edward Island and Newfoundland had refused, at least for the time being, to join. In the middle of the continent, just north of the 49th parallel, was Lord Selkirk's Red River Colony, and on the west coast was the recently enlarged British Columbia, each of them a separate entity. Apart from Alaska and Greenland, which were American and Danish respectively, the rest of North America north of the Canadian-American boundary and the 49th parallel fell mostly within the huge domains of the Hudson's Bay Company (HBC). There were also the Arctic islands beyond the mainland, which were vaguely looked upon as British, although their real status was uncertain.

By the transfer of 1870, the vast empire of the Hudson's Bay Company was formally handed over to Canada. This brought to an end exactly two hundred years of company proprietorship under the royal charter of 1670. The text of the charter shows clearly that the original intention was to make the governor and company "true and absolute Lordes and Proprietors" of Rupert's Land in all respects whatsoever, excepting only the obligation of loyalty and allegiance to the Crown itself. Some of the more important of their exclusive rights and privileges, for example with regard to trade, land, exploitation of natural resources, lawmaking, administration of justice, immigration, settlement, and defence, were specified in considerable detail. The charter also attempted to define and delimit the territories it granted, but unfortunately the state of geographical knowledge at the time did not permit this to be done with exactitude.² This circumstance, along with doubts and disputes about the validity of the charter, exposed the company to a succession of serious challenges, from the French colony to the south until 1763, from rival fur interests based on Montreal until the amalgamation with the North West Company in 1821, and from the two Canadas, separately or together, until Confederation. The company defended itself against these assaults with determination and a good deal of success, relying for support mainly upon the Imperial authority that had granted the charter; and it is true that throughout the long period of recurring controversy this support was seldom denied. Ultimately, however, the Imperial authorities were driven to



FIGURE 1-1: THE 1870 TRANSFER FOR RUPERT'S LAND TO CANADA. *NATIONAL ATLAS OF CANADA*.

the conclusion that the company must surrender at least its control of the land, and in these circumstances the proprietorship of the company was brought to a close. While the surrender was being arranged, the Canadian officials showed extreme unwillingness to recognize the company's title, but the Imperial authorities insisted that since the company had been lord-proprietor for two hundred years it would have to be treated as such for the purpose of the transfer. Thus, whatever flaws or loopholes there may have been in the charter, its validity was upheld by Imperial authority until the end.

The transfer itself was actually accomplished in two stages: the company's surrender of its territories to Great Britain in 1869, and Canada's acceptance of them from Great Britain in 1870.³ The addition of the company's territories to Canada had been anticipated by the insertion of a clause (no. 146) for this purpose in the British North America (BNA) Act of 1867,⁴ and by the passing of the Rupert's Land Act of 1868.⁵ The Canadian Parliament passed addresses on two occasions formally requesting the transfer,⁶ the deed of surrender turning over the company's territories to Great Britain

was signed in November 1869,⁷ and an Imperial order in council of 23 June 1870 finally admitted the HBC territories into the new Dominion.⁸ A Canadian statute of 12 May 1870 had already made provision for the creation therefrom of the new province of Manitoba.⁹ It is noticeable, however, that none of these documents attempted any further clarification of the outer limits of the lands that had been transferred.

The company itself had come to adopt the seemingly obvious implication in the charter that Rupert's Land comprised all territories draining into Hudson Bay and Strait, a view firmly stated by Governor Simpson before a Select Committee of the British House of Commons in 1857.¹⁰ Beyond that was the North-Western or Indian Territory, which the company had held under licence, and which had been considered to include all remaining British continental territories west of Hudson Bay except British Columbia. After 1870, the title "North-West Territories" was generally applied to what was left of former Rupert's Land plus the old North-Western Territory, these being the lands that had been subject to the transfer. Canada's right to administer the North-West Territories as such was not thereafter seriously questioned, especially after the BNA Act of 1871 had been passed.¹¹ There did remain, however, certain lingering doubts about the validity of the charter as a basis for the transfer, and also about the limits (especially northern) of the lands that had been under the rule of the company, since it could hardly be said that these questions had ever been decisively settled.

* * *

These uncertainties, and particularly the status of the islands north of the mainland, were shortly to become sources of considerable

concern. Two apparently innocent requests for concessions of Arctic territory in 1874 – one by a British subject and the other by an American – seem to have set in motion the tangled succession of developments outlined below. These led to the transfer of all remaining British North American Arctic territories to Canada in 1880, but as it turned out, this was not the end of the matter, and there followed years of doubt and confusion over the status of these northern regions.

On 3 January 1874, A. W. Harvey, then at South Kensington, London, wrote a letter to the Under Secretary of State for the Colonies which began with the following question: "Can you inform me whether the land known as Cumberland on the West of Davis Straits belongs to Great Britain and if it does – is it under the Government of the Dominion of Canada?" He added that he would like to know because he had been carrying on fisheries there for the past two years and expected to erect some temporary buildings.¹² On 15 January he wrote a second letter saying that he was leaving London in a short time and therefore would be glad to have the information he had asked for.¹³

The following day, Assistant Under Secretary for the Colonies Sir H. T. Holland, replying for Colonial Secretary Lord Kimberley, informed Harvey¹⁴ rather vaguely that a reference to the Hudson's Bay Company had revealed¹⁵ that the land in question had not been part of the company's territory prior to the transfer of 1869–70, nor did it appear to have been part of Canada before Confederation. Lord Kimberley suggested that Harvey ask the Board of Admiralty whether the land had ever been taken possession of on behalf of the Crown.

About a month later, on 10 February, Lieutenant William A. Mintzer of the US Navy Corps of Engineers wrote a letter to George Crump, Acting British Consul at Philadelphia,

applying through him to the British government for a tract of land twenty miles square in Cumberland Gulf, for the purpose of carrying on a mining industry.¹⁶ The application was forwarded by Crump to Foreign Secretary Lord Granville¹⁷ and passed on by his department to Lord Carnarvon, who had just taken office as Colonial Minister with the new Disraeli administration in early 1874.¹⁸

The applications evidently aroused some discussion among British government officials, as the following brief excerpts from Colonial Office files reveal. One, written to Sir H. T. Holland on 22 April, ends: "If this territory does not belong to Canada as seems probable might it not be annexed with advantage to obviate possible future inconvenience?"¹⁹ Another, dated 25 April, suggests:

It would be desirable to ascertain the views of the Dominion Govt I think before the FO give any answer. We must remember that if this Yankee adventurer is informed by the British FO that the place indicated is not a portion of H. M. dominions he would no doubt think himself entitled to hoist the "Stars and Stripes" which might produce no end of complications.²⁰

On 30 April, Lord Carnarvon enclosed Mintzer's application in a secret dispatch to Governor General Lord Dufferin of Canada, for confidential communication to his ministers, and raised the question whether "the territories adjacent to those of the Dominions on the N. American Continent, which have been taken possession of in the name of this Country but not hitherto annexed to any Colony or any of them should now be formally annexed to the Dominion of Canada." Carnarvon added

that the British government would of course reserve for future consideration the course that should be taken but would not be disposed to authorize settlement in any unoccupied British territory near Canada, unless the Canadian authorities were prepared to assume the responsibility of maintaining law and order.²¹

Enclosed also was a report by Hydrographer of the Admiralty Frederick Evans,²² dated 20 April, which had been prepared in response to a request from the Colonial Office for information,²³ particularly as to whether the territory referred to by Lieutenant Mintzer had ever been taken possession of on behalf of the Crown. The report gave a brief geographical and historical description of the territory in question, but admitted, "Our knowledge of the geography and resources of this region is very imperfect." Evans did note, however, that the coast some distance north of Cumberland Gulf had been visited in 1818 by Captain Ross of the British Navy, who had taken possession "in the usual form" at Agnes Monument, 70° 30' N. 68° W.

On 26 August, Lord Carnarvon sent another secret dispatch to Lord Dufferin containing copies of the correspondence his department had had with Harvey and saying, "I should be glad to receive an expression of the opinion of yourself and of your Ministers in regard to this application as well as on the similar one referred to in my despatch above mentioned."²⁴ During the interval that had elapsed since his first letter was written, Harvey had moved to St. John's, Newfoundland, and had renewed his application, asking for a square mile of land for buildings and mining as well as fishing rights, but he had received a rather discouraging response. On 25 August, Under Secretary for the Colonies R.G.W. Herbert had replied to him, saying that Lord Carnarvon felt obliged to consult the Governor General of

Canada regarding the matter, but was not very hopeful that the desired concessions could be granted.²⁵

On 4 November, Dufferin sent a reply, also secret, to Carnarvon's dispatches of 30 April and 26 August, which indicated that the latter's proposition had been favourably received by the Canadian authorities.²⁶ Enclosed was a copy of an approved order in council, dated 10 October, which stated that "the Government of Canada is desirous of including within the boundaries of the Dominion the Territories referred to, with the islands adjacent."²⁷

Several important features would appear to emerge from the correspondence thus far – the feeling in official circles in both Great Britain and Canada that there were still British territories north of the Dominion that had not yet been annexed to any colony, the willingness of the British Government to turn these territories over to Canada, the willingness of the Canadian Government to accept them, and the doubts of both governments as to what their boundaries might be.

Carnarvon's next dispatch,²⁸ dated 6 January 1875, included a rather barren report by the Hydrographer of the Admiralty²⁹ and a lengthier, more informative one done by his own department,³⁰ both having been submitted during the preceding December. From the evidence of the latter, he wrote:

It appears that the boundaries of the Dominion towards the North, North East and North West are at present entirely undefined and that it is impossible to say what British territories on the North American Continent are not already annexed to Canada under the Order in Council of the 23rd of June 1870, which incorporated the whole of the territories of

the Hudson's Bay Company, as well as the North Western territory in the Dominion.

Later in his communication, he requested the advice of the Canadian ministers respecting the form of the proposed annexation, and suggested that an act of the British Parliament might be suitable. He also asked that the Canadian ministers specify the territorial limits of the lands to be annexed. This point had been discussed in his own department's minutes, which, after referring to the 141st meridian separating British and American territory in the west, continued:

To the East the British Territories might perhaps be defined to be bounded by the Atlantic Ocean, Davis Straits, Baffin Bay, Smith Sound and Kennedy Channel. But even this definition wld' exclude the extreme North West of Greenland, which is marked in some maps as British territory, from having been discovered probably by British subjects. To the North, to use the words of the Hudson's Bay Co. in 1750, the boundaries might perhaps be, 'the utmost limits of the lands towards the North Pole'.

This would appear to be the first time, in this correspondence at least, that these easterly and northerly limits were mentioned. In view of subsequent developments respecting the definition of Canada's arctic boundaries, the suggestion assumes a certain importance.

After some delay, which prompted a further letter from Lord Carnarvon on 27 March asking for a response to the above communication,³¹ Lord Dufferin sent his reply³² on 1

May. Enclosed was a copy of a Canadian order in council,³³ which agreed that the northern boundary of Canada had never been defined and that it was impossible to say what British territory had not already been annexed to Canada. Then, after stating its approval of the boundaries proposed, the order recommended:

To avoid all doubt it would be desirable that an Act of the Imperial Parliament should be passed defining the Boundaries East and North as follows

'Bounded on the East by the Atlantic Ocean, and passing towards the North by Davis Straits, Baffins Bay, Smiths Straits and Kennedy Channel including such portions of the North West Coast of Greenland as may belong to Great Britain by right of discovery or otherwise.

On the North by the utmost northerly limits of the continent of America including the islands appertaining thereto'.

The order in council concluded with a request that no action be taken until after the next session of the Parliament of Canada, because acquisition of the new territories would "entail a charge upon the revenue," and should therefore have the sanction of the Canadian Parliament.

Lord Carnarvon replied³⁴ on 1 June, acknowledging receipt of the above and agreeing to comply with the request for delay. However, the requisite action was not taken by the Canadian Parliament during its next session, and official correspondence on the subject seems also to have lapsed until August of the following year. Canadian Minister of Justice Edward Blake, at this time in England, sent a note to Lord Carnarvon³⁵ with an extract from the

New York Times enclosed, the latter announcing the organization of an expedition under Lieutenant Mintzer to mine graphite and mica in Cumberland Sound. The report indicated that the project was to be under the auspices of the American government. The Colonial Office replied to Blake³⁶ on 22 August, acknowledging his letter and asking if the Canadian authorities had taken or intended to take any further action in accordance with their order in council of 30 April 1875. Blake in his answer had to admit that he did not know of any action taken, nor was he able to tell the intentions of the Canadian government, but he would submit the matter for discussion upon his return home.³⁷

Three weeks later, Lord Carnarvon sent a copy of the correspondence with Blake to Lord Dufferin, adding, "In view of the probable annexation within a short time of this and other northern territories to Canada, H. M. Govt do not propose to take any action in reference to this expedition unless expressly asked to [do] so by the Dominion Govt."³⁸ A further communication from Lord Carnarvon³⁹ enclosed an extract taken by the *London Times* of 27 October from the *New York Times*, announcing the return of Mintzer's expedition from Cumberland Sound with approximately fifteen tons of mica estimated to be worth five to twelve dollars a pound.⁴⁰

After another lengthy interval, Carnarvon wrote to Dufferin on 23 October 1877,⁴¹ sending him nineteen charts of the North American Arctic which had been provided by the Admiralty in response to a Canadian request of 29 August preceding. Another letter from Carnarvon, bearing the same date, appears to demonstrate the minister's growing irritation at the lack of progress in bringing the project to a conclusion.

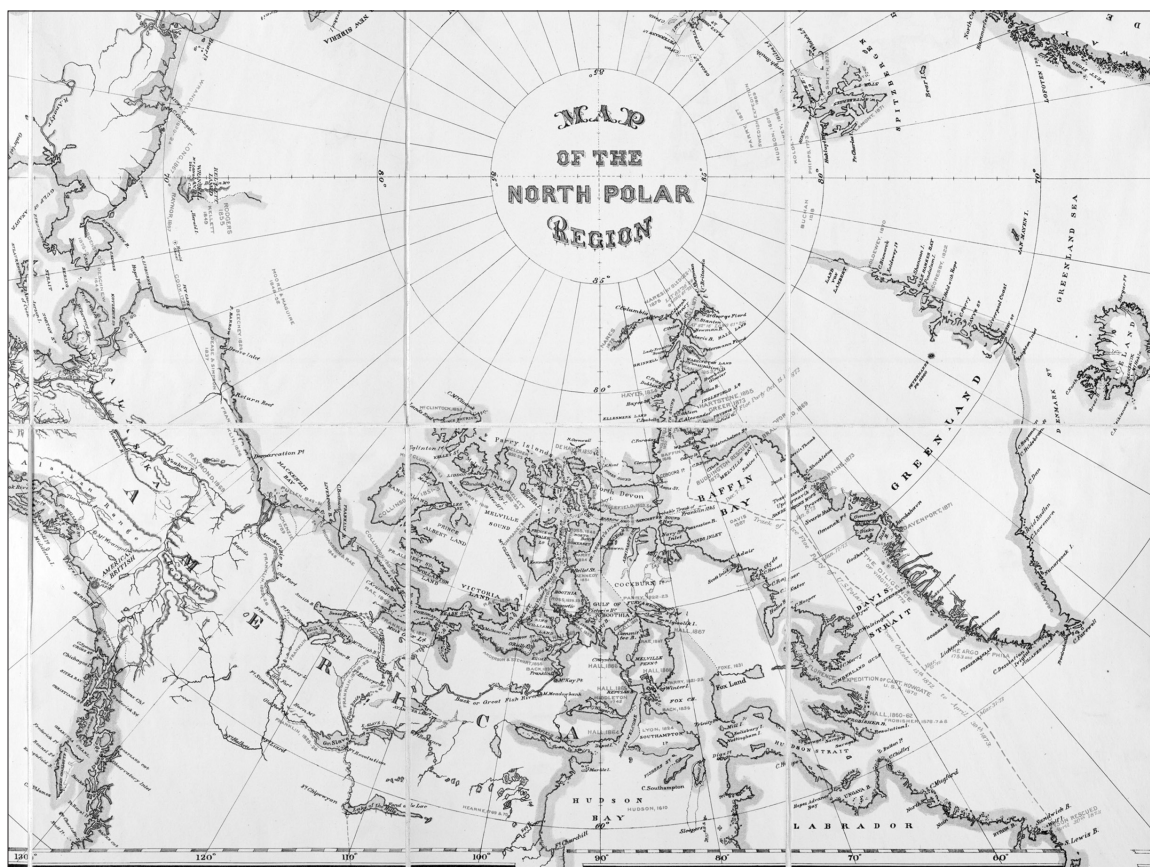


FIGURE 1-2: CHARLES FRANCIS HALL, “MAP OF THE NORTH POLAR REGION, 1879.” *NARRATIVE OF THE SECOND ARCTIC EXPEDITION MADE BY CHARLES F. HALL HIS VOYAGE TO REPULSE BAY, SLEDGE JOURNEYS TO THE STRAITS OF FURY AND HECLA AND TO KING WILLIAM’S LAND AND RESIDENCE AMONG THE ESKIMOS DURING THE YEARS 1864-’69* (NEW YORK: THE GRAPHIC CO., 1879).

With reference to my Despatch, No. 297 of this days date, I have the honor to request that you will recall the attention of your Ministers to the correspondence noted in the margin....

From reports which have appeared in the Newspapers I have observed that the attention of the citizens of the United States has from time to time been drawn to these territories and that private expeditions

have been sent out to explore certain portions of them, and I need hardly point out to you that should it be the wish of the Canadian people that they should be included in the Dominion great difficulty in effecting this may easily arise unless steps are speedily taken to place the title of Canada to these territories upon a clear and unmistakable footing.

I have therefore to request that you will move your Ministers to

again take into their consideration the question of the inclusion of these territories within the boundaries of the Dominion, and that you will state to them that I shall be glad to be informed, with as little further delay as may be possible, of the steps which they propose to take in the matter.⁴²

Dufferin's reply,⁴³ dated 1 December, informed Carnarvon that he had referred the matter to his ministers, who had passed an order in council⁴⁴ on the subject, a copy of which was enclosed. The order in council observed that nothing had been done subsequent to the earlier one of 30 April 1875, because "there did not seem at that time any pressing necessity for taking action," and then went on to recommend that "as the reasons for coming to a definite conclusion now appear urgent" resolutions should be submitted at the next Parliament authorizing the acceptance of the territories in question. No explanation was offered as to why, in the committee's view, the "reasons for coming to a definite conclusion" were so much more urgent in November 1877 than in April 1875.

A letter of 22 February 1878,⁴⁵ from W. R. Malcolm of the Colonial Office to the law officers of the Crown, raised the question as to whether an Imperial act would be the most desirable method of making the transfer.⁴⁶ After noting that an Imperial act had been suggested, Malcolm continued:

I am desired to enclose copies of opinions delivered by the Law Officers of the Crown dated respectively the 8th of November 1866 and the 8th of May 1871 and I am to state that as it would appear to be lawful for Her Majesty to annex territory by Letters Patent to a Colony having

representative Institutions provided the assent of the Colonial Legislature is signified thereto it seems to the Secretary of State that the object in view might be effected by Letters Patent followed by Legislation in the Parliament of the Dominion without having recourse to the Imperial Parliament.

In accordance with the proposal embodied in the Canadian order in council of 29 November 1877, the transfer was brought up in the next session of Parliament, and the outcome was a joint address to the Queen from the Senate and House of Commons, passed on 3 May 1878.⁴⁷ The resolutions were moved in the House of Commons by the Hon. David Mills, Minister of the Interior, and supported strongly by members from both sides of the House, including Prime Minister Mackenzie and Leader of the Opposition Sir John A. Macdonald. One lone member, the Hon. Peter Mitchell of Northumberland, New Brunswick, voiced strong opposition, maintaining that the acquisition would be both expensive and useless.⁴⁸

The address stated in a resumé that doubts existed regarding the northern boundaries of Canada, that these doubts should be removed as soon as possible, that the British government had offered to transfer the territories in question to Canada, that the offer had been accepted, and consequently, to remove all doubts, it was desirable that "an Act of the Parliament of the United Kingdom of Great Britain and Ireland should be passed defining the North-Easterly, Northerly, and North-Westerly Boundaries of Canada, as follows...." The description of the desired boundaries following this passage was essentially similar to that contained in the order in council of 30 April 1875, except that it made no direct reference to possible British

territories in northwestern Greenland and did establish a specific western boundary along the 141st meridian.

The question of whether an Imperial act was necessary to accomplish the transfer was again raised in Sir Michael Hicks-Beach's letter of 17 July 1878 to Lord Dufferin (Sir Michael having replaced Lord Carnarvon at the Colonial Office on 4 February).⁴⁹ After acknowledging receipt of the joint address of 3 May, and referring to the request for an Imperial act, Sir Michael continued:

I have been in communication with the Law Officers of the Crown on this subject⁵⁰ and I am advised that it is competent for Her Majesty to annex all such territories to the Dominion by an Order in Council, but that if it is desired after the annexation has taken place to erect the territories thus newly annexed into Provinces and to provide that such Provinces shall be represented in the Dominion Parliament recourse must be had to an Imperial Act; since, as I am advised, the Crown is not competent to change the legislative scheme established by the British North America Act 1867 (30 and 31 Vict: c.3).

I therefore propose to defer tendering to Her Majesty any advice upon the subject of the address of the Senate and House of Commons until I am informed whether it will meet the views of your Govt that Letters Patent be passed for annexing these territories to the Dominion leaving the question of Imperial legislation for future consideration if it should be thought desirable to erect any

such territories not now belonging to the Dominion into Provinces.

Lord Dufferin's reply,⁵¹ dated 8 October, enclosed a memorandum prepared by Minister of Justice Rodolphe Laflamme⁵² and an order in council⁵³ concurring in it. These documents indicate that the Hicks-Beach proposal had been received rather doubtfully by the Canadian authorities, who clearly were by no means convinced of its soundness. The main points of disagreement were set forward very ably by the Minister of Justice in his memorandum.

Briefly reviewing the circumstances leading up to the situation, he noted that the joint address of 3 May 1878 had requested an Imperial act to make the transfer, while the law officers now advised that an Imperial order in council would be sufficient. He then pointed out that a principal reason for requesting Imperial legislation had been that Lord Carnarvon himself had suggested it in his dispatch of 6 January 1875. Apart from this, however, the Canadian government still doubted that an order in council would have validity and continued to regard an Imperial act as preferable. In their belief, the only power for extending the limits of Canada was given by section 146 of the BNA Act of 1867, where specific provision was made for the annexation to Canada by order in council of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land, and the North-Western Territory. The two northern territories had been duly annexed in 1870 under the terms of section 146;⁵⁴ if they in fact included the territories under discussion nothing further needed to be done, but if they did not then resort to further Imperial legislation would be advisable, since the powers given by section 146 might be exhausted in this area. For this reason, and because the boundaries of Rupert's Land and the North-Western Territory

were “unknown,” it had been thought better to “avoid all doubt in the matter” and obtain an Imperial act.

So far as the other issue was concerned, respecting the law officers’ belief that an Imperial act would be necessary if it were desired after the transfer to create provinces from the new territories, the Canadian authorities were much less troubled. The memorandum simply drew attention to the BNA Act of 1871,⁵⁵ which had granted the Canadian Parliament the right both to administer territories forming part of the Dominion but not included in any province and to create new provinces therefrom. The minister surmised that “the attention of the Law Officer of the Crown was probably not directed to this Statute.”

In spite of Hicks-Beach’s lack of enthusiasm for an act of Parliament to bring about the transfer, the Colonial Office proceeded to draw up a bill for this purpose and sent a draft copy⁵⁶ of it to the Secretary of the Admiralty on 18 January 1879. The accompanying letter⁵⁷ asked for any observations the Admiralty might have on the matter, and particularly any suggestions that would help to define more accurately Canada’s new boundaries. It recognized, however, that it was asking for the virtually impossible since the northern boundary was “utterly unknown,” and it was “with the view of meeting this difficulty that the N. and N. E. boundaries [had been] left so vague.” The key passage in the draft, which appears the more significant both because it gave open expression to official uncertainties and because the bill was never enacted into law, began as follows: “The Dominion of Canada shall include all British Territory (if any) which is not already admitted to the Union nor part of the Colony of Newfoundland and which is situate within the following boundaries....” The description of boundaries that followed was almost identical with that

given in the Canadian joint address of 3 May 1878. Even allowing for the vagueness admitted in the letter, it is evident that this description was considerably more precise than the one that ultimately replaced it in the document finally adopted.

The reply from the Admiralty⁵⁸ enclosed a commentary on the draft bill, with a proposed amendment, which had been prepared by Admiralty Hydrographer Frederick Evans,⁵⁹ and in which the Lords of the Admiralty concurred. Evans expressed doubts whether Britain should presume to claim all territory up to the northernmost extent of the archipelago, noting that British explorers had reached no further than the entrance to Smith Sound (about 78°30' N) prior to 1852, while Americans between that date and 1873 had penetrated beyond the 82nd parallel. However, the British arctic expedition of 1875–76 had then gone some distance beyond the most northerly point reached by the Americans. His amendment, to replace the draft bill’s definition of boundaries, ran as follows:

On the East the Atlantic Ocean, which boundary shall extend towards the North by Davis Straits, Baffin’s Bay and Smith’s Sound as far as the parallel of 78° 30' of North Latitude, including all the islands in and adjacent thereto, which belong to Her Majesty by right of discovery or otherwise. Thence on the North the boundary shall be the parallel of 78° 30' North Latitude, to include the entire continent to the Arctic Ocean, and also the islands in the same Westward to the one hundred and forty first Meridian West of Greenwich; and thence on that Meridian Southerly till it meets on the N.N.W.

part of the continent of America the United States territory of Alaska.

Thus, if the hydrographer's statement had been adopted, no mention would have been made of the most northerly territories, and the British claim would have stopped at 78°30' N.

During the next few days there was an interesting exchange of comments among Colonial Office officials,⁶⁰ including a tartly worded suggestion from Hicks-Beach to the effect that members of his department should not propose Imperial legislation without his sanction.⁶¹ Ernest Edward Blake of the department expressed grave doubts about the wisdom of attempting as precise a delimitation of northern and northeastern boundaries as the hydrographer proposed, and stated his preference for leaving them indefinite.⁶² This idea was put forward still more specifically by Under Secretary Herbert in a memorandum to the minister commenting on the latter's desire to avoid a bill:

I see the objection to legislation very clearly: on the other hand I fear that without it there will be no means of establishing the right of Canada to territories which are believed to be British but the boundaries of which have never been authoritatively defined.

If a Bill is found to be unavoidable, perhaps it might take the less assailable form of a measure "to declare that all territories and places in North America now belonging to the Crown, but not hitherto specially included within the boundaries of the Dominion, shall be so included."⁶³

Sir Michael agreed with this suggestion, remarking that such a form would be best whether the case were dealt with by a bill or an order in council.⁶⁴

The memorandum of the preceding year by the Canadian Minister of Justice and the related documents were all sent by the Colonial Office to the Law Officers of the Crown on 26 February. An enclosed letter,⁶⁵ written by Herbert, drew attention to the Canadian authorities' preference for an Imperial act, and their opinion that, once the territories had been properly transferred, the BNA Act of 1871 would be sufficient to permit the Dominion to create provinces therefrom. The law officers were asked to state if they believed further Imperial legislation necessary, and the letter concluded, "It appears to Sir Michael Hicks Beach to be for obvious reasons undesirable to have recourse to legislation by the Imperial Parliament unless such a course is unavoidable." What the "obvious reasons" might be was not further enlarged upon.

The reply of the law officers,⁶⁶ dated 3 April, confirmed their former opinion that Her Majesty could by order in council annex the territories in North America belonging to the Crown to Canada. So far as the other matter was concerned, regarding the erection of such territories into provinces, they admitted that their "attention had not been drawn" to the BNA Act of 1871, and they thought that this statute would in fact give Canada full executive and legislative authority over these territories after their annexation.

The substance of the law officers' report was communicated by Hicks-Beach to the Marquis of Lorne,⁶⁷ who had succeeded Lord Dufferin as Governor General in November 1878. Sir Michael added:

I shall be prepared, therefore, should your Government desire it, to take the necessary steps forthwith for effecting the annexation to Canada of the territories in question by Means of an Order of Her Majesty in Council; – but as Imperial Legislation is not necessary for this purpose it will of course not be advisable to have recourse to it.

Evidently fearing that reservations might still be held in Canada about the proposed order in council, Sir Michael wrote a further, confidential note to the Governor General⁶⁸ just one day later, which reveals clearly his anxiety that the change be accepted.

Referring to my Desp. no. 106 of the 18th inst't. intimating the opinion of the Law Officers of the Crown respecting the annexation of certain territory to Canada by means of an Order in Council, I anticipate that your Gov't will share the satisfaction with which I have received this advice. There are obvious reasons which make this course of action preferable to attempting to secure the same object by the introduction of a Bill into the Imperial Parl't. Questions might be raised in the discussion of such a measure which might, in the great press of business, not improbably lead to the abandonment of the project; and I shall be glad to learn that your Gov't concur in my proposal to obtain an Order in Council for the purpose.

The Governor General's reply,⁶⁹ written more than six months later on 5 November, enclosed

a copy of an order in council⁷⁰ approved the day before. The order embodied a memorandum by Prime Minister Macdonald, which stated that the information about the opinion of the law officers respecting the annexation was "in the highest degree satisfactory" and requested an order in council of Her Majesty's government for the purpose of such annexation.

On 6 February 1880, the Colonial Office sent to the law officers a draft copy of the proposed order in council,⁷¹ requesting their opinion as to whether it would be "proper and sufficient" for its purpose. The draft was practically identical to the order as finally approved, except that the effective date of the annexation, which had not yet been decided upon, was left out. It is noticeable that the description of the boundaries of the territories to be annexed abandoned earlier attempts at more precise delimitation and employed the extremely vague terminology that appeared in the final order in council. There appears to be no record of a reply from the law officers; it may be presumed, however, that their endorsement was given, in view of the above-mentioned similarity of the draft to the order as finally passed.

A draft copy of the order was sent on 24 July to Sir John A. Macdonald, who was in England at the time, with the request that he suggest an effective date for the annexation. Macdonald's reply on 28 July⁷² indicated that he thought the precise date immaterial, but should Lord Kimberley (the new Colonial Secretary) approve, he would suggest the first of September following. This date was immediately inserted in the draft, and Lord Kimberley sent a copy on the same day to the Lord President of the Council, with the request that it be submitted to Her Majesty at the council's next meeting.⁷³

The order in council⁷⁴ was approved only three days later, indicating that it was handled without delay. Since it is unquestionably one of

the key documents in the entire story of Canada's effort to acquire title to these northern regions, it is worth reproducing in full:

At the Court at Osborne House,
Isle of Wight, the 31st Day of July,
1880.

Present:

The Queen's Most Excellent
Majesty,

Lord President,

Lord Steward, Lord Chamberlain.

Whereas it is expedient that all British territories and possessions in North America, and the islands adjacent to such territories and possessions which are not already included in the Dominion of Canada, should (with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion.

And whereas, the Senate and Commons of Canada in Parliament assembled, have, in and by an Address, dated May 3, 1878, represented to Her Majesty 'That it is desirable that the Parliament of Canada, on the transfer of the before-mentioned territories being completed, should have authority to legislate for their future welfare and good government, and the power to make all needful rules and regulations respecting them, the same as in the case of the other territories (of the Dominion); and that the Parliament of Canada expressed its willingness to assume the duties and obligations consequent thereon;'

And whereas, Her Majesty is graciously pleased to accede to the

desire expressed in and by the said Address: Now, therefore, it is hereby ordered and declared by Her Majesty, by and with the advice of Her Most Honourable Privy Council, as follows:

From and after September 1, 1880, all British territories and possessions in North America, not already included within the Dominion of Canada, and all islands adjacent to any of such territories or possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.

(sgd) C. L. Peel.

Lord Kimberley sent the approved order to the Marquis of Lorne in a dispatch dated 16 August,⁷⁵ and it was published in the *Canada Gazette* on 9 October. Thus the formalities connected with the transfer were finally brought to a conclusion.

Comments

The correspondence summarized above appears to give a fairly clear picture of the rather involved negotiations leading to the transfer. However, several aspects of it merit further comment.

1. One of these is the extraordinary amount of time required to complete the transfer. The first official suggestion of a transfer

was made by Lord Carnarvon in his dispatch of 30 April 1874, and afterwards a sense of urgency is sometimes discernible in the remarks of officials on both sides of the Atlantic,⁷⁶ yet well over six years elapsed before the order in council was finally signed on 31 July 1880. The most obvious explanation, evident from the correspondence, is undoubtedly the correct one; the British and Canadian authorities spent a good deal of time trying to determine what territories would be subject to the transfer, and then encountered more delay trying to decide whether an Imperial act or order in council should be used to effect it. Furthermore, it was a move initiated by British rather than Canadian statesmen, the Dominion government for a considerable time showed little interest or concern, and it fell to the lot of a few Imperial officials, principally colonial ministers Carnarvon and Hicks-Beach, to push matters along and occasionally prod the rather indifferent Canadians into action.

2. The absence of precise territorial delimitation in the order as finally constructed has aroused comment,⁷⁷ and is certainly inconsistent with the earlier attempts to avoid leaving anything in doubt. The Colonial Office enlisted the help of the Hudson's Bay Company, the Admiralty, and the Canadian government, as well as its own personnel, in order to determine what Arctic territories were British property, and throughout most of the correspondence the quest continues for an exact definition of the territories being transferred. It is also evident in the Canadian joint address of 3 May 1878, and the remarks of the members who spoke during the debate when the address was accepted indicate their belief that a major benefit of the transfer from Canada's point of view would be the clarification of her northern boundaries. Nevertheless, all such attempts were abandoned at the end, and in the

final order the British authorities resorted to the almost meaningless expression "all British territories and possessions in North America, not already included within the Dominion of Canada, and all islands adjacent to any of such territories or possessions ... (with the exception of the Colony of Newfoundland and its dependencies)"⁷⁸ in naming the territories subject to the transfer. Why the change?

Here again the answer, or much of it, seems obvious. In his influential 1905 *Report upon the Title of Canada to the Islands North of the Mainland of Canada*, Dr. W. F. King (the Chief Astronomer in the Department of the Interior at the time) suggests that Great Britain doubted the validity of her title to all the lands within the limits that had been proposed and hence declined to make a precise delimitation, although she did want to transfer to Canada whatever possessions she had in this quarter.⁷⁹ In a 1921 memorandum, Hensley R. Holmden, Associate Archivist in charge of the Maps Division, who in general agrees with King, observes that the British did not know which of their Arctic territories had not already been annexed to Canada, and that in any case an exact definition could not be given of territories that were then still largely unknown. For these reasons, he is certain that the order in council was intentionally phrased in imprecise terms.⁸⁰ All these points are borne out by the correspondence, which indicates that at the start the authorities wanted a precisely worded document, and gave up only when it became obvious that this would be impossible to achieve in satisfactory fashion. It is also clear that the Admiralty hydrographer's report of 23 January 1879, with its suggestion that the British claim stop at 78°30' N in deference to American explorations farther north, caused second thoughts about the wisdom of an exact claim. At any rate, this

marks the approximate point where attempts at precise delimitation were abandoned.

Whether there were other, more obscure reasons for the change is difficult to say. The British authorities may have been genuinely reluctant to claim territories where the American title might be stronger than their own, or possibly, in more Machiavellian fashion, they may have hoped that by an indefinite claim rights could be gained, in the passage of time, that Britain did not at the moment possess. There is the further possibility, mentioned by neither King nor Holmden, that they may not have wanted to give up all chance of a claim to part of Greenland, and so avoided precise geographical delimitation in order to keep that prospect open for the future.⁸¹ Whatever the full explanation may be, the vagueness of the order in council as finally adopted gave rise later on to serious doubts as to what had actually been transferred to Canada.

3. Another apparent inconsistency, mentioned by King⁸² and discussed at some length by Holmden,⁸³ is the abandonment by the Imperial authorities of an act of Parliament (which they themselves had suggested in the first place) in favour of an order in council to bring about the transfer. Again there appears to be no real mystery involved, in the light of what is revealed in the correspondence. An act was suggested by Lord Carnarvon on 6 January 1875, and during early negotiations it was assumed on both sides of the Atlantic that this device would be used. On 22 February 1878, shortly after Hicks-Beach had become Colonial Secretary, the alternative suggestion of an order in council was made at his direction, with reference to earlier opinions given by the law officers of the Crown in rather similar cases, on 8 November 1866, and 8 May 1871.⁸⁴ On two later occasions (28 May 1878 and 3 April 1879), the law officers reaffirmed that a transfer by order

in council would be valid (thus removing the doubt that had bothered the Canadian authorities), whereas the Canadian Minister of Justice cited the BNA Act of 1871 as evidence that Canada could create provinces from the new territories once the transfer had been completed (thus clearing up the point that had escaped the law officers themselves). In the end, both sides were satisfied that the order in council was in all respects adequate, and Sir Michael, who appears to have been the chief sponsor of the change, had won his point. His motives are indicated in several of his letters, notably that of 19 April 1879, where he speaks of “obvious reasons which make this course of action preferable” and worries over the possibility that “questions might be raised in the discussion of such a measure (i.e. an act) which might, in the great press of business, not improbably lead to the abandonment of the project.” There is perhaps room for a certain amount of curiosity about his “obvious reasons” and what it was he actually feared most – delay or defeat in Parliament, excessive or unfavourable publicity, a strong public reaction against the project in either Great Britain or the United States – but it at least seems clear that he preferred the order in council because he thought it would be quieter, faster, and more certain of passage.

4. Another feature that seems rather odd is that the law officers could have overlooked the BNA Act of 1871, since it had been passed to meet a situation rather similar to that which they were anticipating when they gave their opinion (28 May 1878) that further Imperial legislation would be necessary after a transfer by order in council if it were desired to create provinces from the new territories. The circumstances surrounding the passing of this act are briefly as follows.

In 1870, while the Manitoba Bill was under discussion, the question was raised as to

whether the Parliament of Canada had authority thus to create provinces from unorganized territories and to give them representation in the Dominion Senate and House of Commons.⁸⁵ The matter was taken under consideration, and on 3 January 1871 Governor General Lord Lisgar sent Colonial Secretary Lord Kimberley⁸⁶ an approved minute of council⁸⁷ on the subject, with an attached report, dated 29 December 1870, from the Minister of Justice (Sir John A. Macdonald). In his report, Macdonald noted the difficulty that had arisen and the fact that the BNA Act of 1867 did not specifically provide for the representation of the territories in the federal Parliament, and then recommended that

the Earl of Kimberley be moved to submit to the Imperial Parliament at its next Session, a Measure

1. Confirming the Act of the Canadian Parliament 33rd Vict. chap. 3 above referred to as if it had been an imperial Statute and legalizing whatever may have been done under it, according to its true intent.
2. Empowering the Dominion Parliament from time to time to establish other Provinces in the North Western Territory ... and also empowering it to grant such Provinces representation in the Parliament of the Dominion.

A suggested draft of the requested bill was sent by Lord Kimberley to Lord Lisgar on 26 January,⁸⁸ and a Canadian order in council was passed on 27 February,⁸⁹ embodying the substance of Kimberley's draft in another that

Lisgar returned to him on 2 March.⁹⁰ The draft bill, in slightly changed form, was inserted in a joint address to the Queen from the Senate and House of Commons on 13 April,⁹¹ and sent by the Governor General to Kimberley on 18 April.⁹² The BNA Act of 29 June 1871 followed.⁹³ The sections most relevant here read as follows:

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted....

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament....
4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

The act also stated (section 5) that both the Rupert's Land Act and the Manitoba Act were to be deemed "valid and effectual for all purposes whatsoever."⁹⁴

Thus, if the BNA Act of 1867 had failed to give Canada the power to create provinces from territories that had been or might be annexed to it, the act of 1871 would seem to have remedied this deficiency.

Conclusion

The documents referred to in the preceding pages appear to throw a good deal of light upon the transfer, its background, and certain other matters related to it. It is clear that Britain decided, after receiving two embarrassing and potentially troublesome applications for land and other privileges, to make Canada the proprietor of all British possessions in this area that had not already been placed under Canadian jurisdiction. There could possibly be something to Holmden's suggestion that Great Britain believed such a transfer would enable her to appeal to the Monroe Doctrine for settlement in case of a dispute with European powers.⁹⁵ It was an American, however, who made the original

non-British application for a concession, and it is evident that the major concern of the British authorities was with the United States.⁹⁶ They may have thought that by quietly transferring Britain's rights in this region to Canada they would be in a better position to forestall or defeat any attempt by the United States, whether based upon the Monroe Doctrine or not, to assert American sovereignty there. Furthermore, the fact of the transfer might in itself imply that the territories in question were subject to measures of sovereignty and control, both before and after the transaction was completed.

Regarding the legal status of the transfer, the total evidence of the preceding pages would certainly indicate that, although it was attended by a good deal of delay and confusion, the transfer itself was valid enough as a voluntary gift to Canada of whatever rights Britain possessed. What was in doubt, then and later, was the completeness of Britain's own title at the time of the transfer, as well as the extent of the territories subject to the transaction. Holmden puts the matter succinctly enough: "The Imperial Government did not know what they were transferring, and on the other hand the Canadian Government had no idea what they were receiving."⁹⁷

